

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2004-03
Editor: Rose Mary Treadway

July 2004

A MESSAGE FROM

BILL CERVONE

As we do each year, the October issue of the Legal Bulletin will focus on legislation passed during the recently concluded session. We generally wait until then in order to be sure that various new laws are actually signed by the Governor, even though many will go into effect on July 1st and, in some instances, earlier. There are, however, always a handful of new laws that have already been signed and that have special interest to the law enforcement community so I am mentioning a couple of them now. Bear in mind that the complete text of these bills must be referred to for a full understanding of everything involved. These notes are intended only to alert you to the fact that a change has occurred.

First, Section 921.143 has been amended effective July 1st to preclude a court from accepting a plea bargain that would prevent law enforcement, correctional, or probation officer from speaking as to the sentence

to be imposed. I hope that there has never been a situation in this Circuit where an attempt has been made to keep an officer from addressing the court at sentencing. Apparently that has not always been true elsewhere in the state. While we may disagree from time to time as to how a particular case should be resolved, you have my assurance that you will always have the opportunity to address the court if you wish.

Second, also effective July 1st, Section 775.08435 has been created to prevent the court from withholding adjudication on repeat felony offenders. This statute is complex and applies to different situations in different ways but will serve to stop the occasional situation where a defendant can somehow talk a judge into withholding multiple times at least for the most part.

Finally, Section 111.065 has been amended effective May 12th to require an employing agency, under some circumstances, to pay the reasonable attorney fees and costs of an officer who is

charged with a crime. Again, this is a situation that rarely happens here; but this statute is complex and it is of interest.

There are, of course, many other substantive enactments that will be reported in October. Until then, if you run into a situation that you think might be affected by some new legislation or have any questions about new or amended laws, please call the SAO and we will research it and provide a copy of the applicable language.

SAO PERSONNEL CHANGES

ASA **TOM GRIFFIN** has resigned his position to pursue other interests.

ZACK JAMES will join the State Attorney's Gainesville Office in August as a new ASA in County Court. **ZACK** is a graduate of the University of Miami Law School, although he completed his last year at the University of Florida Law School.

Part-time ASA **MICKIE BEVILLE-LAMBERT** is now a full-time ASA assigned to the Juvenile Division in Baker and Bradford Counties.

CONGRATULATIONS!

In April, **HIGH SPRINGS** Police Chief **Ray F.**

Kaminskas announced the following promotions:

ARVEY BASS promoted to Patrol Lieutenant.

GORDON FULWOOD promoted to Detective Sergeant.

DEBORAH KRAMER promoted to Patrol Sergeant.

ANTOINE SHEPPARD promoted to Patrol Sergeant.

ALACHUA COUNTY SHERIFF'S Captain **BUDDY CREVASSE** retired in May after 37 years of service to the community.

ASA **CHRIS ADAMEC** and his wife, Kathryn, welcomed baby boy Alexander Christopher to the SA family in May.

Also in May, ASA **JAMES COLAW** and his wife, Robin, became proud parents of baby boy, Tyler James.

In May, Chief Robert Jernigan named **ANTHONY DOBOSIEWICZ** as **ALACHUA POLICE DEPARTMENT Officer of the Year.**

WILLISTON POLICE Chief **Dan Davis** has sworn in **ROB PROCTOR** as a new officer; had promoted **JONATHON JARRELL** to Patrolman First Class; and has promoted **BRYON STOKER** to Corporal.

SAO Investigator **BETH TORRES** and GPD Investigator **MIKE LYNCH** were nominated for the **"Florida Narcotic Officer's of the Year Award."** The

nominations were submitted by the Multi-Agency Drug Task Force and reflect the work of Investigators Torres and Lynch with complex cases handled by MADTF and FDLE.

A MESSAGE FROM THE IRS

The following article is submitted from the Excise Office of the Internal Revenue Service

Unusual Fuel Activities May Be Sign of Federal Fuel Tax Evasion

The Jacksonville Excise Office of the Internal Revenue Service became involved with the Environmental Crimes Task Forces in Jacksonville and Gainesville several years ago.

We believe that individuals and companies who have little or no regard for environmental laws similarly will have no respect for Federal excise tax laws. Persons who store, transport, buy, or sell motor fuel and disregard State and Local environmental laws are also likely to be in violation of Federal excise tax laws.

IRS has 136 Fuel Compliance Officers (FCO's) around the country with five in Florida. They are located

in Jacksonville, Tallahassee, St. Petersburg, Ft. Lauderdale and Orlando.

