

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2003-02
Editor: Rose Mary Treadway

April 2003

A MESSAGE FROM STATE ATTORNEY BILL CERVONE

As I write this it is time to plan again for the annual law enforcement memorials that our Circuit will hold on various dates and in various locations this Spring. Over the last two years we have had tragic reminders of how dangerous the job each of you do can be and how fragile life itself is in the deaths of GPD Officer Scott Baird and UCSO Deputy Renee Azure. As if the loss of these two local heroes wasn't enough, there was, of course, the horrific loss of life, including so many firefighters and police officers, in the September 11th attacks. Now we face as a nation active warfare on foreign soil.

Even before this issue of the Legal Bulletin went to print on April 1st, war had started. For those of us in the law enforcement community, war has already had a profound effect. There is scarcely an agency of any size that has not had to deal with the problems created by military call-ups to active duty of reservists. For some of our

larger agencies, this has meant more than a few people. Those of us who are left behind must not only pick up the workload for fellow officers who have been deployed either across the country or overseas but also must do that with the burden of concern for the safety of our comrades that we have. Some might think it ironic that so many local law enforcement officers are also reservists. To me, that reality is nothing more than a re-affirmation of the dedication of the law enforcement community as a whole to serving and protecting.

As I am sure many of your agencies have, my office is participating in a variety of efforts to show our support for our servicemen and servicewomen. I urge you all to do so as well and to keep all of our military personnel, especially those who are on leave from our various agencies, in your thoughts and prayers during the difficult months that may lie ahead.

SAO PERSONNEL CHANGES

ASA **ROSALYN MATTINGLY** has resigned from the State Attorney's Office to enter private practice in Gainesville. ASA **STEVE PENNYPACKER** has resigned to take a position as a Judicial Hearing Officer

ASO Deputy **EDWARD BENNETT JR** has been promoted to sergeant and assigned to the Uniform Patrol Division.

Also promoted to sergeant and assigned to the Patrol Division are ASO Deputies **JOSH MEAD** and **LATRELL SIMMONS**.

CONGRATULATIONS!

LEVY COUNTY Sheriff's Deputy **CHUCK BASTAK** has been promoted to the rank of captain replacing Captain **DAVE SHEWEY**, who retired in February after 37 years of law enforcement experience in Levy County.

LEVY COUNTY Sheriff **JOHNNY SMITH** has also promoted four other deputies to the rank of corporal: **CARL ROGERS, ZACK KNIGHT, DANNY TURNER** and **TODD HOUCHIN**. Sheriff Smith also designated Investigator **LAUREE ALLEN** as his agency's first agricultural investigator.

The American Correctional Association has also accredited the **Levy County Jail**, citing its meeting or exceeding standards of excellence for policy, procedure, personnel and equipment.

Deputy **DEBRA HILL** of the ALACHUA COUNTY SHERIFF'S OFFICE has been promoted to lieutenant.

VICTIMS' RIGHTS WEEK

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

On Wednesday, April 9th, a Candlelight Vigil will be held at 6:30 pm in Squirrel Ridge Park, located off of Williston Road just west of SW 13th Street. The public is also invited to donate a plant in memory or in honor of anyone who has been touched by violence. Dedication of the plants will take place at 5:30 pm.

On Friday, April 11th at 8:30 am, the LifeSouth Bloodmobile will be at the State Attorney's Office all day to accept your donations of blood. Donors will receive a pint of Blue Bell ice-cream as a "thank you". All law enforcement is encouraged to donate in honor of victims of violence.

Baker County will hold services on May 1st at 7 pm at the Baker County Sheriff's Office.

CULTURE OF VIOLENCE

The HARN Museum at the University of Florida is presenting a series of lectures and performances examining the cultural, social, political and personal aspects of violence in America. On April 13th at 3 pm, Aphrodite Desiree Navab will present an abstract presentation of the violent terminology embedded in the culture of photography. These lectures are organized by the University Gallery at the University of Massachusetts at Amherst and are open to the public.

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:

For **Union** and **Bradford** Counties, a memorial service will be held on May 8th at 6:30 pm at the Lake Butler Community Center.

In **Alachua** County, memorial services will be held at the Law Enforcement Memorial located off of Tower Road on May 23th at 10:30 am.

