FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

July - September, 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

Department of Highway Safety and Motor Vehicles v. Butler, 959 So. 2d 434 (Fla. 3d DCA 2007).

After his third driving under the influence conviction in 2001, the defendant's drivers license was revoked for ten years, with hardship reinstatement available after two years. In 2006, he was granted reinstatement on the condition he enroll in the department's special supervision program. He was subsequently informed that he would be issued a restricted license upon installation of an ignition interlock device on his vehicle. The defendant sought declaratory relief in the circuit court, arguing that his employer (on whose vehicle the device had to be installed) had been granted a waiver; that the device was not imposed as a condition of his sentence for the 2001 offense; that his convictions precluded application of section 322.2715, Florida Statutes (the provision authorizing the department to require the use of the ignition interlock device); and that the hearing officer awarding reinstatement did not require installation of the device. The circuit court ruled in favor of the defendant, finding that the department could not require installation on the employer's vehicle, while noting that should the defendant purchase a personal vehicle, the device had to be installed.

The district court reversed, observing that section 322.271(2)(d), Florida Statutes, gave the department authority to require installation of the device when considering a hardship license. The district court noted that although the device was not mandatory at the time of the defendant's conviction (2001), it was

mandatory when he sought reinstatement. The court distinguished the situation from that in which the department attempted to seek installation after reinstatement, a practice prohibited by Department of Highway Safety and Motor Vehicles v. Gonzalez-Zaila, 920 So. 2d 1220 (Fla. 3d DCA 2006).

Cooper v. State, 960 So. 2d 849 (Fla. 1st DCA 2007).

The defendant was convicted of DUI manslaughter, fleeing or attempting to elude (second degree felony), and driving without a valid drivers license (third degree felony). He was sentenced to 15 years probation, which he subsequently violated. The trial court sentenced him to 20 years incarceration on the DUI manslaughter charge and five year concurrent sentences on the other two charges.

The district court reversed and remanded, holding that the 20-year sentence on the DUI manslaughter exceeded the statutory maximum on a second degree felony charge. The court rejected the state's argument that a 20-year sentence was permissible since the statutory maximum for the three offenses was 35 years, observing that the fact that the trial court could order consecutive sentences on remand did not cure the illegality of the sentenced entered.

Department of Highway Safety and Motor Vehicles v. Clark, 32 Fla. L. Weekly D2155 (Fla. 4th DCA September 12, 2007).

After a traffic accident, the defendant was informed by a law enforcement officer that her driving privileges would be suspended if she refused to submit to a breath, blood, or urine test. The defendant refused to take a test and her drivers license was suspended, an action later affirmed by an administrative hearing officer. The circuit court reversed the license suspension and the state petitioned for certiorari review in the district court.

The district court denied the petition, observing that the relevant provision, section 316.1932(1)(a)1., Florida Statutes, requires a law enforcement officer who reasonably believes that a driver is under the influence to advise the driver that refusal to submit to a breath test may result in a license suspension. Advising the defendant concerning a blood test when it was not statutorily authorized may have misled the defendant into thinking she would have had to submit to the more invasive blood test. The court rejected the state's argument that the cases relied on by the defendant involved the exclusion of evidence in criminal trials, noting that the issue was the admissibility of evidence rather that the exclusionary rule and

thus the cases were applicable in an administrative setting.

Fender v. State, 32 Fla. L. Weekly D1527 (Fla. 4th DCA June 20, 2006).

The defendant was found guilty after a jury trial of driving under the influence, resisting arrest without violence, and failing to submit to a breath test. After a bench trial, she was convicted of her fourth offense felony DUI and misdemeanor refusal to submit. To prove the defendant's prior DUI convictions, the state produced a certified copy of a criminal history report from the clerk of court's office, the defendant's fingerprints and a report from a fingerprint analyst matching the defendant to two of her prior bookings, and a certified copy of her driving record. On the refusal charge, the state introduced a certified copy of the defendant's driving records and a non-certified copy of her booking records (both evidencing a prior DUI arrest and refusal).

