

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2004-02
Editor: Rose Mary Treadway

April 2004

A MESSAGE FROM STATE ATTORNEY BILL CERVONE

I ran into an interesting case recently that warrants discussion this quarter. Styled **Boyd v. City of New York**, the case is a federal opinion dealing with civil false arrest and malicious prosecution claims and discusses an important part of the concept of probable cause as it applies to criminal prosecutions.

Briefly, Boyd had the misfortune of being linked to a stolen car that law enforcement officers had under surveillance in Queens, New York. The car had been missing for several weeks and when discovered by police did not look stolen in that it was not damaged, still had the correct tag on it, did not have a jimmed or tampered with ignition or lock, and so forth. When questioned, Boyd, not surprisingly, claimed that he had bought the car from an unknown person for \$75 at the airport. (You may recognize this as a variety of the "some other dude did it" defense.) Also not surprisingly, the police didn't believe a word of this and arrested him for various offenses. Ultimately, Boyd escaped conviction and a civil law suit for false arrest and malicious prosecution followed. A key part of that case was a dispute between Boyd and the officers as to whether or not Boyd was in custody for **Miranda** purposes when he made his admission about buying the car,

ase was a dispute between Boyd and the officers as to whether or not Boyd was in custody for **Miranda** purposes when he made his admission about buying the car, which was the only evidence suggesting criminal possession of the car by him.

In dealing with the civil claims, the New York court noted that probable cause for an arrest does not require absolute certainty and that these facts were sufficient for that standard to be met and for the arrest to be valid. However, the court also addressed whether or not there was sufficient probable cause to believe that a prosecution would be successful, an entirely different matter from probable cause for an arrest. That, the court said, was for a jury to decide.

This highlights an important concept that plays into prosecutorial ethics and the reasons why some cases, while properly the subject of an arrest, are not sufficient for the filing of an Information or Indictment. An officer on the street and a prosecutor in an office trying to make a filing decision have different obligations and responsibilities, even though both may be calling it probable cause. Simply put, a prosecutor's ethical responsibility is to decline filing if there is not a reasonable belief that a conviction can be lawfully obtained. That level of probable cause involves a great many factors beyond those that the officer on the street is required to consider when making an arrest decision.

The interesting part of this case is the recognition of something I've often said: a

prosecutor's duty differs from an officer's on the street, and requires a balancing of many factors about which the officer simply need not be concerned. Applying this to what we do on a daily basis may help explain why prosecutors, even at the time of making a charging decision, must always keep an eye on whether the evidence will ultimately meet the standard of proof beyond a reasonable doubt, not just probable cause.

SAO PERSONNEL CHANGES

MICKEY BEVILLE-LAMBERT has joined the SAO as a part-time ASA in Baker County handling primarily Juvenile cases. Mickey is a 2002 graduate of Florida Coastal Law School in Jacksonville and a former Alachua County Sheriff's Deputy.

FLORIDA BAR PRESIDENT'S PRO BONO AWARD GIVEN TO WALTER GREEN

ASA **WALTER GREEN** received the 2004 Florida Bar President's Pro Bono Award for the Eighth Judicial Circuit on January 29 before the Florida Supreme Court in Tallahassee. The award recognizes individual lawyers who provide free legal services to the poor and make a commitment to public service.

Since its inception in 1981, a presentation has been made annually to a single lawyer in each of

Florida's twenty Circuits. It is believed that Walter is the first prosecutor in the state to be recognized with this prestigious award, although Chief Assistant **JEANNE SINGER** was the award recipient in 1993 while in private practice. Other attorneys who have worked for SAO8 and who have won this award, both while in private practice, are **JOYE CLAYTON** in 1995 and **MARY DAY COKER** in 2001.

Walter's community service work includes many hours at Duval Elementary School and with the Youth Employment Start Program and Gentlemen Of Distinction, all of which target at-risk youth and provide mentoring.

CONGRATULATIONS!

In February, the following **ALACHUA COUNTY SHERIFF'S** personnel were promoted in rank:

Sergeant **PETE BRIGGETTE**, Lieutenant **DANIEL BRINSKO**, Sergeant **DANNY BUCKLEY**, Lieutenant **HARLAN JENNINGS**, Sergeant **ALSTON MACMAHON**, Sergeant **CHRISTOPHER MONK**, Assistant Division Manager **JOHN MOORHOUSE**, Sergeant **ESTAN MOSHER**, Lieutenant **STAN PERRY**, Lieutenant **JOHN REDMOND**, and Sergeant **DENNIS ROADRUCK**.

