

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

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Editor: Rose Mary Treadway

April 2005

A MESSAGE FROM

FROM BILL CERVONE
State Attorney

I write something like this every year at this time but it bears repeating. In fact, it should be repeated far more often than just at this time of the year, and it should be repeated for no reason other than that each of you who read this Legal Bulletin deserve to hear it and to know that it is true.

Spring brings with it this year's Law Enforcement memorials, and all of those ceremonies remind us of what we should be saying to you all year round, but don't.

Thank you.

Thank you to those of you who serve our communities through the various police agencies for which you work.

Regardless of your rank or position, your tenure or experience, or the color of your uniform, if you wear one, you have made sacrifices that most citizens don't know of and wouldn't understand. Whether you are employed by a municipal police department or a county

sheriff's office, an agency that has statewide jurisdiction, or a branch of the federal government, what you do day in and day out is what makes the rest of us free and safe.

Thank you to those of you who serve as correctional staff, local and state. Working inside the fences, often with those who should never be let out, is seldom recognized for the difficult job it is.

Thank you to those of you who perform the myriad of other criminal justice jobs that we have- probation officers, court services personnel, all of the many things that an increasingly complex society has created, but that we take for granted.

I have three regrets when Law Enforcement memorials occur. First, of course, I mourn with you all of our lost brothers and sisters who gave the ultimate in service. Second, I can't thank each of you personally, which is the least you deserve but which is logistically impossible. And third, I haven't said

any of this to nearly enough of you over the past 12 months, for which I apologize.

Ours is a "What have you done for me lately?" society. We fight like family among ourselves, but we all stand together. Indeed, we take each other for granted as often as not. But not, at least, at this moment. Thank you.

SAO PERSONNEL CHANGES

AMANDA COOPER, a recent UF Law graduate, is one of our new ASAs in Baker County. Amanda interned in the Starke Office last Fall. Her new position in Macclenny increases the attorney staff there to three full time lawyers in order to address the increased caseloads.

Bradford County ASA **GREG FORHAN** has resigned his position to pursue private business opportunities. His felony position will be filled shortly.

DOUGLAS MASSEY has been hired as an Assistant for County Court in both Bradford and Baker Counties. Doug's family is from Bradford County and he is returning home after working for several months as an ASA in the Keys.

ASA **FRANCINE TURNEY** has been

transferred from Gainesville to the Bradford County Office to handle felony cases and **ANGIE CHESSE** has returned from Bradford County to assume a traffic caseload in Gainesville.

CONGRATULATIONS!

CLAYTON REITER was recently promoted to Deputy Chief of Police for the City of Alachua. He had been a lieutenant and has been with APD for ten years.

Gainesville ASA **ADAM VORHIS** and his wife Beth are the proud parents of new baby boy, Evan Scott, born March 20th.

The 2004 Alachua County Sheriff's Office Awards Ceremony was held in February and the following promotions were announced:

Sergeant **SCOTT ANDERSON**,
Lieutenant **JACK JACOBS**,
Captain **CHARLES LEE**,
Lieutenant **KAREN LOVE**,
Sergeant **ALSTON MACMAHON**,
Sergeant **DAVID TUCK**, and
Sergeant **THOMAS WITHERINGTON**.

Detective **MARK LITZKOW** was awarded the "Detective Sergeant Gregory W. Weeks Award" and the Medal of Valor was awarded to Deputy **DAVID RODRIGUEZ**.

Other ASO promotions

recently announced include:

EMERY GAINEY, Colonel, Chief of Staff; **LEON CAFFIE**, Major, Director of Operations; **DONNIE LOVE**, Captain, Uniform Patrol; **MIKE FELLOWS**, Captain, Technical Services; **TONY CANCHOLA**, Captain, Criminal Investigations; **ALICE LEE**, Lieutenant, Warrants; **KEVIN OBERLIN**, Lieutenant, Uniform Patrol; **WHITNEY BURNETT**, Lieutenant, Uniform Patrol; and **JOHN RICHMAN**, Sergeant, Uniform Patrol.

