FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January – March, 2008

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referred to as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court, that is, plaintiff or defendant. In administrative suspension cases, the driver will be referred to as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will determine the placement order in these summaries.]

Driving Under the Influence

Concha v. State, 972 So. 2d 996 (Fla. 4th DCA 2008).

The defendant was stopped for driving under the influence and subsequently failed to successfully complete roadside balance tests. After being taken to an alcohol testing center, he refused to perform any tests. At trial, the state elicited testimony from the officer that the defendant did not demand to perform the tests at the center and that he refused to take a breath test. At its closing argument the state emphasized the failure to perform the tests, referencing the fact that the defendant had a guilty conscience by refusing the tests. The defendant was found guilty of driving under the influence.

The district court reversed, holding that prosecutor's question that is fairly susceptible of being interpreted by the jury as a comment on the defendant's right to remain silent is improper. While recognizing that a DUI suspect's refusal to submit to field sobriety tests may be admissible, the court used the following reasoning to reach the foregoing result:

> Here, the state suggested [defendant] knew he was intoxicated because he did not ask to perform the sobriety tests when he had the opportunity at the BAT facility. The state's inquiry into [defendant's] failure to demand the tests was fairly susceptible of being interpreted as a comment on [defendant's] right to remain silent. [The defendant] had a right not to say anything and not to demand an exculpatory procedure.

The district court then rejected the state's argument that the objectionable testimony was used as impeachment, noting that it preceded the defendant's testimony. Finally, the court held that the error (furthered by highlighting it in closing arguments) was not harmless, since evidence of guilt was not overwhelming and consisted solely of the roadside observations.

Department of Highway Safety and Motor Vehicles v. DeGroot, 971 So. 2d 237 (Fla. 2d DCA 2008).

After being arrested for driving under the influence, the defendant submitted to a breath test. At his administrative formal review, the hearing officer, presented with only a Breath Test Result Affidavit, affirmed the defendant's drivers license suspension.

Upon petition for writ of certiorari, the circuit court, relying on an opinion out of another district, vacated the suspension, since the hearing officer did not comply with the requirement in Florida Administrative Code Rule 15A-6.013(2) which was in effect at the time, to wit, that the law enforcement report submitted to the hearing officer contain, in addition to the affidavit, the results of any breath or blood test documenting the driver's alcohol level.

On second-tier certiorari review, the district court quashed the circuit court's order, citing to its previous opinions which held that the applicable statutory provision dealing with the submission of evidence at administrative reviews is section 322.2615(2), Florida Statutes, which in relevant part requires the officer to submit the "results of any breath or blood test or an affidavit stating that a breath, blood or urine test was requested by a law enforcement officer or correctional officers and that person refused to submit." The court concluded as follows:

> The statute does not specifically require that the intoxilyzer card with the printed results be submitted in order to establish the results of a breath-alcohol test. We conclude the circuit court erred when it concluded that the suspension of [defendant's] driver's license was not supported by competent, substantial evidence due to the failure to include the intoxilyzer print card in the record before the hearing officer.

State v. Alhindi, 971 So. 2d 222 (Fla. 4th DCA 2008).

The defendant was convicted of felony driving while license revoked as a habitual traffic offender. Subsequently the state announced a nolle prosequi on two of the offenses underlying the defendant's habitual traffic offender status and the Department of Highway Safety and Motor Vehicles removed the defendant's revocation from its records. The defendant then moved to dismiss the felony charge, alleging that the department had illegally revoked his license. The trial court granted the defendant's motion to dismiss.

The district court held that the state had proved the following three elements: 1) the department had revoked defendant's driver's license as a habitual offender under section 322.264, 2) the department gave defendant notice of the revocation of his license, and 3) defendant operated a motor vehicle upon a highway of Florida while the license was revoked.

The court rejected the defendant's argument that the revocation was illegal, noting that the department relied on factually valid convictions to support its decision. The defendant's remedy was to correct the record upon receiving the revocation notice rather than ignore it and continuing to drive with a habitual traffic offender designation.

Benner v. State, 974 So. 2d 578 (Fla. 1st DCA 2008).

