FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

January – March, 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. Tidey, 946 So. 2d 1223 (Fla. 4th DCA 2007).

The defendant refused to take a breath test after his arrest for driving under the influence. He requested a formal review hearing from the department and sought recusal of all department hearing officers, arguing that they were not neutral. The request was denied and the defendant filed a petition for writ of prohibition in circuit court. At an evidentiary hearing, the defendant presented the testimony of three attorneys that the non-lawyer hearing officers stopped their hearings to consult with the department's legal counsel about the admissibility of evidence and asserted that such acts constituted ex parte influence and a conflict of interest. The circuit court granted the writ, concluding that the department allowed or encouraged its hearing officers to confer with staff attorneys on issues of law, a practice which the court recognized as exposing the hearing officer to ex parte influence and conflict of interest. The court's judgment granting the writ prohibited the department from allowing communications between its hearing officers and staff attorneys about questions of law or fact concerning driving privilege litigation. In addition, the court ordered that the driving privilege of all parties be reinstated, even though such privileges were suspended by the operation of section 322.2615, Florida Statutes, and no hearing was ever held on the propriety of the suspensions.

The district court reversed, observing that there was an established procedure (rule 15A-6.008, Florida Administrative Code) for a motion for recusal to be filed with the assigned hearing officer. The court declined to address the merits of the various due process issues raised or the possibility that the defendant's rights might have been violated if the hearing had taken place, reasoning as follows:

> We conclude that the letter/motion for recusal was legally insufficient to support prohibition, in that it was not filed with the hearing officer before whom the case was pending, and it sought relief, the recusal of all DHSMV employees, beyond the scope of the recusal rule. Throughout the trial court's hearing, the department objected to the scope of the prohibition proceeding. In the hearing, and by its judgment, the court focused on due process arguments, but did not consider or address the sufficiency of the letter/motion for mass recusal.
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> We also note that the judgment, in directing the department to prohibit communication between the hearing officers and the department staff attorneys, grants injunctive relief for which none was prayed. Trial courts may not *sua sponte* grant injunctive relief.
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> Additionally, the irreparable harm necessary for injunctive relief is not shown where relief is available, here, by motion to recuse once the officer's conduct occurs under section 322.2615(6)(a), Florida Statutes, or by writ of certiorari upon an adverse decision pursuant to section 322.2615(13), Florida Statutes, or by a suit for declaratory relief pursuant to section 86.001 Florida Statutes. Addressing these issues by way of certiorari or a declaratory action could provide a more manageable process to insure that proper record is made and would assure the department the benefit of appropriate pleadings to clarify the issues and the agency to conduct complete discovery.
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> We additionally concluded that the trial court went beyond the scope of the procedure by reinstating the driving privileges of the appellees. Pursuant to section 322.2615, Florida Statutes, driving privileges are automatically suspended following a DUI arrest. The suspension may only be lifted by the department after a hearing.

State v. Cubic, 946 So. 2d 606 (Fla. 4th DCA 2007).

The defendant was charged with felony driving under the influence as a result of a .098 breath-alcohol test result. The trial court suppressed the test results in response to an admission by the state that it had not used distilled or de-ionized water in its monthly testing of the Intoxilyzer 5000 (having substituted tap water), as required by FDLE rules 11D-8.002(8-10) and 11D-8.006(2), Florida Administrative Code. The court rejected the state's argument that the variation from strict compliance was of the type of "insubstantial differences" in testing procedures allowed by section 316.1932(1)(b)2., Florida Statutes, finding that the state had not proved by a preponderance of the evidence that the use of tap water represented an insubstantial difference as contemplated by applicable law.

The district court affirmed, holding that a trial judge's ruling on the admissibility of evidence will not be disturbed absent an abuse of discretion. The court noted that the trial judge had the opportunity to hear the conflicting evidence, observe the witnesses (state and defense), and evaluate their credibility and credentials. The district court then rejected the state's argument that the trial court had erred in not allowing it to try to introduce the defendant's test

results through traditional evidentiary techniques, observing that the issue had not been preserved.