Longtime GPD Officer **ROD SCOTT** has retired after almost 24 years with the Department.

In March, ASO Majors **JIM ECKERT** and **AL WEIKEL** retired after service to ASO for 23 years and 12 years respectively. Lieutenant **BUTCH JONES** has also retired after more than 30 years of service to ASO.

CASE LAW UPDATE

U.S. Supreme Court

DETENTION DURING SEARCH

In March, the United States Supreme Court issued an opinion in Muelhler v Mena holding that an occupant of a location being searched by execution of a search warrant could be detained by handcuffs during the search

and questioned.

Mena and others were detained in handcuffs during a search of the premises they occupied. The police had entered pursuant to a search warrant. The U.S. Supreme Court stated that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted". The Court noted that minimizing the risk of harm to officers is a substantial justification for detaining an occupant during a search and ruled that an officer's authority to detain incident to a search is categorical and does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure."

Because a warrant existed to search the premises and Mena was an occupant of the premises at the time of the search, her detention for the duration of the search was reasonable. Inherent in the authorization to detain is the authority to use reasonable force to effectuate the detention. The use of force in the form of handcuffs to detain Mena was reasonable because the governmental interest in minimizing the risk of harm to both officers and occupants, at its maximum when a warrant authorized a search for weapons and a wanted gang member resides on the premises; outweighs the marginal intrusion.

Moreover, the need to detain multiple occupants made the use of handcuffs all the more reasonable.

Although the duration of detention can affect the balance of interests, the 2-3 hour detention in handcuffs in this case did not outweigh the government's continuing safety interests.

Further, the Court found that questioning Mena about her immigration status during her detention did not violate her Fourth Amendment rights. Officers did not have to have an independent reasonable suspicion in order to so question Mena. Mere police questioning does not constitute a seizure.

More U.S. Supreme Court

SEARCH AND SEIZURE: PROBABLE CAUSE FOR SNIFF

After an Illinois state trooper stopped the Defendant for speeding and radioed in, a second trooper, overhearing the transmission, drove to the scene with his narcotics-detection dog and walked the dog around the Defendant's car while the first trooper wrote Defendant a warning ticket. When the dog

alerted at the Defendant's trunk, the officers searched the trunk, found marijuana, and arrested the Defendant Caballes.

At Caballes's drug trial, the court denied his motion to suppress the seized evidence, holding that the dog's alerting provided sufficient probable cause to conduct the search. Caballes was convicted, but the Illinois Supreme Court reversed, finding that because there were no specific and articulable facts to suggest drug activity, use of the dog unjustifiably enlarged a routine traffic stop into a drug investigation.

In January, the United State Supreme Court ruled in Illinois V Caballes that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Florida Cases

SEARCH AND SEIZURE: DOG SNIFF DELAY

Trooper Hardley first spotted Poliar on the Florida Turnpike. Hardley observed that Poliar noticed the trooper and immediately slowed from 50 mph to 30 mph. The minimum speed limit

was 40 mph. The trooper's experience was that other people do not slow to such a low speed on the turnpike when they see a trooper.

Poliar was then stopped for excessively tinted windows. Poliar displayed extreme nervousness. When the trooper asked Poliar for his license, Poliar was "shaking like a leaf". When Poliar was asked for his current home address, he provided a street name that differed from the one on the license. Poliar was again asked for an address and gave the correct street name, but was unable to come up with a house number. Because of the common occurrence of identity theft, the trooper routinely asked for a driver's street address to verify that the driver was the person listed on the license.

Once Poliar was unable to give a street number for his home address, the trooper asked him for his date of birth. Poliar responded with a birthday different from the one on the license.

Poliar said he was traveling to Orlando from Miami, which, based on his experience, the trooper knew to be a source city for the narcotics trade. The trooper saw no luggage in the car. He asked Poliar if he had ever been arrested. Poliar replied yes for immigration, but no for anything else.

