

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

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Editor: Rose Mary Treadway

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A MESSAGE FROM

BILL CERVONE
STATE ATTORNEY

Happy New Year to all! I hope that each of you had a wonderful holiday season and that 2006 holds only the best for you.

I've never been much for New Year's resolutions but they can serve to focus attention. So, with all good intentions, here is my professional resolution for 2006.

We're going to tackle the delays that bedevil the criminal courts. One thing I know is that our case loads aren't going to get any smaller. Even though crime rates continue to go down, our continually increasing population guarantees that the raw number of crimes and thus cases will keep going up. The last time I checked, Tallahassee wasn't likely to give us a lot of new prosecutors and law enforcement officers, so we might as well figure out something else that makes our workload manageable.

Eliminating delay would be a good start. The first thing we're going to do is oppose continuances more frequently as well as more vigorously.

Delay serves no one well, least of all the State, and un-needed continuances are nothing but delays.

Next, we're going to make a conscious effort to be sure that our filing decisions are made more timely and more efficiently, across the board. If we can bring the time involved in that step down, then the formal process of court docketing can get started sooner.

Finally, I am charging my investigative staff to more closely monitor pending matters such as lab examinations and requests for follow-up information. If we can avoid last minute problems with incomplete lab work and newly discovered witnesses, we can avoid continuances for those reasons.

I'm not sure what degree of success we'll achieve in

having the defense bar and the courts change the way things have been done in the past, but without trying, we'll never know.

Your assistance will be critical to any success we have-timely reports and follow-up, attendance at depositions and hearings when necessary, and any number of other contributions from the law enforcement community can help us accomplish this.

SAO PERSONNEL CHANGES

Baker County ASA **AMANDA COOPER** has resigned her position in order to concentrate on other interests.

Bradford County ASA **ROBERT WILLIS** has resigned his position to accept a newly created position as Director of Public Safety for Gilchrist County. Robert's felony caseload will be filled by **BRUCE HELLING**, a former prosecutor in the Ninth Circuit who has moved back to Gainesville, where he is from.

Gainesville ASA **ADAM VORHIS** has resigned his misdemeanor position to be a stay-at-home dad.

Gainesville ASA **KEVIN ROBERTSON** will resign effective in mid-January to enter private practice.

ASA **ANDREA MUIRHEAD** will return from her leave of absence on January 9th and will assume a position in the Levy County office. ASA **RICH CHANG** will return to the Gainesville office at that time.

CONGRATULATIONS!

Former Marion County Sheriff's Major **ROBERT DOUGLAS** has been selected by the Chiefland City Commission as the city's new Police Chief.

ASA **DAVID OBERLIESEN** was married in November to Leah Sutherland.

Officer **JIM SAMEC** retired from the Gainesville Police Department in October after 26 years of service.

In September, Evidence Custodian **MYNELLE LAPOINTE** also retired from GPD after 35 years of service to the agency.

Effective January 31, 2006, latent fingerprint examiner **MARTIN SNOOK** of the Alachua County Sheriff's Office will retire. However, he will return to that position in March of 2006 for an additional year.

Lt **ED BOOK** of the Gainesville Police Department received the Statewide Drug Prevention Award at the 2005 Statewide Prevention Conference in Orlando in November.

Former Gainesville ASAs **JIM NILON** and **LEANDRA JOHNSON** have

been appointed by Governor Bush as Circuit Court judges in the Eighth and Third Circuits, respectively.

CASE LAW UPDATE

Florida Cases

MIRANDA: NO MEANS NO!

Because officers continued to question a defendant after he had expressed his wish to remain silent, the statements should have been suppressed, the Third DCA held in Smith v State, decided in November.

Benjamin Smith was convicted of several charges relating to an armed carjacking. Smith told officers he wished to assert his right to remain silent, but the officers kept questioning him. Smith moved to have the court suppress any statement he made after invoking his right to remain silent, but the trial court denied the request. On appeal, the DCA reversed, finding that the officers should have stopped asking questions after Smith expressed his desire for questioning to stop.

"The record shows that defendant's incriminating statements were made in response to police questioning which improperly... followed an unequivocal expression of his wish to remain silent," the DCA said. "Because we cannot find this error harmless beyond a reasonable doubt, a new trial is required on the charges to which the statements were pertinent." The Court found that the

defendant's invocation was not ambiguous and there was no need to question him further to determine his wishes. The defendant's statement, "I have nothing to say" is not ambiguous.