Cicilian v. State, 945 So. 2d 654 (Fla. 4th DCA 2007).

The defendant was arrested and charged with misdemeanor DUI in February, 1999, but failed to appear in court, resulting in the issuance of a capias for his arrest. The capias was not served on him, however, until April, 2006, at which time the state charged him with felony DUI, based on the February, 1999, incident and three prior DUI's. The defendant moved to dismiss the felony DUI charge on the ground that the statute of limitations had run. The trial court denied the motion. The defendant filed a petition for writ of prohibition.

The district court granted the writ the prohibition, holding that prosecution for felony DUI is barred by the statutory three-year limitation period. The district court rejected the trial court's conclusion that the felony charged in 2006 was merely an enhancement for purposes of sentencing rather than a different crime. The district court reasoned that felony DUI requires proof of an additional element that misdemeanor DUI does not require (prior convictions) and is therefore a completely separate offense.

Gonse v. State, 952 So. 2d 555 (Fla. 2d DCA 2007).

The defendant was convicted of and sentenced for felony fourth offense driving under the influence and felony driving while license permanently revoked (DWLR). On the DUI conviction the defendant was fined $7,500 ($2,500 under section 316.193, Florida Statutes, driving under the influence, and $5,000 under section 775.083, Florida Statutes, third degree felony). He was sentenced to consecutive terms of imprisonment, the trial court finding that the felony DUI was not a penalty enhancement of a misdemeanor offense and that the DWLR was not an enhanced sentence, but rather a separate felony offense requiring proof of revocation as an essential element. Under such circumstances, consecutive sentencing did not constitute an impermissible double enhancement.

The district court affirmed on the consecutive sentencing issue, reasoning that felony DUI is a separate offense from misdemeanor DUI and that the existence of prior DUI convictions is an element of felony DUI. The court also noted that the fact that the defendant's license was permanently revoked constituted an element of the felony DWLS rather than a sentence enhancement. The instant situation was distinguished from consecutive sentences that have already been enhanced pursuant to a sentencing enhancement statute for offenses committed during the same criminal episode or from the situation where sentences were enhanced based on prior record, in which cases further enhancement was precluded from being imposed consecutively.

The district court did reverse on the fine issue, holding that the only authority for a fine for a fourth or subsequent DUI offense is found in section 316.193(2)(b)(3), Florida Statutes, which refers to the imposition of fines under section 775.083, Florida Statutes. Since the limit under section 775.083 is $5,000, the fine was reduced from $7,500 to $5,000.
Dean v. State, 948 So. 2d 1042 (Fla. 2d DCA 2007).

The defendant was convicted of driving under the influence with serious bodily injury and sentenced to five years probation. He was subsequently charged with violating two conditions of his probation, the first requiring the performance of 150 hours of community service at the rate of five hours a month and the second prohibiting both the consumption of alcoholic beverages and the visiting of businesses whose main source of income is derived from the service of alcoholic beverages. The trial court found a violation and ordered the defendant to serve five years in prison.

The district court reversed, holding that violation of neither condition was established. In relation to the community service, the court noted that the trial court did not provide a beginning and ending date for completion of the hours and thus the state could not prove a willful and substantial violation if there were sufficient time for the probationer to complete the required hours at the required rate.

The district court then observed that the only proof establishing a violation of the second condition related to consumption of alcohol since there was no allegation regarding the visiting of the aforementioned businesses. The court noted, however, that the state relied exclusively upon the testimony of the defendant's probation officer's supervisor and the program manager of the DUI interlock company, to the effect that the defendant experienced ignition lock ups on his vehicle. The state did not introduce any business records regarding the interlock device. The district court observed that the defendant testified that he had not consumed alcohol during the probation period and had passed every urinalysis he had taken. Evidence was also introduced that the interlock device could register false positives. The district court concluded that the state, by solely providing hearsay testimony, had not sustained its burden of proof in a violation of probation hearing.