Approximately four minutes after the initial stop, the

trooper returned to his patrol car, requested a criminal history and license check, and called for a K-9 to assist. While he was waiting, the trooper began to write up a citation for tinted windows. The driver's license check came back valid. The criminal history indicated that Poliar had a previous drug arrest in Orlando, a fact that he had lied about minutes earlier.

The trooper contacted the El Paso Intelligence Center to run a "pipeline" check to see if Poliar appeared on a federal database. The Center told him that there was a record indicating some type of immigration problem.

The trooper questioned Poliar further about his criminal history. Although he admitted to a drug arrest in the Bahamas, he would not respond to the trooper's questions about the Orlando drug arrest. The trooper then issued Poliar the faulty equipment notice.

The combination of these factors caused the trooper to ask Poliar if he could check his car for illegal drugs. Poliar consented. The narcotics dog then arrived on the scene and located the contraband.

The Fourth DCA in Poliar v State held that there was reasonable suspicion of criminal activity that justified Poliar's detention until the drug dog alerted

to drugs in the back seat, which occurred within 20 minutes of the stop.

Poliar's excessive nervousness, his inability to answer simple questions about his birth date and home address, his deceit in failing to disclose his previous drug arrest, his travel from Miami, and questions about his immigration status justified Poliar's detention for further questioning and investigation for a period of time beyond that necessary to write a citation and do a computer check of his back ground.

This was not a case where the driver should have been "free to go" after the citation issued. The Court said these questions were not a "fishing expedition" designed to delay to allow time for the K-9 to arrive.

Here, the trooper asked sensible questions under the circumstances in the three to four minute initial detention, responding appropriately as Poliar's responses altered the dynamics of the stop.

SEARCH AND SEIZURE: PLAIN VIEW

A deputy received a tip that Jones may have a stolen boat motor in his possession and may have killed an eight-point buck on State Park

property.

Jones was located and admitted to having a felony record based on a juvenile conviction. The deputy also noticed shotgun shells in one of Jones' boats and became suspicious that Jones might be illegally in possession of a firearm.

The deputy and Jones eventually drove back to Jones' trailer where Jones was asked for and granted consent to enter to search for the stolen motor and a 12 gauge shotgun. Jones accompanied the deputy during the search. While in Jones bedroom, the deputy lifted up a mattress and found between the mattress and box spring a clear, plastic tackle box measuring two inches deep by 8-10 inches long. The deputy picked up the box and could see into each compartment, noting that each was labeled with a piece of tape. One compartment contained meth paraphernalia, another, a small bag with a small amount of meth visible in it. The deputy said there were baggies in each compartment labeled with what each contained: clean dope, old dope, clean swabs, old swabs, new tubes, used tubes. Etc.

The deputy seized the meth and paraphernalia and Jones was charged with possession. Jones filed a motion to suppress alleging that there was no probable cause to search between the mattresses.

The Second DCA in Jones v State suppressed the drugs finding that although the drugs were in plain view, there was no probable cause to seize them because the incriminating nature of the meth and paraphernalia was not immediately apparent.

Under the "Plain View" doctrine, an item may be seized without a warrant if (1) the police are legitimately in a place where the item may be viewed, (2) the incriminating character of the item is immediately apparent, and (3) the police have a lawful right of access to the item.

The Court concluded that the State only met the first and third prongs of the plain view doctrine. As to the first prong, the deputy was in a place where he had a legitimate right to be—Jones's bedroom in his trailer home. Before entering the home, the deputy specifically asked for consent to search the trailer for a boat motor and a 12 gauge shotgun. Jones voluntarily consented and even accompanied the deputy on the search.

As to the third prong, whether law enforcement has a lawful right of access to an object is "generally determined by the scope of the search permitted by either the terms of a validly issued warrant or the character of the relevant exception to the

warrant requirement." Here, the scope of the search was limited by Jones's consent to a search for a boat motor and shotgun. In the course of the deputy's search, he lifted the mattress. Upon lifting the mattress, the tackle box was in the deputy's plain view. The deputy testified that guns are commonly hidden underneath mattresses. Therefore, lifting the mattress did not exceed the scope of the consensual search. The deputy had a lawful right to lift the mattress and a right of access to the box that was in plain view once he lifted the mattress.