SEARCH AND SEIZURE UPDATE

UNREASONABLE DELAY

Officer Lemery stopped a vehicle driven by Defendant LeCorn for dark window tint. LeCorn explained that it was a rental car and that he had nothing to do with the tint. The officer decided to issue a warning instead of a ticket, but he noticed that LeCorn and his passenger appeared nervous and fidgety. LeCorn was requested to step out of the vehicle and walk back to the unit while the warning was being prepared.

Another officer then appeared within **four** minutes with a K-9, who walked around the Defendant's car and eventually alerted on the driver's side. The Defendant denied there was anything illegal in the car. Officer Lemery patted the Defendant down and felt something chunky, hard and brittle. Lemery asked the Defendant what it was and LeCorn failed to respond. LeCorn was then asked if he was armed with a gun which he denied. Lemery asked the Defendant if the object was cocaine. The Defendant admitted it was.

LeCorn moved to suppress the cocaine based on the

unreasonable delay in writing the warning which enabled the K-9 officer to arrive and conduct the K-9 search of the car.

The Fifth DCA in LeCorn V St held that the time to issue a notice "should last no longer than is necessary to write the notice and, when necessary, to make the license, tag, insurance and registration checks as long as that information can be obtained within a reasonable period of time." The Court found that four minutes was not unreasonable delay. Further, the Court found that the pat-down following the dog's alert on the car was permissible.

SEARCH AND SEIZURE OF PASSENGER

Polk County Deputy Gilbert saw a car running a stop sign and stopped the car. The Defendant, Faulkner, was the passenger. As the deputy approached, Faulkner attempted to get out of the car but was directed to stay in the vehicle for "general safety purposes". Faulkner was not suspected of any criminal conduct or being a threat. The deputy then investigated the driver who had no driver's license. The deputy had Faulkner get out of the car, come to the rear of the patrol car and produce identification. At this point, the deputy

realized that Faulkner was listed on the registration as the owner of the vehicle and had allowed an unlicensed driver to drive his car. Faulkner advised that he had been drinking, did not feel comfortable driving and had asked his friend to drive not knowing he had no license.

The deputy then asked Faulkner if he was carrying any weapons or guns. The Defendant said no. The deputy asked if he could pat him down and Faulkner agreed. A pat down resulted in a finding of drug paraphernalia and the Defendant was arrested.

The Second DCA in Faulkner v St held that the consent for the pat-down was a product of an illegal detention and therefore involuntary. The Court held that the deputy had no reasonable suspicion that Faulkner had committed a crime or was a threat such as to justify that Faulkner remain in the vehicle during the initial encounter.

Although the Court recognized that the U.S. Supreme Court has held that for general safety purposes an officer may routinely order the driver of a lawfully stopped vehicle to exit the vehicle, the DCA held that " a command preventing an innocent passenger from leaving the scene of a traffic stop to continue on his independent way is a greater intrusion upon personal liberty than

an order simply directing a passenger out of the vehicle." Thus, Faulkner's "detention" was illegal and his consent to a pat-down was involuntary.

**SEARCH OF VISITOR TO HOME
BEING SEARCHED**

While Polk County deputies were searching a residence pursuant to a search warrant, Sosa-Leon walked up to the front door carrying a can of beer and a Wal-Mart bag. As he approached, a detective standing in the doorway moved aside and asked Sosa-Leon to step inside. Once inside, Sosa-Leon was directed to raise up his hands so that he could be patted down and directed to hand the bag to the other deputy. The detective found a pistol in the Defendant's waistband.

A second detective smelled the odor of marijuana coming from inside the bag and arrested the Defendant for possession of cannabis and possession of a concealed firearm.

The trial court ruled that these circumstances justified the search for weapons because the Defendant "suddenly entered the home that was being lawfully searched while carrying a bag from which the odor of marijuana was

emanating." However, the Second DCA in Sosa-Leon v St reversed the Defendant's conviction holding that the Defendant was asked to enter the home and the marijuana was not smelled by the investigator until after he had grabbed the bag from the Defendant so that the pat-down search could proceed. Here, the deputy did not testify to any articulable suspicion that Sosa-Leon was armed in order to justify the pat-down. Rather, he testified that it was a routine search always done under similar circumstances.

Here, the deputies did not have an articulable suspicion that the suspect was armed prior to the pat-down, nor was the contraband odor detected prior to the seizure of the bag to justify the seizure. Further, the Court found no evidence that the Defendant was sufficiently related to activities of the residence being searched to bring him within the purview of the search warrant.

**DRIVING WHILE LICENSE
SUSPENDED OR REVOKED**

(Due to a printing error in the last issue, the article submitted by ASA Steve Walker is being re-printed in its entirety.)