The defendant appealed the trial court's summary denial of his rule 3.800(a) motion, arguing that he was improperly sentenced to drug offender probation for his DUI offense. The defendant argued that his DUI conviction was not an offense within chapter 893, Florida Statutes, as required by sections 948.034 and 948.20, Florida Statutes.

The district court noted that the trial court, in denying the 3.800(a) motion, clarified that the drug offender portions of the defendant's probation were not imposed pursuant to sections 948.034 or 948.20, Florida Statutes. Instead the trial court had imposed standard probation with special drug offender conditions.

Next the district court considered whether the trial court orally announced the special conditions. The trial court orally announced the special conditions that defendant not consume any alcohol or non-prescribed drugs during his probation, so the district court affirmed those conditions. However, the trial court failed to orally announce the substance abuse treatment condition of probation, so the district court reversed that condition.

Criminal Traffic Offenses

Lykes v. State, 972 So. 2d 292 (Fla. 5th DCA 2008).

The defendant was convicted by a jury of fleeing to elude a law enforcement officer at a high speed or with wanton disregard for the safety or property. The jury was instructed that the state was required to prove beyond a reasonable doubt that "during the course of the fleeing or attempting to flee, the defendant drove at a high speed or in any manner demonstrating a wanton disregard for the safety of persons or property." The defendant contended that based on this instruction, he was deprived of a unanimous verdict since some juries may have accepted the high speed theory while others the wanton disregard.

The district court initially noted that the defendant failed to make a contemporaneous objection, but found this fact irrelevant since there was no (much less fundamental) error of any type. The court held that there were two alternative ways to establish the offense and that a general guilty verdict will be set aside only when the conviction may have rested on an unconstitutional ground or legally inadequate theory. The court held that reversal was "not warranted when the general verdict could have rested upon a theory of liability without adequate evidentiary support since there was an alternative theory of guilt for which the evidence was sufficient."

Berube v. State, Fifth District, 33 FLW D451, opinion filed February 8, 2008.

The defendant was convicted of vehicular homicide. On appeal the defendant argued that the trial court erred in denying his motion for judgment of acquittal because the state failed to show that he was driving in a reckless manner sufficient to prove vehicular homicide.

Noting that vehicular homicide cannot be proven without also proving the elements of reckless driving, the district court pointed out that the state must present evidence of conduct at least sufficient to constitute reckless driving, defined as a "willful or wanton disregard for the safety of persons or property" in section 316.192, Florida Statutes (2005). The district court also cited the Florida Supreme Court's description of recklessness as less than culpable negligence but more than a mere failure to use ordinary care.

The district court found that the evidence, taken in the light most favorable to the state, showed that the defendant was driving on a busy four-lane road when he perceived behind him a truck's quick stop, squealing brakes and air horn, and the defendant moved into the center of the intersection. Cars were stopped for red lights in the double left turn lanes in both directions. Passengers in the defendant's car screamed at the defendant to move, thinking that the truck might still hit them. After brief hesitation, the defendant made an improper left turn across incoming traffic.

The district court found that the cases finding culpability for vehicular homicide involved levels of recklessness exceeding the defendant's conduct. The district court noted that the defendant was not intoxicated or otherwise distracted, he was not speeding, his vehicle was mechanically sound, and the weather was clear. The district court pointed out that the state's proof lacked evidence that the defendant, in an intentional, knowing and purposeful manner, made an improper left turn with a conscious and intentional indifference to consequences and with knowledge that damage was likely to be done to persons or property.

The dissenting opinion stated that the majority accepted the fact that the defendant's passengers screamed at him to move because they thought that the truck could still hit them. The dissenting opinion pointed out that the jury may not have accepted that testimony as true. The dissent also pointed to the decision in State v. Ynocenscio, 773 So. 2d 613 (Fla. 5th DCA 2000), which found that passing in a fog was more than mere negligence even though that defendant was not speeding, was driving on a straight section of highway, and was in a vehicle that was mechanically sound. The dissent found that it was reasonably foreseeable under the circumstances of the instant case that death or great bodily harm would result when the defendant drove across multiple lanes of traffic when he did not have the right of way and did not check to determine if the lanes were clear.

