

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2001-02

Editors: VonCille Bruce and William P. Cervone

April 2001

A MESSAGE FROM

STATE ATTORNEY BILL CERVONE

During the next few weeks many of us will participate in one or more of the law enforcement memorials that are held at this time of year around the Circuit, State and country.

Those services are especially meaningful this year to us in the Eighth Circuit in light of the death of Gainesville Police Department Office Scott Baird in February. Scott was the first local officer to give his life in the line of duty in many years and his death should serve to remind all of us of the responsibilities and risks faced each day by those who serve and protect our communities.

Officer Baird's approach to his work can serve as a model to all of us as well.

By all accounts, a career in law enforcement was his goal from childhood, and when he became a sworn officer he took pride in doing the best job he could.

He is remembered as always being ready to help and to serve, and always doing so in a professional and courteous fashion. In many

ways he was our future, and our future is diminished by his loss. May all of us serve to honor his memory by seeking to do our jobs with the love for what we do that he had and with the respect and concern for those who we serve that he showed. May we also at this time of year remember those others who have fallen before him.

SAO PERSONNEL CHANGES

In mid-January, **ASA JIM FISHER** was transferred to a felony narcotics prosecution position. This is a new position where he will assist ASA Ray Earl Thomas with SIU and other narcotics cases. Jim's regular felony position was taken by **ASA JOHN BROLING**, who has previously been in the County Court Division supervising interns. John's previous position was taken by **ASA ALISON TALBERT**, who transfers there after spending the last 5 months in the Intake Division.

On March 1st, **ASA SUSANNE WILSON BULLARD** transferred to an Intake position, where she will be assigned multiple intake and administrative tasks in

addition to maintaining a small felony caseload.

Susanne's Gainesville felony position was filled by **ASA SHAWN THOMPSON**, and Shawn's traffic unit position was filled by **ASA KIM ECKERT**.

On March 5th, **ROSALYN H. MATTINGLY** started as an ASA in the Gainesville Domestic Violence unit to fill Kim Eckert's position. She joins the SAO after having previously served as a prosecutor in Louisiana and Alabama for several years. Most recently she served as a District Court Judge in Bay Minette, Alabama, where she handled domestic violence, dependency, traffic, and misdemeanor cases among other responsibilities. Rosalyn is re-locating to Gainesville to join her husband, Gary, who is one of WCJB TV20's news anchors.

ASA MARCIA LOMBARDO resigned from her position in the Bronson CWLS office effective March 23rd in order to return to her home in Long Island. Marcia's position will be filled on April 16th by **TOM COPELAND**, who comes to the SAO and the Child Welfare project after many years in private practice in our area, during which he handled primarily domestic relations and custody cases.

PHIL PENA joined the SAO on March 15th and has been assigned to the Bronson

office. Phil comes to us after working as an ASA for several years in the Broward and Collier County offices.

He will replace **ASA KIRSTIN STINSON**, who is about to take maternity leave and who will be returning to the Gainesville Office afterwards.

CONGRATULATIONS TO...

... **ASA WALTER GREEN**, who received a special Community Recognition Award from the Corner Drug Store on January 11th for his work with the Drug Court program.

... **ASA DAVID KREIDER** and his wife, Consuela, who became the proud parents of their second child, Jocelyn Elena, on January 26th.

... **GRETCHEN HOWARD**, Project Manager for Project Payback, who received the 2001 Ferneise B. Nix Law Enforcement Award at the Seventh Annual Rape Awareness Month Luncheon held on January 26th in Gainesville. Gretchen is the second SAO employee to receive this award since its creation in 1995. The award is given annually to a person who demonstrates the honest and thoughtful attention to victim's rights that retired GPD Detective Fern Nix has always upheld.

... **ASA KRISANNE RUSSELL**, who was married on February 24th to Steve Vann. Steve is employed at the St. John's

River Water Management District. After a honeymoon trip to Oregon Krisanne and Steve will continue to live in Gainesville.