Kubasak v. Department of Highway Safety and Motor Vehicles, Fifth District, 32 FLW D618, opinion filed March 2, 2007.

The district court denied the defendant's petition for writ of certiorari from a circuit court decision adverse to the defendant on an administrative suspension issue. The district court stated that the defendant's reliance on State v. Muldowny, 871 So. 2d 911 (Fla. 5th DCA 2004), in which the court upheld the exclusion of test results because the state failed to provide requested documentation relating to the breath-testing instrument, was misplaced since Muldowny should not be construed to relieve the defendant from the necessity of complying with section 322.2615(6)(c), Florida Statutes, when a subpoenaed witness has failed to appear. That provision reads as follows:

> (c) A party may seek enforcement of a subpoena under paragraph (b) by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, a person is not in contempt while a subpoena is being challenged.

Department of Highway Safety and Motor Vehicles v. Rife, 950 So. 2d 1288 (Fla. 5th DCA 2007).

The defendant was arrested for driving under the influence, his third such offense. Since the previous conviction had been within ten years, he was charged with felony driving under the influence pursuant to section 316.193(2)(b)1., Florida Statutes. The department initiated forfeiture proceedings under the Florida Contraband Act, specifically pursuant to section 932.701(2)(a)5., Florida Statutes, which includes within the definition of "contraband article" a "vehicle of any kind." The trial court dismissed the department's petition, concluding that no forfeiture could occur for the offense of driving under the influence unless the offender's license was suspended, revoked, or cancelled as a result of a prior DUI conviction, as specifically required in section 932.701(2)(a)9., Florida Statutes. This provision includes within the definition of "contraband article" any motor vehicle used during the course of committing an offense in violation of section 322.34(9)(a), Florida Statutes, which prohibits driving under the influence while license suspended, revoked, or cancelled as a result of a prior DUI conviction. The trial court reasoned that, pursuant to rules of statutory construction, the specific forfeiture provision for DUI controls over the more general "vehicle" provision.

The district court reversed, holding as follows:

> While section 932.701(2)(a)9. of the Florida Statutes defines a "contraband article" to include a motor vehicle used while driving under the influence of alcohol or drugs if the person's driver's license is suspended, revoked or cancelled as a result of a prior conviction, even if such violation is not a felony, that section does not supersede section 932.701(2)(a)5. of the Florida Statutes which defines "contraband article" to include any vehicle used in the commission of a felony. Here section 932.701(2)(a)9. does not apply because both parties admit that [the defendant] was not driving while his license was suspended, revoked, or cancelled or disqualified. Both parties also agree that a third DUI charge that occurs within ten years after a prior conviction is a third degree felony. If either section is applicable, forfeiture is allowed. Under the alleged facts of this case, section 932.701(2)(a)5. of the Florida Statutes was applicable and, accordingly, the dismissal of the forfeiture action was error.

Turner v. State, 951 So. 2d 1036 (Fla. 4th DCA 2007).

The district court held that the state is not required to produce the source code for the Intoxilyzer 5000 because that information is not within its possession or control, citing State v. Moe, 944 So. 2d 1096 (Fla. 5th DCA 2006).

Criminal Traffic Offenses

Platt v. State, 948 So. 2d 942 (Fla. 5th DCA 2007).

The defendant was involved (at least the evidence strongly suggested) in a high-speed chase involving a state trooper in Columbia County, which chase arguably resulted in the death of the trooper when he crashed into a tree. Later that day, the defendant was involved in a high-speed chase in Citrus County, which resulted in charges of two counts of aggravated battery (striking a police car with this vehicle), fleeing and eluding law enforcement at a high speed, possession of cocaine, possession of more than 20 grams of cannabis, and various misdemeanor offenses. At the Citrus County trial, evidence of the death of the trooper in Columbia County was introduced, including photographs of the crash and sound recordings of the trooper's last minutes alive. The defendant was convicted on all charges.