State v. Stephenson, 973 So. 2d 1259 (Fla. 5th DCA 2008).

The defendant pled no contest to aggravated fleeing and eluding and one count of resisting an officer without violence. The trial court departed downward, in the sentence for the aggravated fleeing and eluding, because the defendant 1) expressed remorse for his crimes, 2) had several family members dependent upon him for support and 3) had not reoffended during the fourteen-month period since being released from prison. The state appealed this departure sentence for the aggravated fleeing and eluding.

The district court discussed limitations on a trial court's authority to depart, citing State v. Tyrrell, 807 So. 2d 122, 125 (Fla. 5th DCA 2002). Under Tyrrell, a trial court must first determine whether there is a valid legal ground for departure with adequate factual support. A reviewing court would affirm that decision if any reason provided by the trial judge is valid and supported by competent, substantial evidence. The trial court must next determine whether departure is the best sentencing option for the defendant, weighing the totality of the circumstances, including aggravating and mitigating factors. That second determination is within a trial court's discretion and will be sustained on review unless there is an abuse of discretion.

With regard to remorse, the district court found that the language of section 921.0026(2)(j) requires, in addition to remorse, that the crime was committed in an unsophisticated manner and constituted an isolated incident. The district court found that the offense at issue was not an isolated incident, in light of his substantial criminal history. The district court also found that the record did not contain any competent, substantial evidence that the offense was committed in an unsophisticated and isolated manner. Thus the district court found that a downward departure under section 921.0026(2)(j) was unjustified.

The district court then pointed out, with regard to the trial court's family support concerns, that Florida courts have consistently rejected family support concerns as valid reasons for downward departure.

Finally, with regard to the defendant's fourteen months without reoffending, the district court found that the trial court does not have discretion to grant a downward departure based on factors already considered by the sentencing guidelines, such as a defendant's criminal record, or lack thereof.

The district court concluded that the grounds on which the trial court departed were either legally insufficient or not supported by competent, substantial evidence. The district court vacated the sentence and remanded for sentencing equal to or greater than the lowest possible sentence mandated by the Criminal Punishment Code.

State v. Perkins, 977 So. 2d 643 (Fla. 5th DCA 2008).

The defendant was charged with driving while license suspended or revoked after two previous convictions for driving while license revoked. After pleading not guilty at arraignment, the defendant later moved to dismiss on the basis that the information was not properly sworn. The trial court granted the motion and dismissed the case; the state appealed.

The defendant's motion to dismiss argued that the deputy's charging affidavit did not contain sworn testimony that the defendant had two or more prior convictions for driving while license suspended. At the motion hearing, the trial court noted that rule 3.140(g) states that no objection to information on the ground that it was not signed or verified can be entertained after the defendant pleads to the merits. Defense counsel pointed out that he mentioned that issue at

arraignment and the trial court recalled the discussion.

The district court, reviewing *de novo*, cited rule 3.140(g) and noted that under settled Florida law, technical defects in form may be waived by failure to make timely objection or by a plea to the merits.

The district court then also held that the defendant's motion lacked merit, finding that the prosecutor could rely on a certified copy of the defendant's driving record to support the charge.

The district court reversed the dismissal of the information and remanded for further proceedings.

Steil v. State, 974 So. 2d 589 (Fla. 4th DCA 2008).

The defendant was convicted of aggravated fleeing or eluding an officer, a second degree felony, and argued on appeal that the trial court erred in denying a motion for judgment of acquittal. Agreeing with the defendant, the district court reversed for the conviction to be reduced to simple fleeing or eluding.

Pointing out that the aggravating fleeing or eluding requires that the pursuing officer have lights and sirens on, the district court noted that the officer testified that he did not have lights and sirens on during most of the pursuit. The officer testified that he did not clock the defendant's speed, although the officer estimated his own speed at fifteen to twenty miles an hour over the thirty-five miles an hour speed limit and estimated that the defendant was driving a little faster than he was. The officer saw the defendant run stop signs, but he did not observe any other vehicles affected by the defendant's driving.

The district court found that there was insufficient evidence of "high speed" or "wanton disregard" while the lights and sirens were on. The district court reversed for the conviction to be reduced to simple fleeing and eluding, a third degree felony.

