

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2006-03
Editor: Rose Mary Treadway

October 2006

A MESSAGE FROM

BILL CERVONE
STATE ATTORNEY

As always, this issue of the Legal Bulletin is largely devoted to new legislation. Everything mentioned here is in effect, either on or before October 1st. These brief summaries are intended to alert you to a change and certainly don't take the place of reading the entire piece of legislation. If any are of particular interest to you, call our office and we'll send you the complete text.

Several of these new or changed laws are worth particular emphasis. For example, in July, I commented on a change that would allow prosecutors to make the final argument at trial. The Florida Supreme Court has not yet ruled on the constitutionality of that legislative action, so we are going forward on the belief that it will survive the inevitable challenges the defense will make.

Of note to law enforcement agencies is a change to the expungement laws. In the event that an arrest is made contrary to law or by mistake, the originating agency now has an affirmative duty to apply for an administrative expungement on behalf of the affected person. No rules for how this is to be done have been put forth by FDLE yet. Situations where this might apply are not common, but they do come up from time to time, usually as a result of an identity theft type of situation. All agencies should carefully look at the new language of Section 943.0581 to be prepared to handle this obligation.

Also of interest is the creation of Section 837.055, under which there now exists a first degree misdemeanor offense for knowingly and willfully giving false information to a law enforcement officer conducting a missing persons or felony investigation with the intent to mislead the officer or impede the investigation. This is a

direct result of the Citrus County case many of you are familiar with in which the State was unable to prosecute individuals who withheld information about a suspect in the sexual assault and murder of a young girl, and fills a loophole in the law.

Finally, Section 943.1717 has been created to prohibit use of a Taser or any other dart firing stun gun except in an arrest or custody situation when an individual has the apparent ability to threaten an officer or is attempting to flee or escape. The Criminal Justice Standards and Training Commission has also been mandated to develop training standards for the use of Tasers. The message here is clear: there is a concern statewide about the potential mis-use of these important tools and their potential effects, and prudence dictates a great degree of restraint in their use.

In any event, please at least glance through the following lists for things that might apply to or interest you. Let us know if you have questions.

SAO PERSONNEL CHANGES

ASA **ALAN HAWKINS** resigned his position in the Alachua County Juvenile Division in August in order to return to school. Alan will be pursuing a Master's in

Latin American Business at the University of Florida.

Effective October 9, ASA **BRIAN KRAMER** will become the Division Chief for the Gilchrist County Office and ASA **GLENN BRYAN** will become

the Division Chief for the Levy County Office. ASA **KRISTIN PICKENS** has been re-assigned to a part-time position handling mental health and post-conviction proceedings.

JESSE SMITH has joined the Alachua County Misdemeanor Division as a new ASA. Jesse is a University of Maryland Law School graduate and a 2002 Honors graduate of the University of Florida. He has previously volunteered with the SAO in several positions.

ASA **DEBRA ROSENBLUTH** has resigned her position in Alachua County to take a position with Three Rivers Legal Services.

CONGRATULATIONS!

Congratulations to ASAs **STEFFAN ALEXANDER, JESSE IRBY,** and **ANDY MOREY,** all of whom passed the Florida Bar exam and were sworn in as attorneys.

Governor Jeb Bush has appointed **DALE WISE** as the interim Alachua County Sheriff to replace retiring Sheriff **STEVE OELRICH.** Wise will serve from September 29 until a newly elected Sheriff takes office on November 13. Wise, 59, is employed with the Wakulla County Sheriff's Office. He graduated from Florida State University with a degree in Criminology and previously served with the Florida Department of Law Enforcement. He graduated

from the FBI National Academy in Quantico, Virginia, in 1985.

FLORIDA CASES

Alachua County Sheriff **STEVE OELRICH** retired on September 29, after 14 years and four terms as Sheriff. During his term in office, he served as President of the Florida Sheriff's Association and as a member of the Board of Directors of the National Sheriff's Association. He was previously a Special Agent with the Florida Department of Law Enforcement and a St Petersburg Police Officer. He graduated with a degree in Criminology from Florida State University.

BEVERLY "JAKE" SMITH retired after 32 years of service to the Gainesville Police Department.