...Deputy Chief Assistant State Attorney **JEANNE SINGER**, who was selected by Sante Fe Community College as one of its 2001 Women Of Distinction and honored at an awards luncheon in Gainesville on March 14th.

... **ASA James Colaw**, who was married to Robin on March 17th.

VICTIMS' RIGHTS WEEK

Victim's Rights Week will fall in April this year. In Alachua County, the following events are scheduled:

On April 21st, there will be a brief memorial service at the Victim's Memorial in Squirrel Ridge Park, located off of Williston Road just west of SW 13th Street, beginning at about 11am. The ceremony is followed by a picnic.

A Candlelight Vigil will be held at 6pm on April 26th at the Martin Luther King Memorial Garden, which is in downtown Gainesville across University Avenue from the courthouse.

The annual State Attorney's Office blood drive for victims will be at the Gainesville SAO on Friday, April 27th, from 9am to 4pm. Anyone can donate blood and you can schedule a specific time in order to

avoid waiting. Call Dave Remer at 374-3686 to do so.

LAW ENFORCEMENT MEMORIALS

Area law enforcement memorial services will be held at several locations in May. The following have been scheduled as of this issue's publication date:

In Macclenny, a memorial service will be held On May 3rd beginning at 6pm at the Baker County Sheriff's Office.

In Starke, Bradford and Union Counties will hold a memorial service on May 8th beginning at 6:00pm at the National Guard Armory.

In Gainesville, a memorial service will be held on May 18th beginning at about 10:00am at the Law Enforcement Memorial located off of Tower Road.

In Chiefland, a memorial service will be held on May 3rd beginning at 7:00 PM at the Usher Center.

IDENTIFICATION TESTIMONY

The 4th DCA issued an opinion in late December that touches on testimony that an officer might offer about the description a witness or victim gave of a suspect. Styled Puryear v State, the new case resolves conflicts among several older cases but also sets the stage for further review of this topic by the Supreme Court.

In the case, the victim of a robbery was able to give a clothing, height, weight, and otherwise general description of her assailant but was not able to literally identify him to police. An arrest was made based on the physical characteristics provided by the victim and certain other circumstantial evidence. At trial, both the officer to whom the victim gave the description and the victim's boyfriend, to whom she had given basically the same description of her assailant, were allowed to testify as to what she had said in that regard. The defendant was convicted.

By way of background, Section 90.801(2)(c) of Florida Statutes, which is a part of our evidence code, provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is "one of identification of a person after perceiving the person." The concept of what is and what is not a statement of identification has been the subject of debate in the appeal courts and, as often as not, they disagree. In fact, both the Florida Supreme Court and the 4th DCA itself have issued contradictory opinions on this in the past. One set of opinions limits the definition of "identification" to literally that, while the other expands the definition to include descriptions. Most recent cases have used the more restrictive

definition, often making it difficult to bring description evidence into court. This kind of testimony can be helpful in showing a jury that the victim has given consistent statements and is thus credible.

In this new case, the 4th DCA has ruled in favor of the broader definition that allows description testimony. The court concluded that "the ability to describe a person's physical characteristics is the fraternal twin of the capacity to identify the person." The court also noted that allowing this complies with the basic rationale for this kind of testimony in either form, which is that earlier, out of court identifications are more reliable than those made under the suggestive conditions that exist during a trial and that the availability of the declarant for cross-examination eliminates any significant danger from the hearsay recital of this kind of testimony from other witnesses.

Although this result will be reviewed by the Supreme Court, meaning that any finality on this question is at least a year away, for the time being this case may help the State at trial if local judges follow it. (Local judges may choose to disregard this opinion since it is from the 4th and not the 1st DCA and since there are contradictory Supreme Court opinions.) What this means

is that reports should detail with as much specificity as possible any descriptive statements given by victims and other witnesses. Every detail is important. For example, in Puryear the victim told both the reporting officer and her boyfriend that her assailant had a strong body odor, which the arresting officer confirmed. You never know what seemingly small factor may convince a jury that the correct person has been charged.