In January, the **GAINESVILLE POLICE DEPARTMENT** held its Award Ceremony and honored the following officers:

Police Service Award: Officers **WAYNE SOUTH** and **DON SORLI**.

Award of Excellence: Officers **BILL QUIRK, RYAN CULBERTSON, ROD SCOTT, SHAWN BARNES, JAY DIXON,** and **ROB CONCANNON**; Sergeants **ROB KOEHLER** and **RICK ROBERTS**; and Corporals **LISA SATCHER** and **KEVIN CLINTON**.

Police Star Award: Officers **JAMIE KURNICK, ROBERT GEBHARDT, FARRAH LORMIL, KEITH CARLISLE,** and **ROBERT KING**; and Sergeant **GREG ARMAGOST**.

Distinctive Service Award: Officer **RICHARD LALONDE** and Sergeant **RAY BARBER**.

SAO Victim Services counselors **KRIS KELLY** and **GRETCHEN HOWARD** as well as ASA **HEATHER JONES** were also honored with GPD's Police Service Award.

In February, The ALACHUA POLICE DEPARTMENT swore in two new officers: **ED PERITORE** and **JIMMY SMITH**. Also, Officers **CARL NEWSOME** and **RODNEY SAMUEL** were promoted to the rank of Sergeant.

APD also swore in **CESAR VARGAS** as a new officer in December and promoted Sergeant **CLAYTON REITER** to Lieutenant in October.

CASE LAW UPDATE

INVENTORY SEARCHES AND STANDARDIZED CRITERIA

In an important case emphasizing the necessity of agency standardized criteria, the Second DCA has issued an opinion in **Beezley v. State** granting the Defendant's motion to suppress because there was no indication that a police inventory search of an impounded car was conducted according to standardized criteria.

After arresting Jason Beezley on charges of obstructing the search for a fugitive, officers decided to impound his vehicle and conduct an inventory search that turned up marijuana. Officers testified that under departmental policy, the decision to impound a vehicle was within an individual officer's discretion but after the decision to impound was made, a complete inventory search must be performed. All of the evidence Beezley sought to suppress was found during the inventory.

Reversing these convictions, the Second DCA concluded that, "The State presented no evidence of such standardized criteria, and the trial court made no findings in that regard. Therefore, the trial court erred in denying Beezley's motion to suppress the physical evidence. Because the motion was dispositive, we reverse and remand for Beezley's discharge on all three counts."

What this holding means is that agencies must have an established protocol to govern inventory searches, and officers must not only follow it but must also be prepared to testify as to the protocol and their compliance with it if the search is challenged. Otherwise, suppression may result.

SEARCH AND SEIZURE:
AUTOMOBILE

In January, the Fifth DCA held in **Ndow v. State** that an officer who observes a vehicle being operated in an unusual manner may have justification for an investigatory stop even if there has been no traffic violation or citation issued.

Mamaodou Ndow appealed his conviction and sentence for trafficking in cannabis, challenging the denial of his motion to suppress evidence. An officer noticed Ndow and a passenger in a car that was stopped at a traffic light even though the light was green. The driver sat through the light's entire cycle, then proceeded when the light turned green a second time. The car slowed down, staying behind the patrol car, and pulled off the road so the occupants could trade places. Suspecting that the driver was impaired, the officer approached and smelled marijuana coming from the window. Ndow contended that the trial court should have suppressed the drugs on the basis that the stop was illegal. The DCA disagreed.

"In determining whether such an investigatory stop was justified, courts must look to the totality of the circumstances. Considering the totality of the circumstances detailed above, (the officer's) suspicion that Ndow may be driving while impaired was reasonable and warranted the investigatory stop," the DCA said.

SEARCH AND SEIZURE: HIGHWAY
CHECKPOINTS

The United State Supreme Court also issued an important case in January involving highway checkpoints. In **Illinois v Lidster**, the Court

held that highway checkpoints, where police stopped motorists to ask them for information about a recent hit and run accident, were reasonable.

Police had set up a highway checkpoint to obtain information from motorists about a hit and run accident occurring about one week earlier at the same location and time of night. Officers stopped each vehicle for 10 to 15 seconds, asked the occupants whether they had seen anything happen there the previous weekend, and handed each driver a flyer describing and requesting information about the accident.