REFERENCE GUIDE ON TRAFFIC VIOLATIONS

The Department of Highway Safety and Motor Vehicles reports that the 2006 revision of Appendix C of the Uniform Traffic Citation Manual is now online to improve accessibility. A quick reference guide on traffic violations can be found on the agency website: <http://www.hsmv.state.fl.us/ddl/utc/> . Agencies that do not have access to the Internet may request a hard copy by Mail:

Dept of Highway Safety and Motor Vehicles
2900 Apalachee Parkway, MS 89
Tallahassee, Florida 32399-0575

by Fax: 850-414-1383 and Email: andrews.janice@hsmv.state.fl.us .

A Fourth DCA opinion issued October of 2005 in Lanier v State and discussed in the January 2006 Legal Bulletin has now been *withdrawn* and the decision *reversed*. The original factual scenario will be reprinted here:

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 on 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. She 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 original opinion had reversed Lanier's conviction holding that the detention was unlawful. The Court said that once the passenger was arrested, there was no longer any legal reason for detaining Lanier. 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.

The above decision was *withdrawn* and a new decision substituted in August that *affirmed* Lanier's conviction.

The Court now holds that an officer can legally request identification from even an "innocent" driver of a motor vehicle during the course of a lawful stop of the vehicle. "While we do agree with Lanier that an officer may not continue to detain a driver following a traffic stop once the purpose for the stop has been satisfied and removed, ... when a vehicle has been lawfully stopped and the investigation relating to the stop has not yet been completed, it is not a violation of the Fourth Amendment for an officer to ask the driver to produce identification. The supreme court has held that officers may lawfully request identification from drivers during the course of consensual encounters and may hold the identification long enough to check the validity of the identification and run a warrants check. Certainly, if such a request is permissible during the course

of a consensual encounter, a similar request during the course of a lawful stop and detention does not rise to the level of a constitutionally cognizable infringement."

In addition, when Lanier produced only an ID card rather than a DL, reasonable suspicion arose for Shea to believe that Lanier was driving without a proper license, and Lanier could be validly detained while an investigation of the DL status was completed. Because the evidence against Lanier was obtained during the course of a lawful detention, the trial court properly denied Lanier's motion to suppress, and his convictions for the offenses arising out of stop were affirmed.

CHILD ABUSE STATUTE NOT APPLICABLE TO SPEECH

Edward Munao had two children with former girlfriend, Jodi Walsh: N.M. and K.M. N.M. began having behavioral problems at age four, two years prior to the incident that is the subject of the charges against Munao.

Walsh, the custodial parent, testified that N.M. would swear at her, kick her, pull her hair, throw objects at her and disobey her. N.M.'s outbursts became progressively more violent over time, precipitated by Walsh placing restrictions on his activities. During these outbursts, N.M. typically called Munao on the phone.

The criminal allegations stem

from primarily two such phone conversations between Munao and his son, N.M., age six. N.M. called Munao after an outburst on November 17, 2003. Walsh listened to the conversation from another phone in the house. Walsh testified that Munao told N.M. to "go to the kitchen and get a knife and kill me (Walsh)." Walsh tape recorded a subsequent conversation between herself and N.M., during which N.M. told Walsh that Munao told him to "go in the kitchen, get a knife and stab her." The tape of this conversation between Walsh and N.M. was played for the jury.

Munao testified at the trial that he was frightened that Walsh might try to harm N.M., so he told his son to go into the kitchen and get a knife. He said he did not intend for N.M. to actually get a knife and stab Walsh, or harm her. The State presented evidence of a conversation between Munao and his new girlfriend that occurred while Munao was in jail that he did tell N.M. to get knife and kill Walsh.

The State presented evidence from forensic psychologists that Munao's direction to N.M., who has Oppositional Defiant Disorder, was extremely inappropriate and damaging to a child with N.M.'s problems and could be expected to result in mental injury to the child.

The jury convicted Munao of Child Abuse and Solicitation to commit Aggravated Battery.