TIPS ON TESTIFYING

The following tips on how to be a better witness are in large part common sense and many of them have been widely circulated before in one form or another, but they remain of value and are worth repeating:

1. Dress professionally. The courtroom is a formal place for truth and justice. Studies have shown that navy blue for men and black for women are the most appropriate colors for "looking believable." Women can have more variety. Soft prints, pastels or solid darker colors are fine. Men and women should dress in a conservative fashion. For law enforcement, a uniform helps enhance the appearance of credibility. Avoid flashy colors, anything loud, risqué or tight

fitting, and flashy jewelry. Do not chew gum!

2. Before the trial starts, walk into the courtroom and familiarize yourself with where the witness stand is located and the path you will take to it. This enables you to walk directly to the stand in a forthright manner and be sworn in.

3. Appear and behave professionally. This applies both on the witness stand and off. Obviously, this influences jurors, and you might be evaluated while you are in the hallway waiting as well.

4. When you are sworn in, look at the jury and answer "I do" in a strong, clear voice. Jurors will consider the degree of seriousness you display in taking your oath.

5. Once you are seated, sit up straight and look at the questioning attorney. When answering make eye contact with the jurors. Although you are answering the lawyer's questions it is your role to give answers to the trier of fact, usually the jury.

6. Answer all questions clearly. Do not nod. If you nod, this may cause the court reporter and the judge to tell you to answer audibly and make it look like you aren't sure what you're doing.

7. Keep your hands in

your lap. Keep them away from your mouth.

8. If you need to ask the judge a question, look at the judge and ask "Your Honor?" Wait until the judge gives you permission to ask the question.

9. Listen very carefully to the question. Make sure you understand it before you answer. Never answer a question you do not fully understand.

10. If either attorney objects, stop talking and let the judge rule on the objection before you continue.

11. Avoid being combative. Let the attorneys get as nasty as they want. They are more than likely trying to bait you. Stay cool and answer the questions. Do not joke or answer sarcastically.

12. If you make a mistake, admit it. Do not try to cover it up. Nobody is going to hold it against you that you made a mistake, but they will certainly hold it against you if they think you're lying.

13. Be prepared. The attorney calling you as a witness generally cannot ask leading questions, meaning ones that suggest the answer. So, be sure that you are familiar with what questions you are going to be asked and the information the attorney needs to convey

to the jury. Never memorize your testimony. Know your facts, but do not try to say them word for word. You will look rehearsed during your testimony and you will not be able to handle cross-examination, where the questions are out of sequence. You may feel, during cross-examination, that your testimony is under suspicion or that your personal motives are doubted. However, the process of cross-examination is not meant as a personal attack. It is intended to ensure that all sides of the case are told, and to establish the truth.

14. If the other side asks a question that you think is objectionable, pause before answering and give the lawyer on your side a chance to object. If he does not, answer the question. Sometimes attorneys have reasons for not objecting even if the question is technically not proper. If either attorney objects during your testimony, stop your answer and wait for the judge to tell you to proceed. Do not try to sneak in an answer or finish your sentence.

15. Avoid looking at your attorney when answering questions. This looks like you are asking for help and jurors might interpret this as a damaging question, even though your answer makes perfect good sense.

16. Most important, TELL THE TRUTH, the whole truth, and nothing but the truth.

Every material truth should be readily admitted, even if not to the advantage of the side that called you. Do not stop to figure out whether your answer will help or hurt your side. Just answer the question to the best of your memory without exaggeration. Avoid the temptation to embellish the truth just a bit. It is not necessary and if you are caught it makes your entire testimony suspect. Your testimony will have significantly greater weight if you demonstrate an impartial and dispassionate attitude. Conversely, your credibility will suffer if you appear to have a personal interest in the outcome of the case. You should not appear uninterested or passive. Simply convey the sense that your only interest is to present the facts. Unless you are an expert witness the trier of fact, judge or jury, is only interested in the facts. Do not give personal opinions or conclusions. Do not testify to hearsay unless the attorney calling you has explained to you that there is an exception to the hearsay rule that will allow such testimony to come into evidence.