The State failed to meet the second prong of plain view because the incriminating nature of the meth and drug paraphernalia was not immediately apparent. "A tackle box beneath a mattress alone is not sufficient to suggest an incriminating nature—Jones could have been hiding any number of perfectly legitimate items in the small box underneath his mattress. Although the deputy testified that the tackle box was transparent, he also said that he had to pick it up to identify what was inside."

"Florida courts consistently have held that when closer examination of an item observed in plain view is necessary to confirm the incriminating nature of the contraband, its incriminating nature is not

considered 'immediately apparent'." The Court held that it was undisputed that the 8-10 inch tackle box could not have contained either a shotgun or a boat motor. Picking up the box and examining its contents extended the search beyond the scope permitted by Jones's consent. Additionally, the deputy gave no reason for his exceeding the limited scope of the consensual search. He picked the tackle box up, not because he saw contraband inside or underneath it, but apparently to satisfy his curiosity. Because the incriminating nature of the box's contents was not immediately apparent, the deputy did not have probable cause to seize it.

The Court said that when the deputy saw the box underneath the mattress and did not immediately identify the criminal nature of its contents, he should have returned the mattress to its place or asked for consent to examine the box further.

SEARCH AND SEIZURE:
(MORE) PLAIN VIEW

Daytona Beach Police were called to a motel to do a "knock and talk" at room 109, where police had received complaints that contraband was being sold out of that room. The motel

owner told Officer Youngman that Murphy had been residing in room 109 for a couple of weeks.

Two officers approached Murphy's room from a patio area where chairs were placed along the walkway. The officers were standing in a public area when they knocked on the door. Murphy answered the knock and opened the door. Officer Morford saw, within seconds of the door opening, cocaine sitting on the table 6 feet inside the room. Murphy stepped out of the room and was immediately arrested and seated outside of the room. Officer Morford entered the room, seized the baggies and tested them for cocaine, said test proving positive. After Officer Morford was in the room, he noticed another person inside, a female.

In an appeal of the Defendant's denial of a motion to suppress the cocaine, the Fifth DCA, in Murphy v State, affirmed the conviction, holding that there were exigent circumstances for the officers to seize the cocaine without a search warrant.

The Court opined that here the trial court justified the warrantless seizure partially on the ground that the contraband was in "plain view" from the patio area where Officer Morford was standing when he first saw it. However, the Florida

Supreme Court in Ensor v State distinguished the plain-view situation, which permits a warrantless seizure, from an open-view situation, which may not. In the plain view situation, the officer has a constitutional right to be in the place where the seizure is made. In an open view situation, the officer sees the contraband from a place he or she has a right to be, outside a constitutionally protected area, but may not have constitutional access to the place the contraband is located when seized. In such cases, there must be a Fourth Amendment exception, such as exigent circumstances, to justify the warrantless entry and seizure.

The Court agreed with the trial judge that because of the easily destructible nature of the contraband seen through the open door and because anyone else in the room would have known the police knew about the presence of the drugs in the room, exigent circumstances existed justifying Morford's entry into the room. It would have been improvident for Officer Morford to seal off the room without making sure no one else was in the room or had access to it. Once he entered the room and discovered the additional person inside, he was entitled to seize the contraband in plain view.

CRACKED WINDSHIELD CASE
WITHDRAWN

In the October 2004 newsletter, we reported that the Second DCA had decided in Hilton v State that a seizure of a firearm from a car initially stopped for equipment violation for a cracked windshield, was unlawful as Florida Statutes do not specifically prohibit driving with a cracked windshield.

The Second DCA has now withdrawn that opinion after re-hearing the case *en banc* and has now ruled that an officer **may** stop a vehicle with a visibly cracked windshield regardless of whether the crack creates any immediate hazard.