The district court reversed on the felony DUI conviction, holding that certified copies of prior convictions are necessary to prove prior convictions beyond a reasonable doubt. The district court did, however, uphold the misdemeanor refusal conviction, finding that the certified copy of the defendant's driving record showing a prior refusal was legally sufficient. The court observed that it had previously held that the proof requirements for refusals are not necessarily as stringent as those needed to prove prior DUI convictions (comparing the level of proof for a prior refusal to that necessary to establish a drivers license suspension).

[Note: On Motion for Rehearing, the district court issued a revised opinion on September 12, 2007. First, the district court clarified its holding on the refusal issue to state that the issue before the trial court was whether the state had proven the defendant's license was previously suspended for failure to take a physical or chemical test rather than whether the defendant had previously refused to take the test. The district court then changed its holding on the felony DUI conviction, opining that in light of the provision in section 316.193(12), Florida Statutes, that a driver history record is sufficient by itself to establish a prior conviction of driving under the influence, the state had created a rebuttable presumption of a conviction which the defendant had not rebutted. At 32 Fla. L. Weekly D2163 (Fla. 4th DCA September 12, 2007).]

Weiss v. State, 965 So. 2d 842 (Fla. 4th DCA 2007).

The defendant, who was weaving from one lane to another, was stopped by an officer who testified to concern that the driving pattern indicated that the defendant could either be under the influence or sick. The county court granted the defendant's motion to suppress, finding that the officer did not specifically suspect driving under the influence and that there was no one else on the road at the time (3:00 a.m.) of the stop. The circuit court reversed, holding that because the traffic stop was supported by competent substantial evidence, the motion should have been denied.

The district court reversed, holding that the circuit court had not applied the correct standard of review, that is, whether there was competent substantial evidence to support the trial court's ruling. Observing that weaving or failing to maintain a single lane may or may not establish reasonable suspicion for a traffic stop, the district court reasoned as follows:

> In this case it cannot be said that the finding of no reasonable suspicion was not supported by substantial competent evidence. When the circuit court found substantial competent evidence to support the stop, it applied the incorrect standard of review, and that is a departure from the essential requirements of law.

Criminal Traffic Offenses

State v. Elder, 32 Fla. L. Weekly D27 (Fla. 2d DCA December 20, 2007).

The defendant turned into the path of another vehicle, violating its right-of-way and causing the second vehicle to swerve to avoid a collision. The second car then lost control, drove off the road, flipping over and resulting in the death of the driver and ejection of a passenger. The defendant left the scene and was charged with a violation of section 316.027(1)(b), Florida Statutes, leaving the scene of a crash resulting in death. The trial court granted the defendant's motion to dismiss, which had asserted that a driver cannot be charged with leaving the scene unless there was actual contact between the two vehicles.

The district court reversed, holding that although the defendant did not crash she was "involved" in the crash (as required by the statute) because her driving

caused it. While noting that no Florida appellate court had addressed the issue, the district court noted that there was case law from other states supporting its conclusion that since the "[defendant's] driving caused the events leading up to the crash, she was 'involved in a crash resulting in the death of any person' and was required by the statute to remain at the scene."

[Note: On July 11, 2007, the district court granted the defendant's motion for rehearing, but denied her motion for certification of conflict. The district court withdrew its prior opinion and substituted a new opinion reaching the same conclusion but rewriting portions of the opinion and adding a discussion on the meaning of the word "involved," at 32 Fla. L. Weekly D1666 (Fla. 2d DCA July 11, 2007).]

Pozo v. State, 963 So. 2d 831 (Fla. 4th DCA 2007).

The defendant was charged with vehicular homicide as the result of an accident in which his passenger was killed upon being ejected from the defendant's vehicle when it ran into a tree at a high rate of speed. The defendant was subsequently convicted after a jury trial.