Due to the regulatory provisions of the petroleum and trucking industries, these FCO's have the authority to go onto business or public property for the purpose of inspecting fuel storage tanks and vehicle fuel supply tanks to determine if untaxed/dyed fuel is being used improperly. These officers do not have authority to detain or arrest.

In an effort to identify and stop fuel tax evasion, IRS and State Departments of Revenue (DOR's) have formed several Fuel Tax Evasion Task Forces in the United States. Our Jacksonville group has been a member of the Southeastern Task Force since 1992. For purposes of this Task Force, and because we have similar fuel tax laws to enforce, we were able to arrange special Information Sharing Agreements (relating to fuel taxes) between State DOR's and the IRS.

Currently no such agreements are possible with Environmental Agencies. This makes it difficult for us to share information with anyone outside IRS. However, when our Fuel Compliance Officers go onto property for the purpose of checking fuel and they observe situations that appear to be an environmental crime, we would be able to notify or provide a referral to the

agency having jurisdiction.

We are requesting that members of your agencies, during the normal course of their duties, be aware of any unusual and/or suspicious activity involving motor fuel. This could include a transport truck loading or unloading fuel at a location other than an established fuel terminal or retail location.

It could be two trucks pumping fuel from one to another. Or it could be a truck driver pumping fuel from a skid tank in the bed of his truck into his truck's fuel supply tank.

If any one sees any unusual activities or has further questions involving fuel transportation, storage or sales, please contact Mike Mueller, Florida Excise Tax Manager in Jacksonville, Florida at 904-665-1261.

CASE LAW UPDATE

THE RIGHT TO A LAWYER BEFORE QUESTIONING

In May, the Fourth DCA suppressed the confession in a manslaughter case because the police had only advised the Defendant that he could have an attorney *before* any questioning but failed to inform him that he had right to have counsel present *during* questioning.

Police picked up Gorman Roberts and told him he was

being charged with murder for the drowning death of five-year old Jordan. Roberts was 17 with an IQ of 67. After unsuccessful attempts to reach his parents, police *Mirandized* Roberts from the agency Miranda card advising him, among the other standard phrases, that he had a right to talk with a lawyer and have the lawyer "present before any questioning." Nowhere on the card did it advise of the right to have a lawyer present *during* questioning.

The trial court took judicial notice of 89 different Miranda rights forms used by other Florida law enforcement agencies. They all contained the warning that the accused is entitled to an attorney during questioning, or words to that effect. Although the trial court acknowledged that this element was missing from *this* form, it denied the motion to suppress, finding that the Defendant was competent and gave his statement freely and voluntarily without any police coercion.

Roberts appealed his conviction for manslaughter and contended that his video-taped confession should be suppressed because the Miranda warning he received failed to inform him that he had a right to have an attorney present *during* questioning.

The Fourth DCA agreed in

Roberts v. State and reversed the conviction. Although the DCA conceded that Miranda rights need not be given in the exact form described in the original Miranda case, the DCA held that since the form explicitly stated that an attorney can be present before questioning, the suspect was affirmatively misled into believing that the attorney could not be present *during* questioning itself.

SEARCH AND SEIZURE: TOO MUCH TIME

A 35 minute traffic stop was unreasonably prolonged where the initial stop exceeded the time necessary to write a citation, and therefore evidence obtained through a canine search was inadmissible, the Fifth DCA held in Williams v. State.

Zarek Williams appealed his conviction for trafficking in cocaine and firearms-related charges. Williams was stopped for a window tint and tag violation. Four minutes after initiating the stop, the officer requested a drug dog unit. Thirty-five minutes after the stop, Williams was issued the citation and the dog alerted during a search of the vehicle. Williams claimed the trial court erred by denying his motion to suppress on the basis that he was illegally detained after being issued the citation. The DCA

agreed.

"We cannot ignore the fact that the officer actually had completed the citation and handed it to Williams before the drug dog performed the search of the vehicle. Even if it was reasonable to take thirty-five minutes to obtain the necessary information and issue the citation, the stop had ended before Williams was directed to step to the median, citation in hand, so the dog could proceed with the search," the DCA said.

NOTE: Keep in mind that pursuant to Knowles v Iowa, the 1999 Supreme Court has ruled that there is no authority to search "incident to ticket," but only search "incident to arrest." Thus, in this case if the tag offense was a criminal violation, a custodial arrest of the driver would have eliminated the issues raised by the "dog sniff" after the ticket was issued

SEARCH AND SEIZURE: AUTOMOBILE

In May, the U.S. Supreme Court issued an important decision in Thornton v. United States holding that when an officer makes an arrest of a **recent** occupant of a vehicle, the officer is still allowed to search the vehicle's passenger compartment as a contemporaneous incident of arrest.