SEARCH AND SEIZURE:
WITHDRAWAL OF CONSENT

Detectives were driving a marked unit when they witnessed Lowery riding his bike with no headlight and stopped him for a headlight violation. Upon running a warrants check which showed no warrants outstanding, the detectives issued Lowery a verbal warning for the headlight violation.

Detective Gederian then told Lowery he was free to go and asked Lowery if he had any weapons on him. Lowery said no. Gederian asked if

Lowery would consent to a search and Lowery agreed. Lowery then spun around, faced away from the officers and put his hands in the air for a pat down. Gederian testified "I patted down his left front pants pocket and I felt a knife and I started to reach in for it and he tried to reach in and grab it at the same time and I told him not to do that and I pulled a knife out of his pocket, a folding knife. And then I tried to pat down his right front pants pocket and I felt a bulge and he tried to grab for that again, so I stuck my hand in there and pulled out a pill bottle."

The pill bottle contained crack cocaine. The detective testified that he relied on Lowery's consent throughout the entire search and that, during the search, Lowery never said or implied that he was withdrawing consent.

Lowery argued to the Court that his initial consent was involuntary and instead was an acquiescence to police authority. He also asserted that the seizure of the bottle exceeded the scope of the consent given and that his actions during the search constituted nonverbal gestures indicating a wish to stop or limit the search.

Finally, he contended that pursuant to the "plain feel" doctrine, the seizure of the pill bottle was improper.

Although the DCA agreed that

the initial consent to search was voluntary, it ruled in Lowery v State that the consent was revoked by Lowery by his attempts to reach into his pockets at the same time that the officer was attempting to search the pockets. Since Lowery was told to "stop" when Lowery reached into the pocket, that proved that the officer was using his authority to restrict Lowery's freedom of movement during the search. In a consensual search, an officer has no authority to command the person being searched to stop interfering with the search.

Consensual searches have been invalidated under similar circumstances where a defendant's nonverbal actions are inconsistent with the verbal consent given.

The Dissent stated that the search was lawful, arguing that Lowery's movement of his hands toward his pockets, and what he was intending to do by his movement, was far more "ambiguous" than cases cited by the majority. Here, Lowery did not touch the officer, cover his pocket, grab the officer's hand, try to leave, or otherwise say or do anything to stop the search or to indicate he was withdrawing his consent to the search. Lowery's intent, whether it was to pull out the knife to use against the officer, to pull out the knife or pill bottle

to hand to the officer, or to do something else, cannot be gleaned from his hand motions. If Lowery's intent was to withdraw his consent to the search, nothing prevented him from unambiguously expressing that desire by word or deed.

The Dissent further opined that the officer's statement to Lowery not to reach into the pocket or to stop reaching in to the pocket at the same time that Gederian was doing so does not alter the analysis. "In context, the statement can fairly be read as indicating that the detective would remove what was in the pocket without Lowery's assistance.

SEARCH AND SEIZURE: (MORE)
WITHDRAWAL OF CONSENT

Deputy Spooner stopped Woods for driving without headlights. Woods handed over his license and registration and exited the car, as ordered. Deputy Gore, who had arrived as backup, testified that Woods seemed unusually nervous, especially for a driver who had been told he was to receive only a warning.

Woods had trouble keeping his hands out of his pockets despite repeated orders to remove his hands from his pockets. When Spooner learned there were no problems with the license, he wrote out a warning and returned the license and registration. As Woods was

walking to his car, Spooner called him back and asked if there were any drugs or weapons in the car. Woods said no and Spooner asked for permission to search, which was granted. Woods offered to help Spooner search, but Deputy Gore asked Woods to stay back for officer safety. Gore noticed that Woods again started putting his hands in his pockets. Because Spooner's back was to them, Gore thought it necessary to ensure that Woods was not armed. Gore asked Woods if he had any weapons on his person, and Woods denied it. Gore then asked if Woods had any illegal narcotics on his person, which Woods denied.

