FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

October - December, 2007

[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

State v. Clements, First District, 32 FLW D2496, opinion filed October 19, 2007.

The defendant was charged with driving under the influence, having been observed speeding and shifting between two lanes. After acknowledging the consumption of four or five beers and performing poorly on field sobriety tests, the defendant was arrested and refused to take a breath or blood alcohol test. During his subsequent trial, the state told the jury there were two ways to establish driving under the influence, that is, impairment of normal faculties or a 0.08 blood alcohol reading. The defendant proffered expert testimony to the effect that a person of his weight drinking the amount he allegedly drank during the time he allegedly drank would have no significant impairment (.02 - .05), based upon the standard of an average social drinker. Even though the defendant did not request any jury instruction on impairment, the trial court excluded the proffered testimony, based on State v. Miles, 775 So. 2d 950 (Fla. 2000), noting that the testimony would be irrelevant without instructing the jury on the statutory presumptions. Upon appeal, the circuit court reversed for a new trial, observing that the defense should have been permitted to offer expert testimony tending to show the defendant was not impaired at the time of the arrest despite the consumption of alcohol.

Upon certiorari review, the district court agreed with the circuit court and denied the state's petition, noting that the circuit court had complied with the essential requirements of law, under the rule that relevant evidence that tends to establish reasonable doubt must ordinarily be admitted. The district court added that any uncertainty regarding whether evidence tends to establish reasonable doubt should be resolved in favor of the defendant. In a footnote, the district court observed that the trial court's reliance on Miles was misplaced since that case dealt with the admissibility of blood-alcohol tests, an issue not present in the instant case.

Claps v. State, Second District, 32 FLW D2732, opinion filed November 16, 2007.

The defendant was convicted of and sentenced for DUI manslaughter, leaving the scene of an accident involving injury and/or death, driving under the influence with injury, and two counts of driving under the influence with property damage. On double jeopardy grounds, the trial court neither adjudicated nor sentenced the defendant on three other charges. The defendant moved for postconviction relief on the basis of the ineffective assistance of counsel, to wit, that his counsel did not move for dismissal of the non-adjudicated three charges. The trial court granted partial relief, but denied relief on the double jeopardy claim.

The district court affirmed, holding that counsel was not ineffective in not raising the double jeopardy claim since it was without merit. Specifically, the district court held that the applicable double jeopardy protection applied to multiple punishments for the same offense, not being charged with such offenses. The court reasoned as follows:

> The Double Jeopardy Clauses of the United States and Florida Constitutions provide a defendant with a shield from punishment; conversely, they do not provide a defendant with a sword to wield against the State's executive decisions. See Ohio v. Johnson, 467 U.S. 493, 502 (1984) (observing that a defendant 'should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution' on remaining charges after being found guilty of other related offenses). Allowing the jury to exercise its fact-finding function to decide which crime – or crimes – may have been committed, even when based on the same facts, is a classic and appropriate function of the jury trial system, just as a court's determination as a matter of law which guilty verdicts will be precluded from adjudication and sentencing on double jeopardy grounds is a similarly appropriate function of the judiciary.

Department of Highway Safety and Motor Vehicles v. Trauth, Third District, 32 FLW D2931, opinion filed December 12, 2007.

The defendants' driving privileges were suspended for refusal to consent to blood alcohol testing after being arrested for driving under the influence. The circuit court reversed the suspensions and deemed the defendants to be entitled to attorney fees on the basis of rule 9.400, Florida Rules of Appellate Procedure, referring the case to the county court for determination of the amount. The county court award $38,360 in fees.

The district court reversed the order, rejecting the defendant's arguments that 1) the law of the case doctrine controls, 2) the district court lacks jurisdiction since the county court awarded the fees, and 3) the fee award was proper. On the law of the case argument the district court observed that, while it had previously denied certiorari in the case, it was not a denial on the merits (rather an unelaborated denial) and thus did not invoke the doctrine. Secondly, the district court held that the fee award was not final and appealable until the amount was set and thus the department could not have appealed the circuit court's decision until the county court set the fee. Finally, the district court held that rule 9.400, being procedural rather than substantive, could not provide a basis for the fee award. In the absence of a particular contractual, statutory,

or other procedural basis, the award was improper.

State v. Suttolph, Fourth District, 32 FLW D2919, opinion filed December 12, 2007.

The county court certified the question of whether in a driving under the influence case, the annual inspection reports for breath-testing instruments are testimonial under Crawford v. Washington, 541 U.S. 36 (2004).