The Fourth DCA in Munao v State reversed the Child Abuse conviction holding that the

Child Abuse statute cannot be applied to speech of any kind. Chapter 827.03(1)b) defines "child abuse" as "an intentional act that could reasonably be expected to result in physical or mental injury to a child." The Court said, "We acknowledge that Munao's statements, encouraging his six-year old son to get a knife and stab his mother, are deeply troublesome and offensive. However, it is not this court's role to rewrite the statute by interpreting it as the state suggests. Although section 827.03(1)(b) has withstood overbreadth and vagueness challenges, the problematic circumstances in this case invite the legislature to reconstruct the statutory language in a way that balances the strong interest in protecting children with the fundamental preservation of individual constitutional freedoms."

BUT WAIT:

The First DCA in a September opinion in State v Coleman has ruled that speech can be Child Abuse. This case has been certified to the Florida Supreme Court as conflicting with the Munao case.

**OBSCENE AND HARASSING
PHONE CALLS: HOME AND
AWAY**

The victim was receiving obscene and harassing phone calls to a business phone line located at his comic book business that he operated out of his home.

The police charged William Avrich with making obscene and harassing phone calls to the victim under Florida Statute 365.16(1)(a). That statute provides, in pertinent part:

- (1) Whoever: (a) Makes a telephone call to a location at which the person receiving the call has a reasonable expectation of privacy; during such call makes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, vulgar, or indecent; and by such call or such language intends to offend, annoy, abuse, threaten, or harass any person at the called number;... is guilty of a misdemeanor of the second degree.

The Third DCA in Avrich v State reversed that conviction holding that the victim did not enjoy a reasonable expectation of privacy on his business telephone line. "Florida courts have consistently held that the constitutional protections of a reasonable expectation of privacy do not extend to an individual's place of business..." "Based on the record before us, it is evident that the defendant made telephone calls to the victim's business telephone line, located in the victim's home where he conducted his business. Although the victim may enjoy a reasonable expectation of privacy in his home, that expectation is not extended to his business."

**LEO MUST LEAVE HOME WHERE
NO EMERGENCY**

Deputy Cardarelli was flagged down by an unknown man riding a bike who reported that narcotic activity was taking place in a room at the Rochelle Motel. The man said a couple of "crackheads" were smoking crack in the room and that the man in the room had stolen his own mother's car, cash, and jewelry. The man did not indicate whether the activity had previously taken place, had just stopped, or was ongoing. The man then accompanied Cardarelli to the motel and pointed out the room in question. Cardarelli did not get the man's name and the man did not provide a description of the man in the motel room.

Cardarelli checked with the motel office and discovered the room was rented by a man. Management escorted the deputy to the room where the deputy knocked and announced, and a woman opened the door. The deputy saw a man lying on the bed, advised the woman why he was at the room, and called out "Mr. Reed" a few times without response. The deputy, being concerned with Reed's unresponsiveness, made entry into the room, and shook Reed a few times while advising him of his status as a law enforcement officer. Reed awoke, and the deputy asked to see his ID. Reed provided his driver's license, and the deputy discovered that Reed's license was suspended and arrested him for DWLSR. During the course of the encounter, Reed admitted to stealing his mother's car, cash and jewelry and pawning same to support his crack habit.

The Fourth DCA in Reed v State reversed the conviction holding that once the deputy entered the room and confirmed that the defendant had not overdosed, the deputy was required to leave the room because the exigency dissipated and no criminal activity was apparent in the room. The deputy's stay in Reed's motel room exceeded the scope of the exigent circumstances exception to the warrant requirement and constituted an unreasonable search and seizure violative of the Fourth Amendment.

**CARRYING CONCEALED
FIREARM: ON OR ABOUT?**

Detectives went to Gehring's address to arrest him for aggravated stalking. After waiting for him for 15 minutes, the detectives saw him arrive in a vehicle. Gehring exited the vehicle and the detectives explained to him that he was under arrest. Gehring was placed in a marked patrol unit that had arrived on the scene, and the detectives looked into the vehicle Gehring had been driving. In the vehicle, they found items relating to the aggravated stalking as well as shotgun shells and a pistol grip shotgun. The shotgun was lying on the front passenger seat underneath a blue jacket.