It seems that nearly all law enforcement officers,

regardless of agency, rank, or assignment, write citations for DWLSR. While it is clear that the 1998 amendment to F.S. 322.34 requires that the State prove the Defendant was knowingly driving while his/her license or privilege to drive was suspended, revoked, cancelled, or disqualified, what is not so clear is what evidence is required to prove that the Defendant had knowledge.

According to F.S. 322.34, the knowledge requirement is satisfied if the person has been previously cited, the person admits knowledge, or the person has received notice. It is important to note that the driver's license record of a person may indicate that notice of a suspension or revocation was given pursuant to F.S. 322.251. This statute deals with the requirements placed on the DHSMV for notifying drivers that their license has been suspended or revoked. An indication that notice has been given does **NOT** satisfy the knowledge requirement that notice has been received.

The above mentioned problem is cured, in part, by a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order appears in the DHSMV records. However, this presumption only applies to cases that do not involve a suspension for failure to pay traffic fines or for some other violation of a

financial responsibility.

In cases involving a suspension for failure to pay traffic fines or for violation of some other financial responsibility the presumption would not apply and we would have to prove knowledge through a prior citation, an admission of knowledge, or proof that the person actually received knowledge. Understanding what may be the impossibility of proving the former, because the person may not have been previously cited, and the difficulty of proving the latter, we are stuck with what is in the middle.

The single best way to satisfy the knowledge requirement is through the Defendant's own spontaneous or post-Miranda statement that he/she in fact has knowledge that his/her license is suspended or revoked. Short of that, a spontaneous or post-Miranda statement that he/she has been previously cited and/or received notice would suffice. A statement to the effect that any manner of proving knowledge has in fact been accomplished will prevent the Defendant from claiming there is some sort of mix up with the DHSMV and/or US Postal Service, a claim that will fall on the sympathetic ears of six people who have had to deal with both of those agencies. Obtaining any one of these statements will certainly go a long way in proving a DWLSR before the judge or

jury.

Placing these statements on your UTC or sworn complaint/arrest mittimus will go a long way in securing guilty pleas and preventing these cases from clogging up the system.

DBPR NEWS

The Department of Business and Professional Regulation has requested that all agencies be aware of its desire that possible complaints or cases against Professional Geologists also be forwarded to DBPR for disciplinary action. Under Chapter 455 of Florida Statutes, DBPR's jurisdiction includes geologists licensed under Chapter 492, and there is apparently a concern by the Board of Professional Geologists that violations by either individual geologists or geology businesses are being reported to local law enforcement agencies for prosecution with no corresponding complaint to DBPR for licensing action.

SAO records do not reflect any current charges under Chapter 492, so this problem is apparently not immediately relevant to the Eighth Circuit. If such cases were to arise however, they would most likely involve environmental crimes so it is possible that there

is some connection that is not easily identified by statute number. If you or your agency knows of such a current case or becomes involved in an investigation in which a licensed geologist is being looked at, please follow up with what DBPR is requesting by forwarding a complaint to:

Division of Complaints
DBPR
1940 N. Monroe Street
Tallahassee, Fl 32399
850-488-6603

UNLAWFUL USE OF FALSE NAME

An officer was on road patrol in a high crime area when he spotted the Defendant and another man engaged in what appeared to be a hand-to-hand transaction. The officer didn't know what, if anything, was actually exchanged.

The officer stopped to talk to the Defendant and questioned him from a field interrogation card asking him his name. The Defendant said that his name was "Snitzer". The officer then ran a computer check on the name which revealed that no driver's license was on record for such a name. Suspecting that the Defendant was lying, the officer returned to the

Defendant, told him what the record's check revealed and asked him again for his name, which the Defendant repeated as "Snitzer". The Defendant was not free to leave at this point according to the officer.

Upon noticing a wallet in the Defendant's back pocket, the officer asked for and received the Defendant's driver's license which listed the name "Belsky". Belsky was placed under arrest for giving a false name to law enforcement pursuant to Ch 901.36. Contraband was found on the Defendant's person and he was arrested for narcotics violations as well.