The Court listed other examples in this opinion on "no meaning no": "I have nothing else to say", "I don't want to talk to you m--- f---", "I said I don't want to tell you guys anything to say about me in court", "I have nothing further to say", "No, I don't wish to say anything", "I have nothing to say, I'm going to get the death penalty anyway".

However, the Court did list statements that courts have held to be ambiguous: "Just take me to jail", act of tearing up waiver form is not unequivocal invocation of right to silence, and "I'd rather not talk about it."

ILLEGAL STOP: OUTSIDE/INSIDE JURISDICTION

An off-duty officer may not lawfully conduct a traffic stop outside of his jurisdiction, even if the vehicle ultimately comes to a stop within the city limits that define the officer's jurisdiction, the Third DCA held in State v Pipkin.

An off-duty Coral Gables Police Officer observed Richard Pipkin driving erratically and used his siren and overhead lights to pull Pipkin over. When the officer saw Pipkin, the vehicle was on a road just west of the Coral Gables city limits, but Pipkin

eventually pulled over and stopped approximately 70 feet inside the city limits. Because he was off duty, the officer called for another officer to handle the stop. Pipkin refused to submit to a breath-alcohol test, and his driver's license was suspended for one year. However, the trial court ruled that the first officer did not have the authority to pull Pipkin over, and therefore the ensuing field sobriety test and Pipkin's refusal to submit to a breath-alcohol test could not be used as evidence. The State appealed, but the DCA affirmed the lower court's decision.

"Because the record is devoid of evidence of conduct within the City of Coral Gables on which the stop in this case can be justified, the stop was illegal. Since the stop was illegal, Pipkin's subsequent arrest was illegal," the DCA said.

In a stinging dissent, Judge Schwartz said "The idea that there was no reason to believe that Pipkin violated the law in Coral Gables can be based only upon the quite ridiculous assumption that his intoxication and the erratic driving it caused would cease immediately upon crossing the city limits. Its residents and all South Florida properly regard Coral Gables as The City Beautiful; I had not previously thought that it was also The City Sober... that the officer was legally required to wait until Pipkin lost control of his vehicle in Coral Gables itself before stopping him is simply unacceptable."

DETAIN-YES, ARREST-NO

Detectives Garst and Morie and a reliable CI set up an undercover drug buy. The CI had said he could purchase rock cocaine from someone named "Beaver." In the detectives' presence, the CI called and spoke to Beaver, who gave him another number to call. The CI then called the number and arranged for a delivery of rock cocaine to his motel room.

The CI was wired and the detectives waited outside the room for a prearranged signal that the drugs had arrived. Detective Morie testified that, upon hearing the signal, his plan was to "go in and handcuff everybody...detain for safety reasons," and then he would do "further investigation and ... determine who (he's) going to charge." However, the detectives did not adhere to this plan.

The detectives had seen three men arrive at the motel, and they heard a knock on the CI's door. Within about two minutes, the detectives heard the CI give the signal. Using their own room key, the detectives entered the motel room in approximately one minute. When they entered, the CI and two of the men were in the room. There were drugs on top of the TV and one of the beds and defendant Rock was coming out of the bathroom.

While the other detective secured the CI and two of the men, Detective Garst ordered Rock to get on the ground. When Rock failed to immediately comply, the

detective pushed him to the ground and cuffed him. Then the detective stood Rock up and searched him by reaching into his pockets. He found and seized a pill bottle containing rock cocaine and a bag containing marijuana.

After everyone was secured, and after Rock was searched, the men were separated and interviewed. The CI told the detectives that Rock had gone into the bathroom while he was dealing with the other two men. The officers also learned, post arrest, that the phone number the CI had obtained from Beaver was to Rock's cell phone. When the CI had called the number, Rock had simply answered the phone and handed it to an unidentified person.

Detective Garst acknowledged at the suppression hearing that his pat down of Rock was *not* a pat down for weapons. The trial court found that Rock was arrested at that point and that the detectives had probable cause to search Rock incident to arrest.

The Second DCA in Rock v State disagreed, suppressed the evidence seized from Rock and reversed his conviction.