Gehring was charged and convicted of aggravated stalking and carrying a concealed firearm. On appeal, Gehring argued that the arrest on the firearm charge was unlawful as the firearm was not on or about his person

when it was discovered. He argued that he had gotten out of his car and was arrested before the detectives found the shotgun in the vehicle

The Second DCA in Gehring v State agreed and reversed that conviction. "The evidence presented at trial did not show that the firearm was simultaneously carried by Gehring and concealed." The court noted a contrary opinion reached by the Fifth DCA in J.E.S. v State, a 2006 case where that court held that the evidence was sufficient to support the charge of carrying a concealed firearm where the defendant was seated in a vehicle and was ordered out and a search of the vehicle revealed a firearm hidden under the seat.

DISORDERLY CONDUCT- NOT!

Lake Placid Police Officer Bonnie Pruitt was approached by three girls near a school who told her that Barry had said something to the girls to upset them. Pruitt then approached Barry and his wife to attempt to discuss the matter in an effort to resolve the problem.

Barry loudly told Officer Pruitt to mind her "own f-ing business." When Officer Pruitt continued to try to speak with Barry, he again told her to mind her "own f-ing business." Barry began screaming obscenities at officer Pruitt while pointing and shaking his finger in her face.

While this confrontation was occurring, traffic along the road in front of the school was slowing and stopping to watch. One motorist allegedly yelled something about Barry preparing to hit Officer Pruitt. However, there was no testimony that any of the motorists got out of their cars or otherwise reacted to the scene itself. The jury convicted Barry of Disorderly Conduct.

The Second DCA in Barry v State reversed the conviction holding that there was no evidence that the defendant's words were fighting words or words that would tend to incite an immediate breach of the peace, and there was no evidence that the defendant engaged in any physical conduct toward the officer that affected the officer's ability to do her job. "Speech alone will not generally support a conviction for disorderly conduct." On the other hand, the court noted that protected speech can be rendered unprotected by a defendant's additional physical actions such as repeatedly approaching the officer so closely that the officer has to push the person away; bumping the officer, etc.

Although the court agreed with the State that convictions for disorderly conduct have been upheld where the defendant's words have caused a crowd to gather to such an extent that officers develop safety concerns, the mere fact that people come outside or stop to watch what is going on is insufficient to support a

conviction. Here, the court noted, although motorist slowed down to watch, no one actually responded to Barry's words nor was anyone in the area actually incited to engage in an immediate breach of the peace.

CRIMINAL MISCHIEF-NOT!

Charles Stinnett and his two friends, the Prescott brothers, went to the Buck Wild nightclub to celebrate New Year's Eve. They consumed a twelve pack of beer en route. At the Buck Wild, they continued to drink until they were asked to leave after they got in to a fight with other revelers.

A fight ensued in the parking lot that was broken up by the bouncers. Stinnett entered his vehicle, and as he drove away he fired two shots from his revolver. Stinnett testified that he fired the first shot in the air and that he fired the second shot by accident when his foot slipped off the clutch. No one was hit.

The club owner testified that Stinnett fired two shots; the first one when Stinnett stuck his gun out of his vehicle window and fired the shot without looking where he was shooting. The club owner said Stinnett fired the second shot by aiming his gun directly at a victim and firing. The shot missed the victim but hit a parked car whose owner was uninvolved in the fight.

Based on damages to the car, Stinnett was charged with and

convicted of Criminal Mischief.

The Second DCA in Stinnett v State reversed the conviction holding that the State had failed to prove an essential element of the crime, that being Stinnett's intent to injure another's property.

"To be guilty of this crime the defendant must specifically intend to damage or destroy the property of another... moreover, an intent to damage the property of another does not arise by operation of law where the defendant's true intention is to cause harm to the person of another."

"Here, Stinnett's second shot struck a car, thus damaging the property of another. The evidence showed either that Stinnett fired the shot accidentally or that the shot hit the car when it missed the person Stinnett was attempting to shoot. Either way, there was no evidence that Stinnett intended to damage the car."

K-9 SNIFF NO PC

An officer saw Rehm weaving on a bike with no headlight just before midnight and stopped him. The officer administered field sobriety tests because Rehm appeared to be under the influence. Although Rehm passed the field tests, the officer saw indicators of drug use and requested consent to search. Rehm refused and, within minutes, a K-9 officer arrived.