As Respondent Lidster approached, his minivan swerved, nearly hitting an officer. The officer smelled alcohol on Lidster's breath. Another officer administered a sobriety test and then arrested Lidster. He was convicted in Illinois state court of driving under the influence of alcohol. He challenged his arrest and conviction on the ground that the government obtained evidence through use of a check point stop that violated the Fourth Amendment. The trial court rejected that challenge, but the state appellate court reversed. The Illinois Supreme Court agreed, holding that, in light of **Indianapolis v. Edmond**, the stop was unconstitutional. **Edmond** had held that, absent special circumstances, the Fourth Amendment forbids police to make stops without individualized suspicion at a checkpoint set up primarily for general "crime control" purposes. Specifically, the checkpoint in **Edmond** was designed to ferret out drug crimes committed by the motorists themselves.

In re-instating the conviction, the U.S. Supreme Court held that the primary purpose of the checkpoint was not to determine whether vehicle occupants were committing a crime but to ask the occupants, as members of the public, for help in providing information about a crime in all likelihood committed by others.

“Information- seeking highway stops such as the stops at issue are not automatically unconstitutional, and the stops at issue advanced a grave public concern and interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect.”

This is an important distinction that authorizes law enforcement agencies to conduct checkpoint stops aimed at seeking information as opposed to stopping traffic violators.

SEARCH AND SEIZURE: CONSENT AND THE PLAIN FEEL DOCTRINE

Several days after receiving a complaint that juveniles were selling drugs and brandishing guns at a specific picnic table in a park in St. Petersburg, uniformed officers in marked units appeared at the park to investigate. As they approached the picnic table where 10 to 15 juveniles were, E.B. was the first to get off the table and begin walking away. Up until this moment, the officers had not noticed any criminal conduct or suspicious behavior. Officer Books approached E.B., calling out that he wished to speak to him, but he did not block his path or use force to make him stop. E.B. stopped but did not turn around. Books came around to face E.B.

E.B. told the officer that he was hanging out with friends. Officer Books asked for consent for a pat down, and E.B. agreed. While patting E.B.’s front pocket, Books felt a small tube like a chapstick. He knew it was not a weapon but manipulated it anyway, causing a rattling sound. At this point, E.B. attempted to leave but was prevented from doing so.

E.B. was handcuffed. The tube was removed and found to have crack rocks inside. As E.B. was being escorted to the police unit, his pants fell down, revealing a gun in his waistband.

E.B. moved to suppress the cocaine and the gun, arguing that the officer went beyond the limits of a consensual pat down search and also that there was no probable cause to utilize the “plain feel” doctrine. Under the “plain feel” doctrine, “...if a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour and mass make its (illicit) identity *immediately* apparent, there has been no invasion of the suspect’s privacy...and therefore there is no constitutional basis for suppressing the seized contraband as fruit of the poisonous tree.”

The Second DCA in **E.B. v. State** suppressed the gun and cocaine, holding that E.B.’s attempt to leave when the officer manipulated the tube in his pocket clearly evinced E.B.’s desire to withdraw the previously granted consent for the pat down and continued search of his person. When E.B. withdrew his consent, there was no other probable cause to further detain E.B. The fact that E.B. left the picnic table upon seeing the uniformed officers was not probable cause. Further, the Court held that once the officer felt and recognized the small, cylindrical container in E.B.’s pocket, there was no reasonable belief that it contained a weapon, and by shaking it, removing it from the pocket and opening it, the officer exceeded the limits of consensual intrusion into E.B.’s privacy to do a pat down for weapons. The Court emphasized that probable cause must exist before an object can be seized; after-the-fact discovery of contraband does not render the seizure legal.

The “plain feel” doctrine requires that the officer “immediately recognize the illegal nature of the object by touch, such as from its texture or feel, without squeezing, sliding, or otherwise

manipulating the object, once it was clear that the object could not reasonably be a weapon.”

SEARCH AND SEIZURE AND THE FLEEING PASSENGER

Officer Braddock pulled Brown over because he failed to come to a complete stop before making a right turn at a red light. Braddock saw Brown’s passenger fidgeting as though he were trying to conceal something. Concerned that the passenger might be armed, Braddock called for backup. When Officer Coco arrived, Braddock stopped writing the citation and instead frisked the passenger, feeling something concealed in his pants.

The passenger broke free, ran away, and was caught by officers as he was entering a pond. On the bank of the pond, the officers found cocaine in a bag thrown down by the passenger. During the chase, Brown was detained at his vehicle by a third officer. Upon returning from the chase, Braddock learned that Brown’s tag, decal, and registration were invalid. Having called for a tow truck to remove Brown’s vehicle, the officers began an inventory search. They found more contraband in the passenger area and a firearm in the jack box in the trunk.

Brown moved to suppress, claiming that he was detained for an unreasonable amount of time for a traffic offense while officers dealt with his passenger. He argued that the frisk, pursuit, and arrest of the passenger were illegal and that therefore his detention during that time was also illegal.