Gore then asked Woods, "Would you mind, please, emptying your pockets." Gore later explained that Woods' demeanor led Gore to believe there was something else there, a weapon, illegal substance etc. It was then that Woods removed from his pocket what appeared to be a crack pipe.

The Fifth DCA in Woods v St reversed the conviction, holding that the officer's request that the defendant remain with one officer while the second officer searched the car constituted a show of authority which restrained the defendant's freedom of movement. The defendant's subsequent consent to search his pockets was tainted by the illegal detention.

The Court said "...no reasonable person, who is stopped nearly at midnight by two deputies, would feel free to ignore a deputy who asks the person to stay away from the other deputy during or at the conclusion of a traffic stop. Gore's asking Woods to remain with him while Spooner searched the car 'constituted a show of authority which restrained Woods' freedom of movement because a reasonable person under the circumstances would believe that he should comply'."

The Dissent argued that no violation of the Fourth Amendment occurred. "The conduct of Woods was more than enough to create a reasonable suspicion which justified the request of the deputies to empty his pockets. The fact that Woods was nervous; that he kept putting his hands in his pockets; that he was repeatedly asked not to put his hands in his pockets; that he repeatedly ignored the request and put his hands back in his pockets created a justifiable concern that Woods was either hiding something or was carrying a knife or a gun."

The Dissent concluded by saying, "It is beyond comprehension to conclude that Woods was the subject of an 'illegal detention' because Deputy Gore, motivated by safety concerns arising in connection with this roadside encounter,

simply asked him to stay back while Deputy Spooner searched his car. This unwarranted stretch of the Fourth Amendment minimizes the safety concerns of law enforcement officers and sends a dangerous message to them. It suggests that police be taught: If an individual who is the subject of a consensual encounter gives consent to search his car, the individual must, absent voluntary movement, remain precisely where he is at the time the consent is given. If that happens to be close behind the officer overlooking the officer's shoulder during the search, then so be it. The officer is forced to decide between his or her safety and jeopardizing the validity of the search. Such a procedure is contrary to officer safety and common sense."

MOTEL ROOM EVICTION

Fort Lauderdale Police Officers were called to the Travel Lodge Motel by the manager for a noise complaint. The manager explained that guests had complained of disturbing noises coming from Brown's room.

Once officers went to the room, they heard a series of bumping and dragging sounds, and furniture moving from

inside the room.

In the presence of the officers, the manager told Brown through the closed door that he was an undesirable guest and that he had to leave. Brown replied that he did not have to vacate because he had done nothing wrong. Brown had prepaid for his room in cash.

The officers knocked on the door, announced their presence as officers, and advised Brown that he was an undesirable guest, that if he did not leave he would be arrested for trespassing. Brown responded that he would only leave for a Broward County Sheriff.

The manager then attempted to open the door with a key, but the door only opened a few inches because it was held by a chain bar. After informing Brown that he had to leave, the officers forced the door open and entered the room. They saw Brown standing in the room holding a brown nylon bag. Brown refused their order to put the bag down. The officers struggled and wrestled with Brown, requiring pepper spray to subdue him. A search incident to arrest uncovered cocaine inside an eyeglass case, a bag of cocaine inside a sock, and glass pipes in the motel room.

Whether the officers lawfully entered the motel room and arrested Brown turns on the application of

section 509.141(2) Florida Statutes that authorizes the operator of any public lodging establishment to terminate the stay of an undesirable guest if the operator meets "two requirements". First, the operator must notify the guest, either orally or in writing, "that the establishment no longer desires to entertain the guest" and "request that such guest immediately depart from the establishment."

The second statutory requirement is that

"if such guest has paid in advance, the establishment shall, at the time such notice is given, tender to such guest the unused portion of the advance payment; however, the establishment may withhold payment for each full day that the guest has been entertained at the establishment for any portion of the 24 hour period of the day."

The Fourth DCA in Brown v State reversed the conviction because the manager did not tender Brown the unused portion of his cash payment at the time the manager gave the oral notice to vacate.