The district court upheld the trial court's denial of the defendant's motion of acquittal, holding that as a matter of law grossly excessive speed alone can constitute the reckless conduct necessary to support a charge of vehicular homicide. Observing that the defendant was driving between 67 and 90 miles per hour in a residential neighborhood, the district court held that this fact alone was sufficient to establish the level of recklessness necessary to justify the denial of a motion of acquittal. The district court also noted that there was more than merely speed involved, given that the defendant was playing with his CD player, was inattentive to his speed in rainy conditions, and was rounding a curve in the road.

Notwithstanding the above holding, the district court, after rejecting the defendant's arguments relating to peremptory jury challenges, a special jury instruction, and another jury question, reversed the trial court for its denial of a post-trial motion to interview the jurors in relation to an external influence issue and remanded for further proceedings.

State v. Wells, 965 So. 2d 834 (Fla. 4th DCA 2007).

The defendant was charged with racing on a highway in violation of section

316.191(2)(a), Florida Statutes. The defendant subsequently filed a motion to dismiss, contending the statute was unconstitutional as applied to him based on vagueness and overbreadth. The trial court granted the motion, holding, in relevant part, as follows:

> . . . After hearing said motion and considering arguments from both sides this Court does find that the defendant does have standing to raise these challenges as Fla. Stat. § 316.191 is being applied to him; that, Fla. Stat § 316.191 on its face and as applied is unconstitutionally vague and does not give a reasonable person of ordinary intelligence fair notice of what constitutes forbidden conduct. Additionally, after hearing legal argument from both the State and the Defendant this Court finds that, Fla. Stat. § 316.191 is unconstitutionally overbroad and criminalizes otherwise innocent behavior that is constitutionally protected. This Court finds that this overbroad infirmity leads to arbitrary and capricious results in its application and enforcement by law enforcement.

The district court affirmed in part and reversed in part, holding section 316.191 unconstitutional both facially and as applied on vagueness grounds, but not unconstitutional on overbreadth grounds. In relation to its vagueness holding the district court stated:

> We conclude that the trial court did not err by finding section 316.191 vague and declaring it unconstitutional both facially and as applied to [defendant's] case. By defining the term 'racing' in part as the 'use of one or more motor vehicles in an attempt to outgain or outdistance another motor vehicle,' the Legislature rendered the statute vague because the 'outgain and outdistance' term could encompass passing, accelerating from a stop, and countless other legal maneuvers (and illegal and otherwise proscribed maneuvers, such as speeding) which drivers employ in their daily lives. Section 316.191, by failing to include an element of competition in its out-of-the-ordinary definition of 'race,' encompasses an endless range of otherwise legal conduct (primarily based on the outgain and outdistance term), including passing and accelerating from a stop (as suggested by the trial court), so as to make the scope of proscribed conduct vague and the statute facially unconstitutional. *See City of Madison v. Geier*, 135 N.W.2d 761, 764 (Wisc. 1965) ("The dominant

> characteristic of a race is the awareness or intent of competition in respect to speed and distance to prove superiority in performance in some respect. Normally, to constitute a race there must be an acceptance or competitive response to the awareness of the challenge; such response may be the result of prearrangement or it may come into existence on the spur of the moment. There need be no prior formal or express agreement. In respect to automobiles, the element of competition resulting from some understanding involving a challenge and a response may often reasonably be inferred from the speeds and the relative positions of the cars."). Furthermore, the trial court appropriately found that the statute was vague both facially and as applied because [the defendant's] alleged conduct was not clearly proscribed by the statute, as it is unclear whether he was attempting to 'outgain or outdistance the other driver' (or undertake any other conduct indicative of racing as defined) or simply speeding.

On the overbreadth issue, the district court accepted the state's contention that the trial court erred because overbreadth is not implicated where a statute does not affect a fundamental constitutional right. The court observed that while the right to travel is a fundamental right, there is only a privilege rather than a right to drive.