"Certainly the officers had grounds to detain Rock and question him. Indeed, that was their plan. And they may have been justified in performing a weapons pat down. But instead of investigating and developing probable cause, they proceeded directly to an arrest and search." The court noted that the fact that Rock's cell phone was used to arrange the deal was not known until after the arrest.

"An officer must possess information constituting probable cause to justify an arrest *prior to the arrest*. The court stated that there was no evidence, from the officers or the other participants in the transaction, to show that Rock was in the room when the drugs were produced. Had Rock simply been detained and probable cause developed before an arrest, the conviction might have been sustained.

SEARCH & SEIZURE:
A TALE OF TWO PURSES

Two cases decided differently based on the passenger's actions involving her purse:

In August, the Second DCA held in State v Casey that law enforcement was justified in searching a passenger's purse, which was left on the passenger's seat. Casey was a passenger in a vehicle stopped by police at 3:30 a.m. for an inoperative tag lamp. After stopping the vehicle, the officer saw an expired out of state temporary tag. Upon performing a license check, the officer discovered that the driver had a suspended license and the vehicle had no registration.

The officer arrested the driver, advised Casey that he was going to conduct a search of the vehicle incident to the arrest, and asked Casey to exit the vehicle. Casey complied, leaving her purse on the front passenger seat. The officer searched the vehicle and purse. Casey's purse

revealed controlled substances and Casey was arrested.

The DCA held that the search was proper, citing the U.S. Supreme Court case of New York v. Belton where the Court adopted a bright line rule that when an officer arrests an occupant of a vehicle, the interior of the vehicle is within the scope of a search incident to the arrest. The search may include the passenger compartment of the vehicle and any container found within the passenger compartment regardless of whether it is open or closed.

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In December, the Second DCA, in State v Tanner held that officers were not authorized to command a passenger to leave her purse in the car, despite her reluctance, and to detain her after a canine alerted on her purse where drugs were subsequently found.

Deputies lawfully stopped a car driven by Robert Holshue in which Tanner was a passenger. After an initial contact with Mr. Holshue, Deputy Bogus returned to her patrol car to write a citation for expired tag. She also called for back-up assistance. Other deputies responded along with drug-sniffing canine, Jerry Lee.

The deputies approached the car and directed Holshue and Tanner to exit so that Jerry Lee could sniff for the scent of drugs. One of the deputies commanded Tanner, despite her reluctance, to leave her purse in the car. After Holshue and Tanner exited, Jerry Lee "alerted", jumped through an

open window of the car, and "alerted" again.

A search of the purse disclosed illegal drugs. The trial court granted Tanner's motion to suppress the drugs, concluding that the deputies had no basis to seize Tanner's purse. The Second DCA agreed.

The appellate court said that the stop of Holshue's car was adequate to allow a dog sniff for illegal drugs within a reasonable time frame. However, that alone did not authorize deputies to deprive Tanner of her purse, and detain her. "She did nothing to warrant her individual detention...nor was there an independent 'reasonable suspicion' that her purse contained contraband."

Contrast the above passenger cases with the following driver case:

Polk County deputies had information that an individual with outstanding warrants was riding as a passenger in a gray Ford Contour bearing a specific license plate number. During routine patrol, Deputy Shea located the Ford, and after confirming that the passenger in the car was the individual being sought, effected a traffic stop of the Ford. The driver had not committed any traffic infractions and pulled over immediately after Shea activated his lights and siren.

Shea went immediately to the passenger door and ordered the passenger out. He then arrested the passenger on the

outstanding warrants. Only after the arrest was completed did Shea walk to the driver's side of the car and first encounter Lanier, who was driving. Shea asked Lanier for some type of ID. When Lanier produced a Florida ID card, Shea took the card from him and ordered him to stay in the car while Shea ran the ID. "I told him to stay in the seat and we were just going to run his name and make sure that he didn't have any outstanding warrants. Make sure that his license was good and then he'd be on his way."

Shea remained near the driver's door while another deputy ran the ID. At some point, Lanier got out of the car. Shea told him to get back in the car. Lanier refused. Lanier then reached into the waistband of his pants. Shea ordered Lanier to remove his hand from his pants, but Lanier did not comply. Shea then grabbed Lanier's arm, wrestled him to the ground and cuffed him. A pat-down search of Lanier did not reveal any contraband but a subsequent search of the area of the struggle revealed a baggie of cocaine. Lanier was arrested for DWLSR and Possession of Cocaine.