The district court affirmed on all counts with the exception of the aggravated battery and the possession of cannabis. Conceding that introduction of evidence of the trooper's death was highly prejudicial and of no relevance, the court held that it was nevertheless harmless beyond a reasonable doubt in relation to most of the charges in light of the overwhelming and conclusive nature of the proof. However, the district court observed that, in the absence of any evidence that the defendant was even aware of the trooper's death until after his arrest (and thus the death could not have served as a motive for any of his subsequent actions), those convictions for offenses in relation to which the proof was not overwhelming must be reversed and remanded. Specifically, the court noted the existence of conflicting evidence justified a retrial on the issue of whether the defendant intentionally struck the patrol car or simply did not see it prior to impact (the act giving rise to the aggravated battery charges) and on the issue of whether the cannabis belonged to his girlfriend and was unknown to the defendant.

Higgs v. State, 948 So. 2d 1024 (Fla. 2d DCA 2007).

The defendant was convicted of various offenses, including fleeing to elude at high speed with lights and siren activated. At trial, the court instructed the jury on the lesser included offenses of fleeing to elude with lights and siren and simple fleeing to elude a law enforcement officer, but refused to instruct on the lesser included offense of reckless driving.

The district court, while conceding that the evidence adduced at trial supported the instruction, held that the error has harmless. The court observed that reckless driving is three steps removed from the charged offense, while the instructions given on the other lesser included offenses were just one step removed. Because the jury declined to exercise its "pardon power" by convicting on one of the lesser included offense instructions which were given, the failure to give one on reckless driving did not require reversal.

State v. Lebron, 954 So. 2d 52 (Fla. 5th DCA 2007).

The defendant was charged with two counts of vehicular homicide, section 782.071, Florida Statutes, as a result of an accident in which the defendant changed lanes simultaneously with a vehicle she was approaching at a high speed, resulting in a subsequent evasive maneuver causing the defendant to lose control, cross the median, become airborne, and crash into an oncoming vehicle, causing the death of two persons. The defendant made a motion for dismissal, arguing that the elements of the offense had not been satisfied. The trial court granted the motion to dismiss, noting that vehicular homicide cannot be proven without also proving the

elements of reckless driving or that the defendant was driving with a willful, wanton disregard for safety. In addition, the court, observing that a defendant must reasonably foresee that the manner and conditions under which he or she was driving could cause death or great bodily harm, concluded that because the courts of Florida have thus far decided that speed alone is insufficient to establish reckless driving, then speed alone could not support vehicular homicide.

The district court reversed, observing that it had never directly held that speed alone is not sufficient to support a charge of reckless driving. The court noted that in a motion to dismiss the state must be given the benefit of a view of the evidence and inferences most favorable to it and is merely required to make out a prima facie case, rather than produce evidence sufficient to sustain a conviction. The district court concluded as follows:

> Given this rather low bar, we conclude that the trial court erred in granting the motion. The State traversed the motion with specific evidence that [the defendant] had operated her automobile at an excessive rate of speed at a time and under circumstances when traffic conditions might well make her operation of the vehicle reckless. In addition, her decision to attempt a pass of the slower vehicle on the right may have been improper in view of section 316.084(2), previously noted. [Section 316.084(2) provides that the driver of a vehicle may overtake and pass another vehicle on the right only under conditions permitting such movement in safety, and that in no event shall such movement be made by driving off the pavement or main-traveled portion of the roadway.] Thus, at least for the purposes of the motion to dismiss, we think the State made out a prima facie case.

Arrest, Search and Seizure

State v. Griffin, 949 So. 2d 309 (Fla. 1st DCA 2007).