After noting that it had already answered this question in the negative (that is, the reports are nontestimonial) in Pflieger v. State, 952 So. 2d 1251 (Fla. 4th DCA 2007), the district court addressed the issue of whether it is always necessary for the state to prove the annual inspection of the breath-testing device. Citing to section 316.1934(5), Florida Statutes, which requires the affidavit containing the test results to include the date of performance of the most recent required maintenance, the district court determined that the "most recent" maintenance could be either the required monthly or annual inspection, depending on which occurred most recently. The district court rejected the defendant's argument that the state must show both.

Gould v. State, Second District, 33 FLW D4, opinion filed December 19, 2007.

The defendant was issued a citation for driving under the influence. The citation included checked boxes indicating a nonfatal crash had occurred (involving no injuries but an estimated $2,800 in property damage), and a blood/breath/urine alcohol level of .000, and containing the notations "Urine Submitted" and "DRE [drug recognition expert] Completed." The committing magistrate found probable cause for the DUI charge on the basis of the citation, rejecting the defendant's objection that the citation was insufficient to establish probable cause. The circuit court denied the defendant's subsequent petition for writ of habeas corpus, citing a district court per curiam affirmed (without opinion) decision for the proposition that a uniform traffic citation by itself can establish probable cause.

The district court, after rejecting the state's challenge to its authority on a mootness argument (defendant was no longer in jail) by holding that the petition presents a question capable of repetition, reversed the circuit court. The district court held that reliance on the uniform traffic citation to establish probable cause was a departure from the essential requirements of law in that it did not include any facts indicating that the defendant's normal faculties were impaired or that his blood alcohol level was .08 or above. The district court then added the following:

> Moreover, the core issue presented to the circuit court by [the defendant's] petition related to the function and the effect of the uniform traffic citation. More than twenty years ago, the Supreme Court of Florida noted that a charging document 'is not evidence against an accused, but rather, it is nothing more or less than the vehicle by which the state charges that a crime has been committed. Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985). In accordance with this precept, every criminal jury trial in this state begins with the trial judge informing the jury that the information or indictment 'is not evidence and is not to be considered by you as any proof of guilt.' Fla. Std. Jury Instr. (Crim.) 2.1. In the

> absence of additional corroborative information such as the result of a breathalyzer test, a uniform traffic citation – like an indictment or information – is nothing more or less than a charging document. . . . By itself, the uniform traffic citation does not constitute evidence. Thus it is ironic that at least some of the county judges . . . regularly do what those same judges instruct jurors that they cannot do – rely on the charging document alone as evidence of guilt. We disapprove this practice because it is inconsistent with the provisions of rule 3.133(a) [Florida Rules of Criminal Procedure] concerning nonadversary probable cause determinations.

On a jurisdictional note, the district court concluded that the decision under review established a principle of general applicability binding on lower courts. In addition, since it resulted in a miscarriage of justice, the exercise of the court's certiorari jurisdiction was warrented.

Sellers v. State, First District, 33 FLW D93, opinion filed December 31, 2007.

As a result of a motor vehicle crash, the defendant was convicted of aggravated manslaughter, DUI manslaughter, vehicular homicide, and child neglect, after the trial court admitted, over the defendant's objection, blood test results demonstrating her impairment.

The district court affirmed, holding that the blood test record admitted into evidence was a business record and not testimonial, since it was performed only because the defendant's emergency room doctor required it for diagnostic purposes, rather than having been ordered by law enforcement and performed in furtherance of a criminal prosecution. The district court also found no error in the introduction into evidence of a beer can found at the scene of the accident, holding that, even if there was error, it was harmless. The court observed that the jury had been presented an abundance of evidence suggesting that the defendant was intoxicated, including two blood tests, witness testimony, the investigator's conclusion that the accident was caused by intoxication, and the defendant's own admissions.

Criminal Traffic Offenses

Cobb v. State, Second District, 32 FLW D2738, opinion filed November 16, 2007.

The defendant was sentenced to ten years' imprisonment on driving while license suspended or revoked charges as a habitual traffic offender (HTO). He filed for postconviction relief based on the ineffectiveness of his counsel for failing to raise the issue that two of the convictions used as predicates for his HTO status occurred prior to the 1997 adoption of the statutory requirement of "knowledge." The court denied the defendant's motion.

The district court reversed, holding that the defendant's claim that his previous convictions occurred prior to the "knowledge" requirement was not conclusively refuted in the record attached by the postconviction court. In the absence of such record evidence, an

evidentiary hearing must be conducted.