The Fourth DCA in Belsky v St suppressed the contraband holding that the officer lacked probable cause to arrest the Defendant for giving a false name under 901.36 because the giving of a false name under this statute must occur during an arrest or lawful detention. Although the initial encounter was a lawful consensual encounter, the encounter turned into a detention when the Defendant was not free to leave. The Court held that there was no reasonable suspicion to detain the Defendant where the officer had only a hunch that Belsky and his companion were involved in a drug transaction. The officer did not testify that he had extensive or specialized narcotics training, did not

see anything actually exchanged between the two, and although the officer described the area as one known for drug activity, he did not identify the Defendant or his companion as known drug dealers or testify about extensive surveillance or observation of suspicious activity. An officer's belief that an individual is lying does not, in and of itself, justify detaining him.

MIRANDA AND POLICE DECEPTION

Loredo was contacted at his home one evening by DeSoto County Sheriff's Detective Lewis who asked him to come to the station to discuss a complaint that he had sexually abused his girlfriend's minor daughter.

Loredo drove to the station in his own car and was led to an interrogation room. The detective told him that the door would be closed but not locked, that he was not in custody and was free to leave at any point. Additionally, Loredo was placed under oath and was advised that a translator was present and available any time he wished to use the translator's services. Near the end of the interview, after Loredo made incriminating statements, the detective twice mentioned that she would take the information that Loredo provided to the

judge. No Miranda warnings were ever given.

Loredo moved to suppress his statements saying that he was interrogated while in custody without being Mirandized. Further he alleged that the officer's comments about presenting the matter to the State Attorney's office and later to the judge were statements suggesting leniency, which made his statements therefore involuntary.

The Second DCA in Loredo V St held that although the Defendant was interrogated, he was not in custody. He was told he was not under arrest, that he could leave at any time and was even given directions for exiting the station. Loredo was not in custody for the purposes of giving Miranda warnings and the police were not in this instance required to give Miranda warnings.

The Court further held that the officer's comments about presenting the Defendant's statements to the State Attorney or the judge did not suggest leniency. There was no explicit suggestion of leniency, and no express quid pro quo bargain for the confession. However, the Court cautioned that custodial interrogators SHOULD NOT indicate an intention to bring the matter to a judge or to the judiciary. "Because judges traditionally impose sentence, such a suggestion may imply lenience and thus

coercive police conduct. A similar concern arises with suggestions to bring the matter to the state attorney, given the number of statutes that essentially place the sentencing decision into the hands of the prosecutor."

Finally, Loredo's argument that the detective made false statements of evidence and promises of treatment to induce his confession was rejected by the Court. "Police deception does not render a confession involuntary per se." "We do suggest, however, that when law enforcement uses such deception, the legality of the confession is more likely to be sustained when Miranda warnings have been given."

FOR COPIES OF CASES...

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call ASA Rose Mary Treadway at the SAO at 352-374-3672.

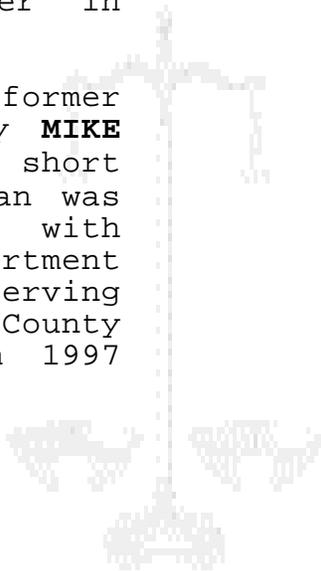
IN MEMORIAM

Former Alachua County Sheriff **LU HINDERY** passed away on February 2. Sheriff Hindery was hired as a

deputy in 1949 and served as Sheriff from 1977 to 1992 until his retirement. He was instrumental in the success of the Florida Sheriff's Youth Ranches and established the first School Resource Deputy Program in the State.

Retired Gainesville Police Officer **KEN SIGNORE** passed away on February 2 at age fifty-five. Officer Signore served GPD for 22 years before retiring in May 2000 and was recognized as the most decorated officer in GPD history.

On February 19, former Bradford County Deputy **MIKE BROGAN** died after a short illness. Deputy Brogan was a Reserve Officer with Alachua Police Department for one year before serving with the Bradford County Sheriff's Office from 1997 until 2002.



OFFICE OF THE STATE ATTORNEY
Bill Cervone, State Attorney

Presents

LAW ENFORCEMENT TRAINING DAY

Wednesday, May 14th

SFCC, Institute of Public Safety
Gainesville

All New Training Topics!

Preparing for Courtroom Testimony
Identity Theft
Shaken Baby Syndrome
Forensics Update
Traffic/DUI Issues Update
And more!

Watch for academy training notices for
registration!

For more information contact
SAO Investigator Spencer Mann
(352) 374-3699