Butts v. State, 975 So. 2d 590 (Fla. 2d DCA 2008).

The defendant was originally charged with vehicular homicide and manslaughter while operating a motor vehicle, but the jury convicted him on the lesser included charges of reckless driving and culpable negligence. The defendant appealed, arguing that testimony by the victim's widow should not have been admitted.

The charges stemmed from an accident that occurred when the defendant struck the rear of a motorcycle. The victim suffered from skin abrasions and a laceration, but when hospitalized, it was discovered that he suffered from other medical conditions of which he was not aware, including severe coronary disease. While hospitalized, the victim died as a result of a pulmonary thromboembolism, or blood clot.

The district court noted that the four lay witnesses gave conflicting testimony regarding the events of and immediately preceding the accident. The district court then considered the testimony of the victim's widow that she had settled with the insurance company for $50,000. The district court noted that the implication of the settlement was that someone else had examined the case and determined that the defendant was liable. Thus the widow's testimony regarding the settlement was irrelevant and prejudicial.

The district court noted that, because of the conflicting evidence and the emotional impact of the widow's testimony, the evidence was not harmless. The district court reversed, remanding for a new trial limited to the misdemeanor charges of reckless driving and culpable negligence. The district court pointed out that since the state presented the widow's testimony to address issues regarding the victim's injuries and death, her testimony would be irrelevant on retrial because the victim's death would not be at issue.

State v. Leukel, 979 So. 2d 292 (Fla. 5th DCA 2008).

The defendant was charged with driving while license permanently revoked and driving while license revoked as a subsequent offender. The defendant filed a motion to be allowed into a pretrial drug court program pursuant to section 948.08(6)(a). Although the defendant was not charged with an offense enumerated under section 948.08(6)(a), the trial court found that the list of offenses eligible for a drug court program in that statute was not exclusive, and that section 948.08(6)(a) must be read in conjunction with section 397.334(2), Florida Statutes (2007). The trial court then placed the defendant in a drug court program.

On certiorari review, the district court pointed out that section 948.08(6)(a) does not require the prosecutor's consent for defendant to enter a drug program. The district court also distinguished the two statutes by noting that unlike section 948.08(6)(a), section 397.334 does not provide for the dismissal of criminal charges upon the successful completion of a treatment-based drug court program.

The district court found that the language of section 948.08(6)(a) was clear and unambiguous and so should be given its plain meaning, without any need to consider section 397.334(2). If the two statutes must be reconciled, the district court noted, then section 948.08(6)(a) would be a specific statute concerning the eligibility requirements for entry into drug court programs. That specific statute would control over section 397.334, which would be considered the general statute concerning implementation of drug court programs.

The district court stated that a defendant not eligible for drug court might still be admitted to a pretrial intervention program, but only with the consent of the prosecutor. Finding that the trial court's order impaired the state's ability to prosecute, the district court granted certiorari relief.

In re: Standard Jury Instructions in Criminal Cases – Report No. 2007-03, 976 So. 2d 1081 (Fla. 2008).

The Florida Supreme Court adopted the following changes to its traffic-related criminal jury instructions:

28.6 Fleeing to Elude a Law Enforcement Officer
§ 316.1935(1)

Amends instruction to change the reference from a "motor vehicle" to a "vehicle."

28.7 Fleeing to Elude a Law Enforcement Officer
§ 316.1935(2)

Deletes as an element that a duly authorized law enforcement officer ordered the defendant to stop or remain stopped, thereby reducing the number of elements from four to three.

28.8 Fleeing to Elude a Law Enforcement Officer
(Siren and Lights Activated with High Speed or Reckless Driving)
§ 316.1935(3)(a)

Reduces the number of elements from five to four by deleting the provision that a duly authorized law enforcement officer ordered the defendant to stop or remain stopped.

28.81 Fleeing to Elude a Law Enforcement Officer
(Siren and Lights Activated with High Speed or Reckless Driving Causing Serious Bodily Injury or Death)
§ 316.1935(3)(b)

Creates a new instruction with five elements and defines terms. Lists no lesser included offenses.