SEARCH AND SEIZURE

A case issued by the 2nd DCA in January serves to highlight the continuing debate about the sufficiency

of information from citizens to justify stopping someone.

In the case, which is styled Ford v State, a Tampa police officer was approached by a woman who he did not know and who told him that a few minutes earlier she had seen a black man approach a white man, who put something in his pocket and gave the black man some cash. The woman assumed she had witnessed a drug deal and pointed the white man out to the officer. The officer then detained the white man, who the officer said was not free to leave, eventually searching him and finding a rock of crack cocaine on his person. The court ruled that both the stop and the ultimate seizure were illegal.

In so doing, the court noted that the stop was based entirely on what the citizen had reported since the officer did not see anything happen. The court also noted that a citizen informant's information is generally reliable. But, the court said, the founded suspicion needed to effect a stop depends on both the reliability of the informant and the content of the information provided. Both factors must be considered in determining whether the totality of the circumstances justifies a stop.

In this case, the only fact the citizen provided was that an exchange of something had occurred. Standing alone, this fact is as consistent with

completely legal behavior as it is with a drug deal. While a trained officer might have experience to lead him to believe that he has seen a drug transaction by way of a hand to hand exchange, a private citizen does not and since the officer did not observe anything he could not testify that the manner of the exchange resembled a drug deal.

The court attempted to soften the blow of throwing the case out by commenting that it is not absolutely necessary for an officer to witness an exchange in order to develop the founded suspicion necessary for temporarily detaining a person to investigate whether a drug offense has occurred. Other factors may exist, such as the reputation of the area for drug dealing, a history of multiple drug arrests at the location, on-going surveillance of the area, or personal knowledge of one of the persons involved as having previously engaged in drug activity. But without such facts, the court concluded in this case, there was no basis for stopping the defendant.

Of course, because the case report does not address whether or not those facts existed but were not brought up in testimony we will never know whether or not the court would have ruled differently if they had been articulated or whether another flaw would have been used to suppress the evidence. As is constantly

pointed out in reading these kinds of cases, however, it is certain that the need for detailed information is again at the center of the problem. The more information contained in reports, the better. It is far better to include details that later turn out to be meaningless than to not mention those details in reports. It is also far better to have them in reports than to simply bring them up later while testifying at deposition or a hearing when you can be accused of having added them after the fact, the suggestion being that if they truly existed they would have been included in a report written at the time.

INTERROGATION TIPS

Everyone will recall the Florida Supreme Court's decision in 1999 in a case styled Almeida v State, which held that law enforcement officers have an affirmative obligation to provide a clear and straightforward answer to a question from a suspect about his right to counsel.

This usually arises in an interrogation context and gives rise to the concern that law enforcement would be put in the position of having to not only advise a suspect of his rights but also to in effect have to tell him to exercise those rights and not talk. A January decision of the 5th

DCA has now offered an interpretation of Almeida that says that that is not required and that greatly helps law enforcement while still following Almeida and cases that rely on that decision.

In the case, which is State v Seaton, the defendant was identified as having been involved in a murder. He was taken to a Volusia County Sheriff's Office location to be questioned. As the interview began and before formal Miranda rights were even given, the defendant asked "Shouldn't I have a lawyer with me?" The officers answered by saying "That's something I can't tell you. That's a decision that you make, not me. Obviously, if you want a lawyer, you have that right." Miranda warnings were then given, which the defendant waived, and a confession resulted.

Before trial, the defendant moved to suppress his confession on a variety of grounds, including that the officers had failed to respond to his question as required by Almeida. Although the trial judge agreed, the 5th DCA did not, ruling that the confession should be allowed to stand.

The court suggested that the defendant was merely asking an opinion which might not even be covered by the Almeida case, and more importantly said that even if it were the response given fully met the requirements of the Supreme Court in that regard. The

answer "clearly and straightforwardly" informed the defendant that the decision to have a lawyer was his to make, and the response was open and forthright. The court specifically rejected defense claims that the only correct answer to the question would be "Yes" and that in dodging the question by saying that he "couldn't" answer the question the officer chilled Seaton's exercise of his rights by suggesting that there was no more to be said on the topic.