The Fifth DCA in **Brown v. State** held that where the officer made a valid traffic stop and saw the passenger fidgeting as though he were trying to conceal something, it was not

unreasonable to interrupt the ticket writing, thereby continuing the defendant’s detention, and frisk the passenger for a weapon. The Court held that when the passenger escaped, the officers had a reasonable belief that a crime was afoot and did not act illegally by chasing the passenger. The continued detention of the defendant during the chase and arrest of the passenger was reasonable.

Brown also contended that the officers conducted an illegal search of his vehicle. The Court held that where the passenger was validly arrested, the officer could search the passenger compartment of the vehicle as a contemporaneous incident of the passenger’s arrest. Once the officers discovered contraband in the front of the vehicle, there was probable cause to conduct a search of the entire vehicle, including the trunk.

This case is important because it helps to explain the requirements in other cases that generally mandate that a traffic detention be concluded as promptly as possible. Under *these* facts, a delay is acceptable when it ordinarily would not be.

STALKING BY HARASSMENT

In a January opinion, the Third DCA ruled in **Seitz v. State** that the trial court could revoke the defendant’s probation for stalking a victim by harassment on the ground that he publicly published and disseminated pharmaceutical records of the victim and caused her to suffer emotional distress.

Seitz had claimed that he did not have any direct or indirect contact with the victim and the stalking statute was intended to govern conduct that falls just short of assault and battery, but

which involves dangerous contact between stalker and victim.

The court disagreed, ruling that Chapter 784.048 does not require contact, direct or indirect, with the victim to be liable for stalking by harassment.

This ruling serves to expand the usual concept of stalking to situations where no direct contact is involved but the victim is still being harassed.

SEARCH AND SEIZURE: ONLY IN IRAQ

In a harsh criticism of an arrest and seizure in Miami, the Third DCA in its March opinion in **State v. Gonzalez** reversed the conviction and suppressed evidence in the prosecution of accused drug dealer Gonzalez, stating that the arrest and seizure was “more akin to Iraq than the United States of America.”

Lucinda Dennison was arrested in Naples for possession of heroin. She agreed to cooperate in the capture of her supplier, a man she knew as “Mike” in Miami. She described him as a short, thin Puerto Rican male in his early twenties with dark hair and eyes. Dennison had never worked with law enforcement before and could not provide a last name for “Mike”. She told police that she had seen Mike driving at least four different vehicles, including a black VW beetle.

Dennison called Mike at law enforcement direction and tried unsuccessfully to get him to come to Naples. He later agreed to meet her in Miami to conduct a transaction. Dennison and law enforcement traveled to Miami for the

transaction. Once in Miami, Dennison called Mike again and agreed to meet at a certain Wendy’s restaurant. Dennison told police that Mike had been driving a black VW beetle with a Miami Heat license plate and that she had previously seen him with a gun.

Naples police drove Dennison to the area to wait for Mike. Other officers were alerted to the location and to Mike’s description. Before Dennison could arrive at Wendy’s, the other officers arrived and saw a person fitting the description given and driving a black VW beetle with Miami Heat plates. Mike ordered food and then parked at a spot in the parking lot and ate.

Suddenly, FDLE SWAT officers in black military style clothing armed with firearms as well as submachine guns pulled up in numerous vehicles. They proceeded to explode a grenade type device for the purpose of distracting Mike while the officers and agents rushed him at gunpoint, ordering him out of the vehicle, placing him in cuffs and forcing him to the ground. The agents did not see Mike Gonzalez commit any crime or even act suspiciously. Mike did not resist. Officers searched him and his vehicle and found heroin.

After this seizure, Dennison arrived and identified Mike as her supplier. She had previously not identified Mike to the officers and agents. She was then driven away from the scene.

The State argued that the evidence should not be suppressed because it was obtained from a valid investigatory stop and based on probable cause under the totality of the circumstances. Gonzalez argued that his detention constituted

an arrest for which there was no probable cause. The DCA agreed with Gonzalez.

The Court held that this was not just a detention but a “full-blown arrest of the type one would expect surrounding the capture of a dangerous terrorist. When combined with a SWAT team converging on a lone, unarmed individual having lunch at Wendy’s, the net result is more akin to Iraq than the United States of America.” The Court further opined that the officers lacked probable cause to arrest Gonzalez in the Wendy’s parking lot. Without confirming that Gonzalez was the “Mike” in question, and that he had drugs in his possession, the police could not have had probable cause to make this arrest. The police here found the heroin after Gonzalez was taken down, handcuffed, and arrested. Dennison only identified Gonzalez after the arrest had been made and the search of the vehicle had begun. “Although we appreciate the difficult and dangerous work that police officers do on a daily basis, it appears that the officers jumped the gun in making the arrest based solely on the description given to them by Dennison.”