Before Office Nichols could stop the vehicle being driven by Thornton, Thornton parked and got out of his car. Nichols then parked

and accosted Thornton, arresting him after finding drugs in his pocket. Incident to the arrest, Nichols searched Thornton's car and found a gun under the driver's seat. In denying the Defendant's motion to suppress the firearm as a fruit of an unconstitutional search, the trial court ruled that the auto search was valid under New York v. Belton. Belton held that when a police officer makes a lawful custodial arrest of an automobile's occupant, the Fourth Amendment allows the officer to search the vehicle's passenger compartment as a contemporaneous incident of arrest.

The Supreme Court affirmed Thornton's conviction holding that Belton governs even when an officer does not make contact until the person has left the vehicle.

In Belton, the Court placed no reliance on the fact that the officer ordered the occupants out of the vehicle, or initiated contact with them while they remained within it.

"There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he was in the car. In all relevant aspects, the arrest of a

suspect who is next to a vehicle presents identical concerns regarding officer safety and evidence destruction as one who is inside."

The Court stated that under the Defendant's theory, officers who decide that it may be safer and more effective to conceal their presence until a suspect has left his car would be unable to search the passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble.

"Belton allows police to search a car's passenger compartment incident to a lawful arrest of both 'occupants' and 'recent occupants'. While an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car when the officer first initiated contact with him."

The Court held that the need for a clear rule, readily understood by police and not depending on differing estimates of what items were or were not within an arrestee's reach at any particular moment, justifies the sort of generalization

which Belton enunciated.

The Court held that there is no need for the officer to determine whether he actually confronted or signaled confrontation with the suspect while he was in his car, or whether the suspect exited the car unaware of, and for reasons unrelated to, the officer's presence.

BOLO BLUES

At approximately 4:15 pm, a BOLO was issued for a stolen late-model two-door Mitsubishi with one occupant. At the time, Broward County Deputy Roiz was driving west bound on West Hallandale Boulevard in heavy traffic. At approximately 4:30 pm, he noticed the only automobile in the area matching the BOLO description and conducted a traffic stop.

Pantin was the driver and admitted he was driving with a suspended license. Pantin was arrested for DWLSR-habitual. However, the car was not the one stolen.

Pantin filed a motion to suppress evidence resulting from the stop on the ground that the BOLO was not specific enough to create a legal justification for the stop. The trial court denied the motion, Pantin plead nolo contendere and appealed the denial of his motion to suppress.

The Fourth DCA in Pantin v State reversed the conviction, holding that the BOLO was not sufficient to create a reasonable, well-founded suspicion of criminality to warrant an investigatory traffic stop given the totality of the circumstances. The BOLO did not provide an adequate description of the vehicle under pursuit where Roiz did not recall whether it contained any information about the model, color, or window tint of the vehicle. Roiz also could not recall any information about the speed, direction, or route of the vehicle.

"This information is especially important in the case at bar because there is no indication of whether the stolen car could be at Pantin's location in heavy traffic in fifteen minutes where the BOLO lacked the location where the car was stolen and its direction of travel. Additionally, Roiz could not indicate whether the source of the BOLO information was included or whether the occupant was further described. Lastly, Roiz did not testify that Pantin was engaged in any conduct indicative of guilt."

The Court said that the BOLO could have described countless cars being driven on the roads of south Broward County. The bare bones description in the case leads inexorably to the conclusion that the BOLO was

not specific enough to create the reasonable, well founded suspicion necessary for a traffic stop. Therefore, the evidence as to the license was suppressed.

EVERY PERSON IS PRESUMED TO KNOW THE LAW---NOT!

In the course of a consensual encounter, the officer asked Perko for identification. Upon receiving the ID and directing another officer to run a warrants check, the officer, *while still holding the ID*, asked Perko if he had any weapons on him. Perko answered "No." The officer then said "do you mind if I check your property," to which Perko responded "go ahead," and the officer found a crack pipe.

The Fourth DCA in **Perko v. State** held that consent to the search of Perko's property was obtained after he had been effectively seized. Therefore, the search was unlawful and the fruits thereof (crack pipe) should be suppressed.