Careful note should be taken of this case. Almeida remains the law but at least under the authority of this new opinion law enforcement officers can defer any decision about invoking counsel to a defendant and not have to express any view about the wisdom of not talking without counsel being present.

BURGLARY

A 5th DCA case from January helps refine the sometimes confusing legal opinions as to what is and is not a burglary.

In the case, styled Weber v State, the defendant stole a ceiling fan that was lying on a cement slab abutting the rear of a first floor apartment, just outside the sliding glass doors. Although the slab was not enclosed it did have a cover over it supported by four posts.

Under the burglary statute, a dwelling includes "any attached porch." The statute does not, however, define that term. Based on the description given the court has done so, ruling that these facts are sufficient. Theft from a porch of this sort is the same as theft from a fully enclosed screened porch or something even more elaborate, and constitutes burglary.

VEHICLES AS WEAPONS - UPDATE

In the April 2000 Legal Bulletin a case styled Clark v State was discussed. In that case, the 1st DCA had ruled that Aggravated Battery could be charged when a person used a vehicle to ram another vehicle even if no literal contact with the passenger of the second vehicle occurred.

The Florida Supreme Court has now reviewed that case and, in an opinion issued in February, has upheld the 1st DCA's ruling.

In so doing, the Supreme Court noted that there must be some significant impact such as would transfer momentum or force to the occupant of the vehicle that is struck and that the sufficiency of the force would normally be a question for a jury to resolve.

This is a victory for law enforcement because it changes older law that was being read to prohibit this kind of charge. Judgement needs to be exercised in

using this theory, but when the facts show some significant effect on an occupant of a car that is struck and an intent to do that, charges should be filed.

CHILD ABUSE NOTIFICATION

In the course of your duties as a law enforcement officer many of you will come into contact with children who are exposed to abuse, neglect or abandonment. Situations that have come up in the past include a two year old child walking alone on a sidewalk on Tower Road in Gainesville wearing only a diaper, a child being sexually molested by a caregiver, children being present during an episode of domestic violence, children in the backseat of a car being driven by a person who is under the influence of alcohol or drugs, and children receiving inadequate care from a drug addicted mother. These are all situations under which you should notify Children And Family Services.

Upon notification, your call will be classified so that an appropriate child abuse investigation can be started. Under FS 39.201 as it currently exists, any person is a mandatory reporter, not just physicians, therapists, teachers, or social workers.

Initiation of a child abuse report is not difficult. A telephone call to the abuse line - 1-800-962-2873 (1-

800-96ABUSE) is sufficient. The hotline is manned 24 hours a day. If you get put on hold, which can happen because the hotline receives thousands of calls each day, you can FAX in a report to 1-800-914-0004. Information needed includes the child's name, date of birth and address, the alleged perpetrator's name, date of birth and address (if you have it), and the nature of the allegation of abuse, neglect or abandonment.

The SAO provides legal representation to Children And Family Services in their District 3, which includes all of the 8th Circuit plus Baker County and other counties in the 3rd and 7th Circuits. The attorneys in the Child Welfare Legal Services project work closely with the criminal prosecutors in the office on cases that involve common parties. Your notification to the child abuse hotline will allow for a quicker investigation of these cases and may protect a child when that might not otherwise occur. Any questions should be directed to Steve Pennypacker, who supervises the CWLS attorneys, at 352-491-4655.

-Contributed by ASA
Steve Pennypacker

SHERIFFS ASSOCIATION WEBSITE

For anyone not already aware of it, the Florida Sheriff's Association has a website that can be accessed at <www.flsheriffs.org> and

which is a good source of basic information for each of Florida's 67 counties. The website includes contact information, biographical information about Florida's sheriffs, and other material that may be helpful if you are trying to contact someone or find something in another part of the state.