The Court concluded that "...it is the statute's dual requirement of notice plus simultaneous tender that satisfies due process requirements. This noncompliance with the statute meant that Brown did not commit a misdemeanor by remaining in the room. Therefore, the police were without authority to make an

arrest under section 509.141(4). With no valid arrest, the search incident to arrest must fail. The evidence illegally seized was inadmissible at trial; also, Brown could properly have resisted an illegal arrest without violence."

**AGGRAVATED ASSAULT AND
IMMINENT FEAR**

An officer cannot be considered to be in imminent fear when both a police vehicle and an armed fellow officer stand between him and a knife-wielding assailant according to the Second DCA opinion in **Sullivan v State.**

After a days-long crack cocaine binge, John Joseph Sullivan called sheriff's deputies to his residence as part of what the Court called an "ill-conceived scheme to commit suicide-by-cop." Two deputies arrived, and Sullivan told one of them that he planned to get an officer to kill him before they left. As one officer, Deputy Lockett, attempted to escort Sullivan's wife out of the home, Sullivan made a sudden movement toward her. Deputy Lockett positioned himself behind a patrol vehicle, with fellow Deputy Wilder standing between the car

and the home. Sullivan came out of the home with a knife and ran toward the officers, but after being ordered to stop, Sullivan dropped the knife and was taken into custody. He was charged with two counts of Aggravated Assault on a Law Enforcement Officer.

On appeal, the DCA found that the facts surrounding the incident were not legally sufficient to establish that Deputy Lockett was in imminent fear, a condition necessary to support the Aggravated Assault charge, because he was protected by both his fellow officer and the vehicle.

"Deputy Lockett had assumed his defensive position behind the cruiser before Sullivan emerged from the mobile home brandishing the knife. At that point, violence was unquestionably imminent as to Deputy Wilder. However, it was too remote from Deputy Lockett for the charge of Aggravated Assault to survive a motion for judgment of acquittal."

**CI HEARSAY NO PROBABLE
CAUSE**

The Second DCA in **Whittle v State** has held that hearsay information from an informant, by itself, does not give officers probable cause to search a vehicle or to arrest a person.

An officer received information from an informant that Henry Whittle had drugs on his person and would be pulling into a parking lot at a certain time. The informant also said his information was obtained in an overheard conversation. The officer went to the parking lot and other officers soon arrived.

When Whittle pulled in and got out of his van, the officers searched him for drugs but found none. They then conducted a full search of his van and found drugs in an eyeglass case in the center console.

The Second DCA reversed Whittle's conviction, finding that the informant was sufficient to start a criminal investigation but did not create the probable cause necessary to conduct a vehicle search.

The Court reasoned that "...the informant's tip may have warranted an attempt at a consensual encounter in the parking lot that could have evolved into a valid investigatory stop. It did not, however, provide the detailed information sufficient to establish probable cause for an immediate arrest of Mr. Whittle or for a search of his vehicle without a warrant. There is simply no indication that the conversation overheard by the informant was more than 'mere rumor', which is insufficient to establish

probable cause. Hearsay information that would not establish probable cause if received directly by a police officer does not achieve greater status if received indirectly through a reliable informant."

EXPLOITATION OF ELDERLY

In September 2000, Robert and Ruth Bernau sold the home in which they had been residing with a dependent adult son. Mr. and Mrs. Bernau were in their late seventies or early eighties.

They moved into another home after they sold this one. At the closing on the sale of the property, which was handled by an attorney who represented the purchasers, the couple received a check made payable to them jointly in the amount of \$847,000. Shortly thereafter, the couple endorsed the check to David Bernau, the defendant, who is one of their sons. David Bernau deposited the check into his personal checking account.

Bernau spent most of the money for his own personal gain and not for the benefit of his parents. By March 2001, when a professional guardian was appointed for the elderly couple, they each possessed approximately \$2000. At that time there was little remaining in David Bernau's account. The guardian instituted various

actions against David Bernau to recover the funds or assets David Bernau had acquired with the funds, ultimately recovering approximately \$380,000 worth of assets for the guardianship estates.