The defendant was stopped for speeding and failing to maintain a single lane. Upon the arrival of a second officer, the first officer stopped writing the citation and walked his canine unit dog around the defendant's vehicle, resulting in an alert on the driver's side of the vehicle. A subsequent search of the defendant resulted in the discovery of cocaine. The trial court suppressed the evidence, ruling that the officers did not have probable cause to search the defendant's person and the search occurred after an unreasonably lengthy detention of the defendant.

Framing the issue as whether a properly trained narcotics detention dog sniff and alert on the defendant's vehicle provided law enforcement with probable cause to search the defendant as the sole occupant of the vehicle, the district court held that precedent constrained it to find that the dog alert provided probable cause to search the car but not the driver. On the issue of unreasonable detention, the court disagreed with the trial court's ruling, observing that any intrusion into the defendant's liberty interests were de minimus, given the lack of any evidence

that the stop was conducted in an unreasonable manner or with an improper delay or that there was any stalling to allow the second officer (necessary for the canine search) to arrive. The district court then certified the following question as a matter of great public importance:

> Whether, under the Fourth Amendment of the United States Constitution, a trained narcotics-detection dog alert of a vehicle provides probable cause to search the vehicle's driver who is also the sole occupant of the vehicle?

State v. Galicia, 948 So. 2d 983 (Fla. 2d DCA 2007).

The defendant was the passenger in a vehicle lawfully stopped for not having headlights on. Upon observing that the defendant was not wearing a safety belt, the officer asked the defendant for identification, in response to which the defendant produced a fraudulent resident alien card and was arrested. The trial court granted the defendant's motion to suppress, finding that the seizure of the card was the result of an unlawful detention and stating that the defendant could reasonably understand that he was not free to leave when asked for his identification by a uniformed deputy who had no legal justification for the request.

The district court reversed, holding that the encounter was consensual since a reasonable person in the defendant's position would not have believed that he was not free to leave. The court found relevant the facts that the deputy never moved from the driver's side of the vehicle and made no attempt to restrict the defendant's ability to leave.

State v. Olave, 948 So. 2d 995 (Fla. 4th DCA 2007).

The defendant, who was operating a van, was stopped for driving with a taillight out. A license check revealed the defendant had a "business purposes only" restricted drivers license and a subsequent interview of the defendant revealed that he was not on the way to work. The stopping officer requested the defendant to exit the vehicle and stand next to the backup officer. The defendant admitted being in possession of Xanax and consented to a search of his person, resulting in discovery of illegal drugs. The trial judge granted the defendant's motion to suppress the drugs as a product of a pre-Miranda custodial interrogation and an involuntary consent.

The district court reversed, holding that the initial stop for a broken taillight was proper and that the stopping officer did not violate the Fourth Amendment by asking the defendant to exit the vehicle, noting that the police may ask drivers to exit their vehicles as a matter of routine procedure for police safety during traffic stops. The court observed that subsequent unrelated questioning was neither a search nor a seizure so long as the traffic stop is not unduly prolonged. The defendant's subsequent admission that he possessed an illegal drug provided probable cause for a search.

May v. State, Second District, 32 FLW D837, opinion filed March 30, 2007.

The defendant was a passenger in a vehicle stopped for having no tag light. The driver was subsequently arrested for having a suspended license. The defendant was asked to provide

an identification card and was ordered to stay in the vehicle. A subsequent search of the vehicle resulted in the discovery of contraband on the defendant. The trial judge denied the defendant's motion to suppress and the defendant was convicted on various possession charges.

The district court affirmed, holding that when the driver was arrested, the officer had authority to search his vehicle incident to an arrest, as well as to detain all occupants of the vehicle. Contraband found on the ground outside the vehicle was admissible because the defendant had abandoned it during a legal detention.

Accident Cases

Department of Highway Safety and Motor Vehicles v. Saleme, Third District, 32 FLW D528, opinion filed 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).