The Second DCA in Lanier v State reversed the conviction, holding that Lanier's detention was unlawful. "Florida law is clear that an officer may not detain a driver following a traffic stop once the initial alleged purpose for the stop has been satisfied and removed." "The officer may not approach the driver and ask to see a driver's license and registration after he has

satisfied the initial reason for the stop. Instead, the only contact permitted after the reason for the initial stop has been satisfied is to tell the motorist the reason for the stop and that the motorist is free to go."

In this case, once the passenger was arrested, there was no longer any legal reason for detaining Lanier. The only reason for the stop was to arrest Lanier's passenger and that was completely satisfied before Shea approached Lanier and requested ID. By requesting Lanier's ID and requiring him to remain in his vehicle while Shea checked for warrants, Shea violated Lanier's Fourth Amendment rights.

ILLEGAL INVESTIGATORY STOP AT HOUSING COMPLEX

In September, the Fifth DCA reversed a conviction for possession of contraband in Williams v State holding that the investigatory stop was illegal.

Officer Marchica of the Cocoa Police Department was patrolling a particular housing project in a "high crime area". The officer said that management of the complex had issued a "blanket trespass order" which he characterized as giving the police department permission to remove any non-residents and enforce certain rules against residents, including rules which prohibit obstructing certain areas and drinking outside the premises.

At 2:30 a.m., the officer made

contact with Williams, who was walking through the complex, in order to determine whether Williams was a resident. Other than the hour, nothing stood out suggesting that he did not belong there. Williams was wearing a hooded sweatshirt with big pockets in the front, and he immediately placed both hands in the front pocket. Williams was defensive, asking why the officer had stopped him and was bothering him. Williams said that he had been visiting a friend or a cousin at one of the buildings.

The officer decided to do an ID check to confirm that Williams knew a resident and to see if he had any outstanding warrants. He asked Williams to take his hands out of his front pocket because the two men were in such close proximity. The officer did not see any bulges in Williams' pocket, but thought that he "maybe was hiding something..." The officer explained that a lot of the people they encounter carry a small pocketknife and he was concerned about his safety.

Williams took his hands out of his front pocket, but almost immediately put them right back in, which caused the officer to ask Williams if he could search him for weapons. Williams refused and walking away backward, said "You ain't going to search me." He then began to run. The officer brought him down with his Taser to detain him. The officer explained that if Williams had not fled, he would have confirmed whether he lived there or knew a resident and, if he did not

belong in the complex, he would then have issued a trespass warning.

The appellate court held that the initial encounter between the officer and Williams was not a valid investigatory stop. There was no reasonable suspicion that Williams was committing the crime of trespass. There was no testimony from the officer that trespass signs were posted in the complex. The court noted that police authority in a case in which no warning is posted is limited to conveying an order to depart the premises.

The court cited the Slydell case out of the Fourth DCA where that court held that even though there were trespass signs posted and the officer was investigating a report of a suspect selling narcotics, the detention of a person walking through the complex was illegal. In the Slydell case, the officer even testified that he was familiar with the residents there and did not recognize the detainee. The Fourth DCA reversed that conviction holding that these facts did not permit an investigatory stop based on a reasonable suspicion that the defendant was trespassing as the officers only had a *hunch* that the defendant was trespassing because they did not recognize him.

The Williams court explained why Illinois v Wardlow did not apply. In Wardlow, the U.S. Supreme Court held that "unprovoked flight" from police in a high crime neighborhood can provide sufficient reasonable

suspicion to warrant a Terry stop. The defendant in Wardlow fled immediately upon seeing a caravan of police vehicles arrive in an area known for heavy narcotics trafficking. In Slydell, as in this case, the defendant did not flee upon seeing the officer. Both individuals stopped and engaged in a brief exchange with the officer and both expressed their unwillingness to cooperate before running away.

**SEARCH AND SEIZURE: MULTIPLE
OCCUPANTS OF VEHICLE AND
CONSTRUCTIVE POSSESSION**

Based on information from a confidential informant, Lakeland Police officers and Polk County Sheriff's deputies were investigating an alleged meth dealer, Tom Perry, Sr. (Senior).