Silverstein v. State, 964 So. 2d 867 (Fla. 4th DCA 2007).

The defendant was convicted, after a no contest plea, of the third degree felony of driving with a revoked drivers license. After serving his sentence, the defendant filed a motion to correct an illegal sentence based on the fact that at the time of the incident leading to his conviction he did not have a valid license and thus should have been charged with the misdemeanor offense of driving without a license. The trial court denied the defendant's motion because he had already served his sentence. The district court affirmed.

The defendant subsequently filed a Motion to Correct Clerical Mistake, stating that subsequent to the above-referenced arrest he was cited for driving with a suspended license and arrested. He claimed that this arrest occurred because the preceding citation for driving with a revoked license contained another person's license number and consequently included the bad driving record of that person. He asked the trial court to direct the clerk of court to remove the preceding citation from his record or have his driving record reflect the error. The trial court denied

the motion, stating that it lacked jurisdiction, and deferred to the Department of Highway Safety and Motor Vehicles.

The district court affirmed, holding that even if the defendant's challenge to the preceding sentence was not barred by res judicta or collateral estoppel, the issue was not raised below and thus could not be considered. In relation to the defendant's primary claim, the court stated that the trial court did not err in denying the motion to correct clerical error, reasoning as follows:

> The court record involving [defendant's] no contest plea to driving with a revoked license contained ticket # 2590-COW, and it showed the driving record which formed the basis for the plea. Although [defendant] asserts that the driving record was the record of the other driver, [defendant] cites no authority which would require the trial judge to direct the clerk of court to essentially 'reform' the court records utilized during the plea. We note, however, that [defendant] may have already obtained some of the relief which he sought in his motion to correct clerical mistake. While this appeal has been pending, [defendant] filed a 'Notice of Corrected License,' which shows that the DHSMV recently issued a corrected driving record for [defendant] which does not contain the October 2003 citation.

Arrest, Search and Seizure

Hilton v. State, 961 So. 2d 284 (Fla. 2007).

The defendant's vehicle was stopped for a cracked windshield, subsequent to which the officers discovered marijuana. After his motion to suppress was denied, the defendant was convicted of possession of marijuana.

The district court reversed, holding that the circumstances of the case did not justify the stop. Specifically, the court observed that there was no prohibition against driving with a cracked windshield (in this case a seven inch crack in the upper tinted portion on the passenger side). Section 316.2952, Florida Statutes, requires that cars be equipped with a windshield with a wiper in working order, but does not mention cracks. The court then rejected the argument that the crack could underpin a violation of section 316.610, Florida Statutes, which makes it a violation to drive a vehicle in such unsafe condition as to endanger any person or

property or to drive a vehicle which does not contain parts or equipment required by law. While conceding that a windshield crack would be an unsafe condition if it impeded a driver's ability to see the road or if it was so large that the windshield was likely to break, the court concluded that such was not the case herein.

Upon rehearing en banc, the district court, on February 16, 2005, at 901 So. 2d 155 (Fla. 2d DCA 2005), reversed its original opinion and affirmed the trial court. The court reasoned:

> We conclude that the officers lawfully stopped [the defendant's] car based on the cracked windshield, because the equipment violation was a noncriminal traffic infraction. Section 316.2952, Florida Statutes (2001), provides that a windshield is required on every motor vehicle and that a violation of this statute is a noncriminal traffic infraction. Section 316.610(1) expressly gives a police officer the authority to require the driver of a vehicle to stop and submit the vehicle to an inspection if the officer has reasonable cause to believe that the vehicle is "unsafe or not equipped as required by law or that its equipment is not in proper adjustment or repair."

The district court went on to add that an officer may stop a car to perform a safety inspection of a broken windshield if it is visibly cracked regardless of whether the crack creates any immediate hazard. The court then certified the following question to the Supreme Court as a matter of great public importance:

> May a police officer constitutionally conduct a safety inspection stop under Section 316.610 after the officer has observed a cracked windshield, but before the officer has determined the full extent of the crack?