The Court noted that the Fifth DCA reached the opposite result under similar facts in **Golphin v State**. The Golphin Court upheld *their* search under the assumption that a person can "withdraw his consent at any time by, for example, asking that his license be immediately returned." Judge

Klein, in the Perko decision, said that that assumption is a *charade* and "presupposes" that the person knows the law of search and seizure. "I, for one, despite my law school education, had no idea there was such a thing as a consensual encounter until I became a judge. Because police officers are, in our society, charged with maintaining order and enforcing the law, it would never have occurred to me that I could insist on the return of my license before the officer was finished with it. Nor would it occur to any other person unversed in search and seizure law."

Thus, a seizure occurs when an officer retains the identification of a person while asking for consent to search his person or property. At least in the jurisdiction of the Fourth DCA, any consent is therefore automatically "involuntary" for any subsequent search.

THIRD PARTY CONSENT

In May, the Fourth DCA issued an opinion in **Shingles v. State** suppressing evidence found pursuant to consent to search from a third party. Although the opinion addressed several search and seizure issues, our opinion will address only the the third party consent issues. Shingles had been picked up by police as a suspect in a

robbery. Police drove him to his home, where the gun and proceeds were thought to be concealed. While sitting in the patrol car, Shingles refused to give consent for the search of his bedroom. The officer then exited the patrol car, went up to the house and obtained permission from Shingles's grandmother for permission to search the bedroom. The officer did not advise the grandmother that Shingles had refused consent. Evidence linking Shingles to the robbery was obtained from his bedroom. Shingles remained handcuffed in the patrol car while the officer performed his search.

Shingles moved to suppress the evidence found in the bedroom. The grandmother had testified that she was able to enter Shingles's bedroom any time she wanted to. She also testified that she did not know at the time she consented to the search that Shingle's had refused consent to search.

The Fourth DCA reversed the conviction, ruling that the grandmother's consent was not valid because Shingles was present at the scene and refused to consent to the search. *A joint occupant or one sharing dominion and control over the premises may provide consent only if the other party is not present.*

The Court cited only one case in Florida that directly holds that a search

of a person's room, within a household owned by another, does not constitute an illegal search and seizure, even though the person whose room is searched is both present and objects to the search. However, S.B. v State, a case out of our First DCA, involved a father giving consent to the search of his minor son's room over the objection of the minor who was present.

The Shingles's Court distinguished S.B. in that Shingles was not a minor and although he resided in his grandmother's house, there was no "parental relationship" of the type envisioned in S.B. Furthermore, Shingles, according to the testimony of the grandmother, periodically had paid \$50 a month rent for the use of the bedroom.

**SEARCH AND SEIZURE: PROBABLE
CAUSE V REASONABLE SUSPICION
(GO GATORS)**

Wildlife Officers received a report of gunfire in the area they were patrolling at 11:30 pm. In the pre-dawn early morning hours, they traveled to a nearby boat ramp and waited.

Ultimately, they saw Bell exiting an airboat carrying two bags, the contents of which the officers could not ascertain from their vantage point. One of the officer shouted either "Wildlife officer" or "Stop, Wildlife

officer." In response, Bell dropped the two bags he was carrying and walked toward the officer. The officer then turned on his flashlight and saw that the bags, which were mesh, contained live baby alligators. Shortly thereafter, the other officer discovered two more mesh bags of gators on the airboat. The alligators were visible to him and were making audible distress sounds. Based on these discoveries, Bell was arrested and charged with 114 counts of illegally possessing an alligator.

Bell moved to suppress this evidence relating to the search and seizure. The trial court granted his motion ruling that there was no "probable cause" and the detention was illegal.

The Second DCA in Bell v State reversed the trial court ruling that the trial court had confused probable cause with reasonable suspicion. "Although probable cause is required before a warrantless arrest can be made, it is not required for an investigatory stop. All that is required for an investigatory stop is reasonable suspicion to believe that the individual has committed, is committing, or is about to commit a crime." When the officer shouted, "Stop, Wildlife officer," he commenced, at most, an investigatory stop, not an

arrest.

The Court noted that even absent the above issue, the alligators were in "plain view" to anyone with a flashlight. "It seems that the officers were inevitably going to see and hear these alligators even if they performed no investigatory stop."

REMINDER:
LEGAL BULLETIN NOW ON-LINE

The Legal Bulletin is now available on-line, including old issues beginning with calendar year 2000. To access the Legal Bulletin go to the SAO website at <sawww.co.alachua.fl.us> and click on the "Legal Bulletin" box.

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 352-374-3670.