The dog immediately alerted to

the left handlebar and the seat of the bike, but a search of the bike turned up nothing. The K-9 officer did not walk the dog around Rehm. The officer then searched Rehm, checking the left front pocket first, and found a large amount of marijuana in a plastic bag.

The Fourth DCA in Rehm v State reversed the conviction, holding that although the stop was proper, with no alert from the dog on Rehm, there was no probable cause for a search of his person.

"It is well established that a dog alert to a vehicle, or a seat in a vehicle, does not, in and of itself, provide sufficient probable cause to search the driver or a passenger." "We note that there is no scientific support in the record for a proposition that a dog alert on a bicycle seat or handlebar is more indicative that the occupant is in present possession of drugs than a similar alert to a recently occupied automobile seat."

**DETENTION, RELEASE, AND
CONSENT TO SEARCH**

Orange County Deputy Schmeltzer saw a vehicle with an obscured tag traveling on the roadway and stopped the vehicle. Driver Sosa identified herself using her driver's license and told the deputy she was taking her passenger to the hospital. The deputy notified Fire and Rescue and they responded to the scene and transported Sosa's passenger to the

hospital.

After the passenger was taken care of, the deputy stated that he gave Sosa's license back to her and told her she was free to leave. The deputy then asked for permission to search Sosa's vehicle and Sosa granted him permission to search. The deputy found Xanax in a brown pouch in the vehicle.

Sosa was charged with illegal possession of the Xanax.

At the defendant's suppression hearing, Sosa testified that she thought she did not have a right to refuse the request to search and believed he would have searched the car regardless.

The trial court granted Sosa's motion to suppress finding that the deputy unlawfully extended the length of her detention by asking Sosa for consent to search her vehicle and finding that there was no reason for the continued detention or continued inquiry by the deputy.

The Fifth DCA in State v Sosa reversed the trial court's suppression of the evidence, finding that once the defendant's detention was over, it was permissible for the deputy to ask questions and request permission to search.

The Court found that once the deputy told Sosa she was free to go, the detention was over. No evidence was presented by Sosa that any officer attempted to prolong the traffic stop, nor was any evidence presented that the

deputy blocked her from leaving the scene, threatened her, held on to her license, or asked her to step out of her car. "It is unclear what else Deputy Schmeltzer could have done to make it more evident to Sosa that the detention was over other than to tell her that she was free to go." "If continued questioning by a police officer of an individual after that individual is told she is free to leave were sufficient to constitute a continued detention prohibited by the Fourth Amendment, then almost any citizen encounter would be deemed a detention."

RESISTING WITHOUT VIOLENCE

A.W. and a friend were found by a school resource officer in a car in the high school parking lot, skipping school. They exited the car at the officer's request; the officer searched the car and the boys and found no contraband.

The officer then asked A.W. to hand over the car keys, but A.W. refused. When the officer attempted to get the keys from A.W.'s pocket, A.W. pulled away, reached into his pocket, retrieved the keys, and threw them on the ground. At that point, the officer arrested him for resisting an officer without violence.

The Fourth DCA in A.W. v State reversed the conviction, holding that the officer was not in the execution of a legal duty at the time of the offense.

The deputy testified he was the school resource officer and had the authority to search the car and the boys because they were "out of bounds" and had been previously directed not to be where they were. He admitted that the boys were not under arrest for anything at the point that he asked A.W. to hand over

the keys. The officer asked for the keys only because he knew that the car did not belong to A.W. and he planned to find the owner and ask whether A.W. had permission to be in the car. He admitted that what A.W. was resisting was not arrest, but a "lawful order."

The court found that the officer's attempt to seize the keys was not reasonably related to the scope of the search or the officer's duty to enforce school rules and bring A.W. in from "out of bounds." The deputy had no independent verification that A.W. did not have permission to be in the car or have the keys. The demand for the keys was not related to the infraction, i.e., being out of bounds, and infringed on A.W.'s privacy rights. Because the keys were unrelated to the initial stop and were not contraband, the officer "might just as well have been asking for the shirt off of A.W.'s back."

"Thus, A.W. was not required to comply with the demand and his conviction for resisting an officer without violence must be reversed."

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.