The Supreme Court rephrased the question as follows:

> Whether as law enforcement officer may stop a vehicle for a windshield crack on the basis that the crack renders the windshield "not in proper adjustment or repair" under section 316.610 of the Florida Statutes (2001).

The Court answered the question in the negative, reasoning that section 316.1952 requires only 1) that a vehicle have a windshield in a fixed and upright

position that is equipped with safety glazing, 2) that the windshield is equipped with a driver-controlled device for cleaning moisture from the windshield, and 3) that windshield wipers are maintained in good working order. In the absence of a provision specifically prohibiting cracks, the operative provision is section 316.610, which permits stops where an officer has reasonable cause to believe that a vehicle's equipment is not in proper adjustment or repair, without specifying that the equipment be statutorily required. This provision, however, does not give officers the authority to stop a vehicle for any equipment defect or damage. The Court observed that for a stop to be constitutional under the "not in proper adjustment or repair" provision, the equipment defect or damage must be in violation of the law. Thus, an officer may only stop a vehicle for a windshield crack if it posed a safety hazard as outlined in section 316.610.

Applying the law to the facts of the case, the Court concluded as follows:

> In the instant case, most of the testimony focused exclusively on the existence of a crack in [the defendant's] windshield, and there was virtually no testimony as to the location or the nature of the crack. The trial court only stated in ruling on the motion to suppress, 'I've observed the photographs. I've observed and confirmed from the photograph that there is a clearly visible crack in the windshield of about the approximate length the officer testified to. Something of seven or eight inches . . .' The trial court made no findings and provided no conclusions with regard to whether the crack in the windshield rendered [the defendant's] vehicle unsafe. In fact, the only testimony with regard to any safety aspect of the windshield was offered by [the officer], who testified that there was no glass falling out of the crack, and that he was not sure whether the crack would obstruct the driver's view. Having received the record, we conclude that there was insufficient evidence presented at the hearing to provide a 'particularized and objective basis' to suspect that the crack in [the defendant's] windshield rendered his vehicle unsafe in violation of section 316.610 . . . The State presented no evidence that the vehicle was in an unsafe condition to endanger person or property and, correspondingly, no evidence that would support an objectively reasonable suspicion that the vehicle was unsafe in violation of the statute. Therefore, the State has failed to support its burden of demonstrating that the stop of [the defendant] was objectively reasonable, and we conclude that the stop was illegal under the Fourth

Amendment.

Alphonso v. State, 963 So. 2d 287 (Fla. 4th DCA 2007).

The defendant was sentenced on a violation of probation after the trial court denied his motion to suppress evidence obtained after the defendant was stopped for the failure to obey a police roadblock set up to assist another motorist. The state presented evidence that the defendant refused to stop even after the officer initiated his lights, honked his horn, and ordered him to stop over his public address system.

The district court affirmed, holding that the stop was valid based on section 316.072(3), Florida Statutes, which makes it unlawful for any person willfully to fail or refuse to comply with any lawful order or direction of a law enforcement officer. The court rejected the defendant's contention that the evidence was not clear that he disobeyed a roadblock, noting that the trial court's deliberation was fully supported by the record.

Austin v. State, 965 So. 2d 853 (Fla. 2d DCA 2007).

The defendant became the subject of an attempted police stop based on erroneous computer information that the license plate on his vehicle was assigned to another vehicle. After a high-speed chase, the defendant jumped from his vehicle and ran from the pursuing officers until he was apprehended. Prior to being caught he dropped a bag of cocaine. He was subsequently convicted of possession of cocaine, fleeing to elude, and obstructing or opposing an officer without violence. The defendant's motion to suppress the cocaine was denied.