Zarba v. State, Second District, 32 FLW D2745, opinion filed November 16, 2007.

As a result of a stop for an inoperative right rear brake light, the defendant was charged with driving while license revoked as a habitual traffic offender. At the hearing on the defendant's motion to suppress, the officer did not testify that the light deficiency rendered the vehicle in such an unsafe condition that its continued operation endangered person or property. The defendant introduced evidence that the center and left brake lights were operable. The trial court denied the motion to suppress, citing section 316.610(1), Florida Statutes, which permits an officer to stop a vehicle if the officer has reasonable cause to believe the vehicle is unsafe or that its equipment is not in proper adjustment or repair.

The district court reversed, describing the two dispositive questions in the case as follows: 1) whether the inoperable right rear brake light was a violation of law or, alternatively, 2) whether the inoperable right rear brake light rendered the defendant's vehicle in such unsafe condition that it endangered either persons or property. The court answered the first question in the negative, holding that a nonworking rear brake light on a vehicle equipped with three brake lights does not constitute a violation of the law because section 316.222(1), Florida Statutes, requires only two functional brake lights on the vehicle's rear. This provision does not require those brake lights to be parallel, not does it require all three brake lights to be operative on a vehicle equipped with a center high-mounted stop lamp. On the second issue, the district court expressed unwillingness to assume that having only two of three brake lights working created a safety hazard endangering persons or property, given that the statute only requires that two rear "stop lamps" display "red or amber light . . . upon application of the service (foot) brake." Since the state presented no evidence and made no argument at the hearing on the motion to suppress that the condition of the vehicle posed a safety hazard, the officer's traffic stop was unlawful.

State v. Mancoade, Fourth District, 32 FLW D2786, opinion filed November 21, 2007.

The defendant was charged with felony driving while license revoked as a habitual offender in violation of section 322.34(5), Florida Statutes. The trial court dismissed the charge based on the defendant's argument that the gas powered mini motorcycle he was operating did not require a drivers license.

The district court reversed, holding that the defendant's vehicle, described as having an engine displacement not exceeding 50 cubic centimeters and a top speed not exceeding 30 miles per hour, was covered under the definition of motor vehicle in section 322.01(26), Florida Statutes. The district court also observed that the defendant's vehicle fell under the definition of "motorcycle," which unlike "motorized bicycle," was not specifically excluded from the definition of motor vehicle.

State v. Byrd, Fourth District, 32 FLW D2875, opinion filed December 5, 2007.

The defendant was charged with a violation of section 322.34(5), Florida Statutes, driving while license revoked as a habitual traffic offender. The trial court granted a judgment of acquittal.

The district court affirmed, holding that the state, without a court order requiring it to do so, had presented only a redacted version of the defendant's driving record which did not establish that the defendant was a habitual traffic offender. The court, observing that the record submitted by the state did not show the accumulation of the specified number of convictions (it only had a notation of revocation and notice thereof), held that the state had as a matter of law failed to establish a prima facie case. The district court further noted that, in the absence of a court order or a waiver by the defendant (neither present in the instant case), there must be competent evidence showing the maintenance of a driving record by the department, the requisite predicate convictions, and proof that the motorist had received notice of designation as a habitual traffic offender.

Simpson v. State, Second District, 32 FLW D2927, opinion filed December 12, 2007.

The officer stopped a vehicle after determining through a computer check, that the registered female owner of the vehicle had a suspended license for failure to have Financial Responsibility insurance coverage. A subsequent check of the male defendant's driving license resulted in the arrest of the defendant for driving on a revoked license. At a hearing on the defendant's motion to suppress, the officer testified that he was aware a male was driving the vehicle when he approached the vehicle. The trial court denied the motion, finding that the issue of insurance coverage on the vehicle was still an open question when the defendant was asked to produce his license and proof of insurance.

The district court reversed, holding that based on the undisputed facts, that is, that the officer had no reason to suspect that the defendant did not have the necessary insurance to operate the vehicle and the identification of the driver as not being a female, the purpose of the stop had been satisfied. Since the officer had no objective basis to suspect the driver was illegally operating the vehicle without insurance, the stop was no longer valid.

James v. State, 881 So. 2d 85 (Fla. 5th DCA 2004).

The defendant was convicted of the second degree felony of fleeing or attempting to elude a law enforcement officer with lights and sirens and with wanton disregard. The jury had been instructed on such offense, as well as a misdemeanor offense, but not on the third degree felony offense (no wanton disregard). The trial court denied the defendant's motion for post-conviction relief based on ineffective assistance of counsel, to wit, the failure to request the third degree felony instruction. The court concluded that there was no reasonable probability that the jury would have declined to follow the law and exercised its jury pardon power, and therefore prejudice was not established.