Law enforcement attempted to set up a purchase from Senior by the CI and surveilled Senior and the CI during the planning stages. Ultimately, law enforcement confirmed that the CI had delivered buy money to Senior who would then go to retrieve drugs and return to the CI. The officers watched Senior arrive at his home. In the interim, the CI called Senior and learned that Senior would be leaving his home soon to deliver the drugs to the informant at a specified location. Law enforcement saw Senior leave his home five minutes later. Although Senior had been alone in his travels up until this point, law enforcement now observed that there was an unknown passenger in the vehicle, who later turned out to be Tom

Perry, Jr. (Perry) Officers did not actually see Senior or the passenger Perry enter the car. The car headed in the general direction of the designated location for the drug sale. On the way, the officers stopped the vehicle and immediately placed Senior under arrest. A search of his pockets revealed two ounces of meth intended for delivery to the informant.

Officers searched Senior's vehicle incident to arrest and found a black bag between the front seats of the vehicle. The officer that performed the search could not remember if the bag was in plain view. Upon opening the bag, they discovered a digital scale and glass tubing with a burn mark. Without any further discussion, an officer immediately placed Perry under arrest for possession of drug paraphernalia. A subsequent search of Perry revealed meth in a coin pocket of his pants.

According to the officers, the discovery of the paraphernalia was the sole basis for the arrest and subsequent search of Perry.

The Second DCA in Perry v State reversed Perry's conviction, ruling that the officers lacked probable cause to arrest passenger Perry for constructive possession of paraphernalia found in the closed bag located between the front seats and thus the seizure of the meth in his pocket was the fruit of the illegal arrest.

The court stated that although there was clear probable cause for the arrest of Senior, any arrest of Perry was premature.

"We emphasize that the facts in this case would have permitted a Terry stop and investigation of Mr. Perry...the police were certainly free to question Mr. Perry about these circumstances and to obtain identification and continue their investigation to develop probable cause. They may have been justified in performing a pat down to make certain Mr. Perry was not armed." But ultimately, the court found that Perry was in the car for only a few minutes. When the officers found the bag, they did not perform an investigation. They did not give Senior or Perry the option of admitting that the bag belonged to one of them. Based on the limited information obtained by law enforcement prior to Perry's arrest, the possibility that Perry knew of the contents of the bag did not rise to the level of probable cause.

The court emphasized that if Perry and Senior had been questioned about the bag and *neither* admitted ownership of the paraphernalia in the bag, then their arrests would have been sustained under the U.S. Supreme Court's 2003 opinion in Maryland v Pringle, that held where a crime is being committed by one or more occupants, the lack of individualized suspicion toward any individual occupant, and the refusal of each occupant to acknowledge his role in the crime provides law enforcement with probable cause to arrest all occupants.

**MIRANDA AND THE INVITED
OFFICER**

When an individual invites an officer into his home and agrees to answer questions about situations he was involved in, he is not considered in police custody and therefore is not entitled to *Miranda* protections, the Fifth DCA held in Snead v State.

John Snead was suspected of two arsons of occupied dwellings. When officers went to question Snead about the incidents, he invited them into his home and asked them to take a seat inside. Snead then carried on a conversation about the fires and voluntarily answered the officers' questions. He eventually was arrested after he admitted to setting the fires. On appeal, Snead argued that his statements should be suppressed because he considered himself in police custody and should have been read his *Miranda* rights. The DCA disagreed, finding that the fact that Snead invited the officers in and the demeanor of the conversation did not give the impression that Snead was in their custody.

"In order for a court to determine that a suspect is in custody, it must be evident under the totality of the circumstances that a reasonable person in the suspect's position would feel a restraint on his or her freedom of movement. In other words, a reasonable person in the position of the person being interviewed would not feel free to leave or to terminate an encounter with the police," the DCA said. "Thus, as here, when a person invites a law enforcement

officer into his or her home and agrees to answer questions, the person is not ordinarily considered to be in custody for *Miranda* purposes."

IN MEMORIAM

ASA Investigator **MARK ISLAR** passed away in December. He had served 13 years with the State Attorney's Office in the Eighth Judicial Circuit as well as previous law enforcement experience through the Alachua County Sheriff's Office.

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 2000. To access the Legal Bulletin go to the SAO website at sawww.co.alachua.fl.us and click on the "legal bulletin" box.

PARKING ALERT

Law Enforcement officers are reminded to seek parking spaces in those areas designated for "Law Enforcement Only" at the Gainesville SAO in order to free up other spaces for the public.