The district court affirmed, noting that while it is true that a stop based on erroneous information concerning the license plate would not have been lawful, the motion to suppress could most easily be denied on the ground that the cocaine was dropped by the defendant before he was seized by the police. The district court found it unnecessary to consider whether the commission of the fleeing to elude offense dissipated the taint of any illegality associated with the initial unsuccessful attempt to stop the defendant.

Torts/Accident Cases

Marcellus v. Cronan, 963 So. 2d 364 (Fla. 4th DCA 2007).

The plaintiff was a passenger in a vehicle rear-ended by the defendant's vehicle. At trial, the defendant requested a jury instruction on the presumption of negligence in rear-end automobile accidents. The trial court declined to give the instruction, finding that there was sufficient evidence presented to the jury indicating that the plaintiff's vehicle may have been improperly parked or stopped on the shoulder of the roadway at the time of the accident (as opposed to being properly positioned waiting for traffic to move forward). The jury verdict was in favor of the defendant.

The district court affirmed, holding that the defendant had presented evidence at trial that fairly and reasonably rebutted the presumption of negligence and thus the negligence issue had properly been presented to the jury without the aid of the presumption.

Department of Highway Safety and Motor Vehicles v. Saleme, 32 Fla. L. Weekly D528 (Fla. 3d DCA February 21, 2007).

The defendant motorcyclist collided with the rear end of the plaintiff highway trooper's vehicle after the plaintiff had entered the roadway in pursuit of another motorcyclist. The jury in a civil case found the defendant 85% negligent and the plaintiff 15% negligent.

The district court reversed, holding that the trial court should have entered a directed verdict in favor of the plaintiff. The district court noted that the presumption of liability against the rear driver in a rear end collision could only be overcome for one of the three common law reasons: mechanical failure, a sudden and unexpected stop or unexpected lane change by the car in front, or an illegal (and therefore unexpected) stop. The court observed that there was absolutely no evidence of any mechanical failure and no evidence of either a sudden or unexpected lane change or illegal stop. Observing that the accident occurred solely as a result of the defendant's negligence, the district court found that the defendant had failed to present any evidence that if there had been a sudden lane change (a fact not supported by the record), it occurred at a time and place where it could not reasonably have been expected. Among the facts the court found persuasive were that the defendant was traveling at a speed of 80-85 miles per hour, the defendant

did not see the plaintiff make a sudden lane change, and the plaintiff had changed lanes when the nearest motorist was more than 100 yards away (sufficient distance to avoid a crash in a 55 mile per hour zone).

[Note: On September 12, 2007, the district court, on Motion for Rehearing, withdrew its previous opinion and substituted an opinion which reached the same conclusion, but deleted its discussion of section 316.0895, Florida Statutes, the provision which prohibits drivers from following too closely, and related case law. At 32 Fla. L. Weekly D2176 (Fla. 3d DCA September 12, 2007).]

Vehicle Forfeiture

Department of Highway Safety and Motor Vehicles v. Frey, 965 So. 2d 199 (Fla. 5th DCA 2007).

The defendant was arrested for driving under the influence. Alleging that the defendant had three or four prior DUI convictions in New York, the department initiated forfeiture proceedings under the Florida Contraband Forfeiture Act, which allows for the forfeiture of personal property used in the commission of a felony. The felony alleged was section 316.193(2)(b)1., which makes a third offense DUI committed within 10 years of a prior conviction a felony. The trial court rejected, with no explanation, the verified affidavit from the arresting officer alleging the prior convictions, but made a highlighted reference to that portion of the affidavit indicating that the officer originally intended to allow one of the defendant's relatives to pick up the vehicle, but later changed his mind.

The district court affirmed. While initially noting that the apparent basis of the trial court's decision was unpersuasive given that there was no requirement either that the property be seized immediately or that the intent to seize be formed immediately (and that the officer's initial inclination to release the vehicle was of no legal consequence), the district court nevertheless held that the state failed to meet the burden of demonstrating that a felony had occurred by showing that any of the defendant's prior DUI convictions had occurred within the 10 years required by the relevant statute.