28.83 Aggravated Fleeing or Eluding
(Leaving a Crash Involving Damage to a Vehicle or Property then Causing Serious Bodily Injury or Death)
§ 316.1935(4(b) and § 316.061

Creates new instruction with seven elements and two further instructions. Lists three Category One lesser included offenses and four Category Two lesser included offenses.

28.85 Aggravated Fleeing or Eluding
(Leaving a Crash Involving Damage to a Vehicle or Property Damage to Another)
§ 316.1935(4)(a) and § 316.061

Creates a new instruction with seven elements and two further instructions. Lists two Category One lesser included offenses and four Category Two lesser included offenses.

Quirk v. Department of Highway Safety and Motor Vehicles, 975 So. 2d 1270 (Fla. 4th DCA 2008).

The district court denied the defendants' petition for writ of certiorari, holding (based on Lescher v. Department of Highway Safety and Motor Vehicles, 946 So. 2d 1140 (Fla. 4th DCA 2006)) that the possibility of a driver's license reinstatement was an administrative matter, rather than the type of punishment subject to the ex post facto provision. The district court again certified the following question to the supreme court:

> 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?

Arrest, Search and Seizure

No new opinions.

Torts/Accident Cases

Quarantello v. Leroy, 977 So. 2d 648 (Fla. 5th DCA 2008).

This appeal concerns the meaning of section 316.613(3), Florida Statutes (1999), which states that the "failure to provide and use a child passenger restraint shall not be considered comparative negligence, nor shall such failure be admissible as evidence in the trial of any civil action with regard to negligence."

A court-appointed guardian of a child brought suit against the child's grandmother for injuries resulting from a motor vehicle accident. The defendant had placed the child, who was eleven-months-old at the time, in a child booster seat in the backseat of her car. The child sustained severe injuries after a car accident.

The complaint alleged that the defendant was negligent because she breached a common law duty to use reasonable care in caring for the child, but the plaintiff intended to introduce evidence that the defendant had failed to use a proper child passenger restraint to ensure that the child was transported safely.

The defendant moved for summary judgment, arguing that section 316.613(3) prohibits introduction of any evidence that she failed to use an appropriate child passenger restraint. The argument essentially contended that the statute provides immunity from any negligence suit where evidence of failure to provide or use an appropriate child passenger restraint is sought to be introduced. The trial court granted summary judgment, and the plaintiff appealed, arguing that the statute at issue only bars evidence of comparative negligence and similar evidence of negligence that can be used to reduce an injured child's recovery.

The district court, reading the statute in its entirety, concluded that the Legislature intended to prohibit evidence of comparative negligence and evidence of negligence that may be similarly used to reduce an injured child's recovery.

In reaching its conclusion, the district court also referred to the statutory canon of *ejusdem generis*, meaning that if an "enumeration of specific things is followed by some more general word or phrase, such general word or phrase will usually be construed to refer to things of the same kind or species as those specifically enumerated[.]" The district court also looked to the interpretation of a similar statute in Louisiana, where a court found that such statute did not immunize a defendant from liability arising from failure to properly secure a child in a vehicle. Noting that the legislature could have explicitly granted immunity from civil suit, the district court found no such a grant of immunity in section 316.613(3).

The district court held that section 316.613(3) does not prevent introduction of evidence that the defendant may have failed to use an appropriate child passenger restraint.

A dissenting opinion found the language of the statute clear and unambiguous, with no statutory interpretation necessary, and thus felt that the trial court properly ruled that the evidence was inadmissible.

Driver's Licenses

No new opinions.

Vehicle Forfeiture

City of Hollywood v. Mulligan, Fourth District, 33 FLW D783, opinion filed March 19, 2008.