LEVY COUNTY SHERIFF'S OFFICE RE-ORGANIZATION

Having now taken office, Levy County Sheriff Johnny Smith has re-organized his command staff. **MAJOR TOMMY MASHBURN** will serve as Sheriff Smith's Chief Deputy. **MAJOR BOBBY MCCALLUM** will be in charge of fiscal operations. **CAPT. DAVE SHEWEY** will be in charge of CID. **CAPT. MIKE JOHNSON** will head the jail. **LT. GARY SACHE** will be in charge of patrol operations. **LT. SEAN MULLINS** will head the SRO program. Sheriff Smith's Executive Assistant is **PATTY GALYEAN**.

OJJDP WEBSITE

The U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, has also announced the creation of two websites of potential interest to the law enforcement community.

The first of these is at <www.childrenwithdisabilities.ncjrs.org> and offers resources and information

for disabled children, their families and service providers. It includes a calendar of events, research and statistical reports, and information about federal, state and local funding opportunities.

The second site is at <www.parentingresources.ncjrs.org> and is an online guide that links parents to information that can help them meet the challenges of raising a child. This website is a part of a national agenda to foster positive youth development and reduce violence and delinquency. It provides information about a variety of topics, including children's developmental stages, teen employment, volunteering, and mentoring.

ALACHUA COUNTY
CRIME STOPPERS

Alachua County Crime Stoppers, formerly Crimetrac, now has a website running. The site includes information about the organization, links to local law enforcement agencies, and updated photos of wanted individuals. The web address is <www.stopcrime.tv> for anyone who is interested.

DRUG TESTING OF
PREGNANT WOMEN

The US Supreme Court issued an opinion in late March holding that public

hospitals cannot test pregnant women for drugs and turn the results over to police without consent. The court ruled that such testing without consent violates the Constitution even when the goal is to prevent harm to potential crack cocaine babies.

The case arose from a Charleston, South Carolina program that instituted testing and that resulted in women who test positive being arrested for violating South Carolina's child endangerment laws. Several prosecutions and convictions resulted, with arrests often occurring shortly after a woman had given birth. The majority of the court took the position that even though the goal of the testing program might have been to get the women involved into drug treatment, the immediate objective of the test was to gather incriminating evidence for law enforcement use, meaning that the warrantless seizure of the blood sample violated the constitution. In a dissenting opinion, three justices disagreed, saying that doctors are supposed to have the welfare of their patients in mind and that the additional thought of informing police of criminal conduct should not change that.

No program of this sort exists in our Circuit and the details of the opinion are not available yet. Without consent or a search warrant, however, nothing of this sort can be used in

trying to deal with the growing problem of drug dependent newborns.

**SAO SOFTBALL TEAM
THRASHES DEFENSE BAR AGAIN**

The SAO played the Eighth Judicial Circuit Defense Bar in softball on March 17th and emerged victorious, 18-10. This is the second year that the SAO team dominated the defense attorneys. After taking an early lead behind good hitting from Mark Moseley, Shawn Thompson, James Colaw and others, the SAO coasted to the win behind stellar defensive plays from Rosa DuBose and P&P's John Cynkar.

IN MEMORY OF:

...Gainesville Police Department Office Scott Baird, who was killed in the line of duty on February 12th. Officer Baird, who was 23, was struck by an automobile while trying to remove an obstacle that had been placed in the road and gave his life while trying to protect others from harm.

He is the first GPD officer to be killed in the line of duty in over 20 years.

...Wes Schellenger, who many will remember from his days with FDLE and the Alachua County Sheriff's Office as a Captain, died on January 18, 2001, at his home in Bradenton. He was

67. During his distinguished law enforcement career, Wes developed a national reputation for his work in homicide investigation and hostage negotiation. He was also a certified diver for search and rescue missions and an expert marksman.

FOR COPIES OF CASES...

To receive a complete copy of any of the cases mentioned in this issue of the Legal Bulletin, please call Investigator VonCille Bruce at the SAO at 352-374-3670, ext. 2164.