The district court reversed, holding that the trial court should have at least conducted an evidentiary hearing in light of the issue involved. The court observed that it was error on the part of the trial court to merely assume the decision not to request the lesser included instruction

was a strategic choice or that there was no prejudice given the lack of any reasonable probability that the jury would have declined to follow the law and exercised its jury pardon power.

[Note: On mandate from the Supreme Court of Florida, the district court reconsidered its holding in light of the holding in Sanders v. State, 946 So. 2d 953 (Fla. 2006), to the effect that when trial counsel fails to request a necessarily lesser included offense that is one step removed from the charged offense, the inability of the jury to exercise its pardon power cannot establish a basis for finding that counsel's omission resulted in prejudice. Thus an ineffective assistance of counsel claim may be summarily denied if the only allegation of prejudice is that the jury was unable to exercise to its pardon power. Observing that the only allegation in the defendant's rule 3.850 motion was that the jury was unable to exercise its pardon power, the district court affirmed the trial court's summary denial of the motion. Opinion filed December 21, 2007, at 33 FLW D40.]

Arrest, Search and Seizure

Dey v. State, Second District, 32 FLW D2671, opinion filed November 9, 2007.

The defendant was stopped for a cracked windshield, resulting in the discovery of cocaine in the defendant's possession. The trial court denied the defendant's motion to suppress, relying on Hilton v. State, 901 So. 2d 155 (Fla. 2nd DCA 2005), which held that an officer may stop a vehicle with a visibly cracked windshield regardless of whether the crack creates an immediate hazard.

The district court reversed and remanded for an evidentiary hearing in light of the Supreme opinion in Hilton v. State, 961 So. 2d 284 (Fla. 2007), which reversed the district court and held that such a stop is permissible only where the officer reasonably believes that the crack renders the vehicle "in such unsafe condition as to endanger any person or property."

State v. Jennings, Fourth District, 32 FLW D2787, opinion filed November 21, 2007.

The defendant was a passenger in a motor vehicle stopped for speeding and no tag light. Upon approaching the vehicle the officers detected the odor of marijuana. When asked, the driver stated there was marijuana in the vehicle, at which time he and the defendant were asked to exit the vehicle. One officer asked the defendant whether he would consent to a search of his person for officer safety and to ascertain the presence of narcotics, in response to which the defendant nodded his head, lifted his arms, and shrugged his shoulders. Cocaine was subsequently found on the defendant. The trial court granted the defendant's motion to suppress, finding that under the totality of the circumstances the search was not for officer safety purposes and that the defendant's nonverbal response was merely an acquiescence to police authority.

The district court reversed, holding that the odor of marijuana coming from an

occupied vehicle provided probable cause that a violation of the narcotics law had occurred. This provided the officers an objectively reasonable basis to search the occupants of the vehicle. The fact that they may have articulated a subjective intent to search for officer safety did not change this fact. The district court also found meritless the defendant's argument that the admission by the driver of the presence of marijuana removed the probable cause, noting that the officers were not required to rely on a statement from a suspect which may be of dubious validity.

Langello v. State, Second District, 33 FLW D3, opinion filed December 19, 2007.

As a result of a stop for the failure to have a tag light illuminating his license plate, in violation of section 316.221(2), Florida Statutes, the defendant was charged with carrying a concealed firearm and possession of marijuana. The defendant's motion to suppress based on the illegality of the stop was denied.

The district court reversed, holding that there was no traffic violation to justify the stop. The district court observed that section 316.221(2) requires "either a tail lamp or a separate lamp . . . placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of 50 feet to the rear." Since the officer had acknowledged that one of the two tag lights was working and could not recall whether the tag was rendered illegible because of the single malfunctioning light, there was no violation and therefore the officer did not have probable cause for the stop (misapprehension of the law cannot establish probable cause). The district court rejected the state's argument that the stop was justified by section 316.610(2), Florida Statutes, which grants an officer the authority to require a driver to stop and submit to an inspection if an officer has reasonable cause to believe the vehicle is unsafe or not equipped as required by law, observing that the vehicle was equipped as required by law. The court further noted that the state had made no attempt to establish that the car was unsafe.

State v. Tullis, Fifth District, 33 FLW D69, opinion filed December 28, 2007.