The State charged David Bernau with one count of Exploitation of an Elderly Person.

The State's case was complicated by the mental status of his parents and the testimony of his siblings. The State did not offer evidence that the Bernaus' were incompetent at the time of the real estate transaction when they endorsed the check to the defendant. The Bernaus' mental status apparently diminished rapidly after they moved. By early 2001, an emergency guardian was appointed for them and they were declared totally incapacitated in March 2001. They did not testify in the criminal case.

The bulk of the State's evidence explained how David Bernau had spent the money, not how he obtained it. The State did not present any witnesses to the transaction in which the Bernaus endorsed the check over to the defendant. There was no testimony or other direct evidence that the defendant lied to his parents or intimidated them in order to obtain the funds. The State did present evidence that the defendant had been convicted of stealing money

from his parents a few years earlier. However, two of Bernaus' other sons testified in support of their brother. One testified that he had personally discussed the matter with his parents and that his parents had confirmed that they intended to give this money to the defendant. Nevertheless, the jury returned a verdict of guilty to Exploitation of the Elderly by Deception or Intimidation.

The Second DCA reversed the conviction in Bernau v State.

Section 825.103(1) sets forth the two separate ways in which this crime may be committed:

- (a) by deception or intimidation; or
- (b) by knowing or reasonably should know that the person lacks the capacity to consent.

Section 825.101(8) defines intimidation and subsection (3) defines deception.

The Court found that the State did not present any evidence of intimidation or deception. Instead the State argued that it was inconceivable that the parents would have given Bernau this amount of money without intimidation or some assurance that he would take care of them. The Court further said that the

parents poor judgment in giving the money to the defendant, without evidence of the defendant's deception or intimidation or showing of incapacity to consent is not circumstantial evidence proving the elements of this crime.

This case is a poignant example of the need for proof matching the statutory elements and not just evidence of morally shameful behavior.

LAW ENFORCEMENT MEMORIAL

The BAKER County Sheriff's Office will host the Baker County Law Enforcement Memorial Service on May 5th at 6:00 pm in front of the Sheriff's Office in Macclenny.

Other Memorials in our area have not been scheduled. Please look for local announcements and attend if at all possible.

IN MEMORIAM

Former Chief Assistant State Attorney **JOHN CARLIN** passed away in March after a long illness. John was an Assistant Public Defender for five years and a prosecutor in the

Gainesville Office for seven years, serving as the Chief Assistant under State Attorney LENN REGISTER. He was 69 years old.

Former GPD Officer **WILLIAM BEAMER** died in March. Officer Beamer had left GPD to work for the Orlando Police Department, where he retired.

Long time Gilchrist County Sheriff's Deputy Darrell Williams also passed away in March after a lengthy illness. Deputy Williams served under four Gilchrist County Sheriffs during his tenure.

VICTIMS' RIGHTS WEEK

The State Attorney's Office will host a blood drive to benefit victims of crime on Friday, April 15 from 8:30 a.m. to 5:30 p.m. at the Gainesville Office. All donors will receive a free T-shirt, a pint of Blue Bell ice cream AND will be automatically entered to win a 2005 Pontiac G6 from Wade Raulerson Pontiac!

National Crime Victims' Rights Week will kick off in

Alachua County with a Ceramic Tile Painting and Park Planting at Victims' Memorial Park at Squirrel Ridge Park, 1603 SW Williston Road in Gainesville at 5 p.m. on Thursday, April 14, followed by the Annual Candlelight Ceremony at 6:30 p.m.

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.

**REMINDER: LEGAL BULLETIN
NOW ON-LINE**

The Legal Bulletin is now available on-line, including old issues beginning with calendar year 2002. To access the Legal Bulletin go to the SAO website at sawww.co.alachua.fl.us and click on the "legal bulletin" box. *An incorrect website was listed in January's newsletter.*