The defendant was arrested by plaintiff's police officers for the misdemeanor offense of solicitation of prostitution. Since the defendant was in his vehicle at the time, the plaintiff city seized and impounded the defendant's vehicle. After the payment of an administrative fine pursuant to the applicable municipal ordinance, the defendant received his vehicle back. The trial judge subsequently rejected the defendant's suit for declaratory judgment on the issue of the constitutionality of the ordinance. The district court reversed, finding that the ordinance affects a criminal forfeiture and is thus preempted by the Florida Contraband Forfeiture Act. The district court certified the following question (as rephrased by the Florida Supreme Court) as being of great public importance:

> Does the Florida Contraband Forfeiture Act (FCFA) sections 932.701 – .707, Florida Statutes (2002), preempt a municipality from adopting an ordinance that authorizes the seizure and impoundment of vehicles used in the commission of

certain misdemeanor offenses?

The Florida Supreme Court answered the question in the negative, holding that the FCFA did not preempt a municipality from using its home rule powers to enact such an ordinance. The court observed that the instant ordinance did, however, raise significant constitutional concerns, which the court declined to address since such concerns were independent of whether the FCFA and the ordinance were in conflict with each other (which they were not) and these constitutional issues were not raised below.

As providing support for its holding, the court distinguished between impoundment and forfeiture as follows:

> Finally, we note that although impoundment and forfeiture are related concepts in the context of government seizure of personal property, they are not synonymous terms. Essentially, an impoundment is the temporary taking of tangible, personal property; forfeiture is the permanent taking of real or personal property (tangible or intangible). For example, forfeiture has been defined as a permanent governmental taking of title and all rights to and in property that has been condemned for its role in a criminal violation. . . . On the other hand, impoundment is defined as 'to place (something, such as a car or other personal property) in the custody of the police or the court, often with the understanding that it will be returned intact at the end of the proceeding.' . . . The Virginia Court of Appeals noted the essential difference in nature of the deprivation imposed by an impoundment as opposed to forfeiture [as follows]: 'A temporary impoundment of a vehicle is not forfeiture, although it has characteristics of forfeiture.' Being temporarily deprived of one's vehicle until one pays a fee to release it also resembles a civil penalty.
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> Based on the foregoing definitions, contrary to the Fourth District's conclusion, the ordinance does 'not affect forfeiture.' It does not seek to permanently divest the owner of all right and title to the vehicle. Rather, the ordinance authorizes the temporary deprivation of access to one's vehicle when it is used in the commission of a drug- or prostitution-related misdemeanor. Although the ordinance requires that the vehicle owner be temporarily deprived of the vehicle and requires that the owner pay a fee in exchange for the return of the vehicle, these requirements do not transform the impoundment ordinance into a 'forfeiture scheme.' The vehicle owner is never permanently deprived of the vehicle; rather, the vehicle's return is simply conditioned upon payment of an administrative fee and incidental costs. If a vehicle owner fails to pay the administrative fee and other costs, the vehicle is not 'forfeited' as in the FCFA. Instead, the vehicle is disposed of as if it were lost or abandoned property under chapter 705, Florida Statutes (2005). . . . Under chapter 705, the vehicle is sold. The money due the City is taken from the sale proceeds, and the balance is held in an account for the owner for up to one year.

Upon remand, district court held that the ordinance, to the extent it provides for

administrative hearings before city officials on whether there was probable cause to impound a vehicle and the amount of any fee to obtain a return of it is unconstitutional as violating the separation of powers and due process. The court reasoned as follows:

> [Previously, the Supreme Court found that determinations of unliquidated money damages for humiliation and embarrassment under the County's Human Rights Ordinance were quintessentially judicial in nature, rather than quasi-judicial. Similarly, it appears to us that the determination as to whether a police officer had probable cause for finding that an owner's automobile was being used in solicitation for prostitution and could therefore be impounded by police is essentially a judicial function. The term 'probable cause' is understood as connoting a determination constitutional in nature, marking the constitutional limits for a warrantless seizure of an automobile. See Florida v. White, 526 U.S. 559 (1999) (holding that Fourth Amendment did not require police to obtain warrant before seizing automobile from public place if they had probable cause to believe that it was forfeitable contraband). Such constitutional determinations are settled not by executive branch authorities in the exercise of their administrative authority but by the judiciary. It is exclusively the province of the judiciary to say what the law is. As the Supreme Court [previously] reasoned . . . , if the legislature lacks the power to create administrative tribunals to try issues given by the constitution to the judicial branch, then surely local governments also lack the power to do so.