The defendant was stopped for a violation of section 320.131(4), Florida Statutes, which requires temporary tags to be conspicuously displayed so as to be clearly visible from the rear of the vehicle. Upon approaching the vehicle the officer detected the odor of burnt marijuana and arrested the defendant. At a hearing, the officer testified that he was unable to read the tag through the defendant's tinted license plate holder. The trial court granted the defendant's motion to suppress, finding that the traffic stop was illegal.

The district court reversed, holding that where the preprinted identification numbers on a temporary tag are illegible from five feet away because of a tinted plate cover (as testified to by the officer), the tag was not "clearly visible." The court rejected the defendant's argument that the tag itself was "clearly visible" and therefore in compliance, noting that such an interpretation would lead to absurd and unintended consequences (an officer being unable to detain a motorist to determine if the tag were valid), and would not give effect to the plain meaning of the words "clearly visible."

After discussing, but finding irrelevant in the instant case the distinction between the preprinted portion and the handwritten portion (expiration date) of the plate, the district court observed that it was the defendant's use of a tinted license plate which caused the entire tag to be illegible. Finally, the district court noted that even if the officer had been able to read the preprinted identification number and letters on the tag after the stop, the officer would still have lawfully been permitted to make personal contact with the defendant to inform him of the reason for the stop.

Torts/Accident Cases

Williams v. Davis, Supreme Court, 32 FLW S745, opinion filed November 21, 2007 (corrected opinion issued November 29, 2007).

The Supreme Court was confronted with a certified question which it rephrased as follows:

> Does the foreseeable zone of risk analysis established in Mccain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992), apply to private owners of residential property containing foliage that does not extend into the public right-of-way so as to create a duty by the landowner to adjacent motorists?

The Court answered the question in the negative, holding that while the McCain foreseeable zone of risk analysis applies, owners of private property do not owe a duty to motorists on abutting roadways as to the maintenance of foliage located wholly within the bounds of the property. The Court added, however, that all property owners owe a duty, under a McCain analysis, not to permit the growth of foliage on their property to extend outside the bounds of the property and into the public right-of way so as to interfere with a motorist's ability to safely travel on the adjacent roadway.

The Court summarized its reasoning as follows:

> Because of the great reliance on automobiles, the higher population density in today's society, and the critical importance of highway safety, all citizens must share the responsibility to assure public safety. Although motorists continue to be primarily responsible for navigating our highways in a safe manner, Florida's system of comparative negligence ensures that the fault of all who may have acted negligently will be taken into account in determining responsibility for a particular injury. However, while we have found there is no principled basis for not extending the law of negligence set in McCain to the conditions on private property that may protrude into the public right-of-way so as to create a hazard to adjacent traffic, we conclude that residential landowners who do not permit conditions on their land to extend beyond its boundaries should not be subject to the same liability.

Drivers Licenses

Pupo-Diaz v. State, Second District, 32 FLW D2442, opinion filed October 12, 2007.

The state filed a violation of probation against the defendant, alleging that he knowingly provided false information to obtain a commercial drivers license in violation of section 322.212(5), Florida Statutes, by falsely reporting that his license had not been previously suspended or revoked. The trial court concluded that this response constituted a criminal offense and violated the defendant's probation.

The district court reversed, holding that there was an insufficient showing that the defendant knowingly made a false statement or concealed a material fact in making the application. Among the facts the district court found persuasive were that the defendant did not see the answers as they were being recorded on a computer screen and was not given the opportunity to review the application prior to signing it, the fact that the examiner had no independent recollection of what was recorded on the application, the absence of evidence as to the defendant's motivation to provide a false answer, and the fact that the defendant had answered the same question correctly on two previous occasions. The foregoing, according to the district court, could support an inference that the defendant misunderstood the question (as evidenced by mistakes in his previous applications). Thus, the district court concluded that the defendant's action was consistent with a lack of understanding on the part of the defendant rather than criminal intent.

Dennis v. Department of Highway Safety and Motor Vehicles, First District, 32 FLW D2915, opinion filed December 12, 2007.

The defendant challenged a summary final judgment in which the trial court concluded that he was not entitled to a full, unrestricted reinstatement of his previously revoked Florida driver's license, pursuant to section 322.28, Florida Statutes. The district court affirmed the trial court's ruling on this point, but reversed the trial court's decision that the defendant was not entitled to request a restricted, hardship license pursuant to section 322.271, Florida Statutes. Since the defendant had not sought a ruling on his right to pursue such license, the trial court erred in addressing this question.