The moral of the story: don’t jump the gun, no matter how sure you are that you’ll be right.

BAD CHECKS COST ALL OF US:

**AN UPDATE ON WHAT LAW ENFORCEMENT
CAN DO TO ASSIST THE STATE ATTORNEY’S
OFFICE IN THE PROSECUTION OF WORTHLESS
CHECK CASES**

*By ASA **June Leonard**, Chief, Check Fraud
Division*

Anyone complaining about the receipt of a worthless check may file a sworn complaint directly with the State Attorney’s Office. Filing such an affidavit may enable the recipient to collect restitution and service fees- at no charge to them- and at the same time will assist the State Attorney’s Office in punishing those who threaten the viability of our business community by stealing through the issuance of worthless checks.

Today’s business world operates more and more on the use of checks for payment instead of cash. Unfortunately, payment by other than cash facilitates stealing by those who cannot be trusted. Bad checks not only cost merchants directly but also cost us as members of the community in increased overhead expenses.

In the past ten years, the Eighth Judicial Circuit State Attorney’s Office has handled over 102,000 cases involving bounced checks. During this same period, we collected approximately \$5,410,000 in restitution and related costs for individuals and businesses who have been victims of worthless checks. This sum does not include court ordered restitution. Thus, in many instances, payment can be obtained without court intervention. When necessary, however, we do not hesitate to prosecute and use the criminal justice system to enforce restitution payments and to lock up repeat offenders.

Generally speaking, the State prosecutes check cases where the check was issued and presented in person and returned unpaid by the bank, stamped either “NSF” (nonsufficient funds) or “Account Closed.”

For identification purposes, the person accepting the check should verify identify by matching the photograph on the check writer’s

driver's license or state ID card with the person writing the check and by matching the signature on the license (or ID card) with the signature on the check. The check should be signed in the presence of the person accepting it, and the person accepting the check should write the license (or ID number) on the check and sign their initials, thus indicating that identification was verified. When a check is returned by the bank stamped "NSF", legal notice of such must be sent to the maker by certified mail and a return receipt requested. This legal notice gives the maker seven days from the receipt of the notice to pay restitution and also provides that, if payment is not timely made, the matter may be referred to the State Attorney's Office for criminal prosecution. Legal notice is not required if the check is returned unpaid stamped "Account Closed".

Any recipient of a bad check may contact the Check Fraud Division at the Alachua County State Attorney's Office (352-374-3693) to receive an NSF notice form and sworn complaint or to ask questions. If a worthless check was received in Baker, Bradford, Gilchrist, Levy or Union Counties, please contact that regional office directly. Baker: (904) 259-3137; Bradford: (904) 966-6208; Gilchrist: (352) 463-3406, Levy: (352) 486-5140; and Union: (386) 496-2832.)

I am available to answer legal questions and discuss policies and procedures with law enforcement, individuals and businesses. Please contact me at the Gainesville Office at (352) 491-4587. Please work with us to rid our communities of worthless checks.

POLICE MEMORIAL

The Alachua County Police Memorial Service will take place on May 28th at 10:30 a.m. at the memorial site on Tower Road in Gainesville.

The Baker County Sheriff's Office will host the Baker County Law Enforcement Memorial on May 6th at 6 p.m.

Bradford and Union Counties will hold a memorial service on May 6th at 6:30 p.m. at the Bradford County Fair Grounds, Main Building.

VICTIMS' RIGHTS WEEK

On Thursday, April 22nd, the public is invited to celebrate Victims' Rights Week in Gainesville at the Victim's Memorial Park at Squirrel Ridge Park, 1603 S.W. Williston Road, from 5 p.m. to 7 p.m.. There will be a ceramic tile painting, park planting, dedication of a Peace Pole, and the annual candlelight ceremony to honor crime victims.

The State Attorney's Office will host a blood drive to benefit victims of crime on April 23rd at the Gainesville office from 8:30 a.m. to 5:30 p.m. All donors will receive a free tee shirt and a pint of Blue Bell ice cream.

Bradford County will honor victims on April 20th at a candlelight vigil at 7 p.m. at Wainwright Park in Starke. Victim advocates for the SAO, Starke P.D. and MADD will be present as well as representatives from DCF and Peaceful Paths.

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.

