

April 2009

LAW ENFORCEMENT NEWSLETTER

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

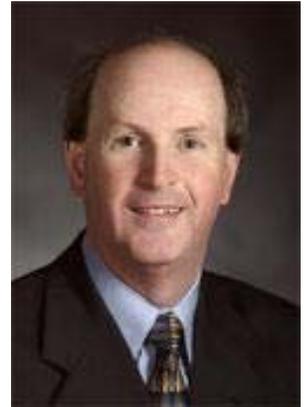
When you read this Newsletter, you will notice many format changes. Implementing those changes has been more tedious than we had hoped for, which is why there

was no January issue this year. Hopefully, we are now on track again. Our plan continues to be electronic delivery of the Newsletter to the extent possible. This, like so

much else, is a money driven issue.

As of the end of 2008, the SAO budget was down about 12% from July of 2007 when things started unraveling in Tallahassee. Future funding is uncertain; if anything is certain it is that funding is not going to improve any time soon. I say this to get to the obvious point that we are at a level where services that have been taken for granted in the past may be unavailable or at least not as readily available as in the past. We, as each of

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Special points of interest:

- Any changes in agency e-mail addresses should be reported to our office at treadwayr@sao8.org.
- 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.



SAO PERSONNEL CHANGES

CAROLE ZEGEL has retired as Executive Director of the Eighth Judicial Circuit State Attorney's Office. Carol was hired by Rod Smith, upon his elec-

tion as State Attorney in 1992. **DAVE REMER**, currently the Director of Victim/Witness Services, will assume the position as Executive Director.

GRETCHEN HOWARD, the current director of Project Payback, will replace Dave in the

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MESSAGE FROM BILL CERVONE CONTINUED

"If anything is certain it is that funding is not going to improve anytime soon." -Bill Cervone

your agencies is, are down several positions. The good news is that by continuing to

hold those positions vacant we have thus far avoided more drastic actions. The bad news is that with fewer ASAs to go around, it simply takes longer to get to some things, and other things simply can't get done. Your understanding as we work

through this difficult time will be an enormous help. To help us make sure that nothing falls through the cracks, please feel free to call if you are concerned about a particular case or situation.



SAO PERSONNEL CHANGES CONTINUED

Victim/Witness position.

ASAs **TIM BROWNING** and **JAMES COLAW** will be designated as the Special Prosecutions Unit, focusing on cases and defendants who are considered to be of significance to the community. Tim will also be responsible for such cases from time to time in Gilchrist and Levy Counties and will work with staff there as necessary. James will have that responsibility for Baker, Bradford and Union Counties.

ASA **OMAR HECHAVARRIA** will be the new Lead Attorney for

Gainesville Felony Division 3.

ASA **STEFFAN ALEXANDER** will be transferred to Felony Division 3.

ASA **DAVID KREIDER** will be the Division Chief for the Bradford County office.

ASA **MICHAEL BECKER** will assume responsibility for the Environmental Task Force.

ASA **PHIL PENA** will assume David Kreider's current Division 4 caseload.

Two new ASAs have joined the SAO: **JEFF GADBOYS** and **LORE-**

LIE PAPEL. Jeff has interned in the Gainesville Office and will be assigned to County Court in Bradford County. Lorelie comes to the SAO from the Duval County SAO. She will be handling a portion of the County Court docket in Baker County and will eventually handle Juvenile cases there as well.

ASA **GEOFF FLECK** will assume responsibility for all attorney training matters, both coordinating the In-Service programs and any outside seminars.

CONGRATULATIONS!

Levy County Sheriff **JOHNNY SMITH** announced the following changes in his office effective last October:

CHARLES W. "BUBBA" CASTELL, former Cedar Key police chief, was hired as a civil deputy to work in the Levy County Courthouse.

Chief Deputy **MIKE**

JOHNSON was promoted to the newly created position of Colonel.

Captain **MIKE SHEFFIELD**, jail administrator, was promoted to Major.

Lt. **EVAN SULLIVAN** was promoted to Captain, supervising public information and professional stan-

dards. Lt. **SCOTT ANDERSON** was promoted to Captain in charge of special operations.

Sgt. **DUANE DYKSTRA**, Commander of the Levy County Drug Task Force, was promoted to Lieutenant.

Sgt. **SCOTT FINNAN**, head of training, was promoted to

Lieutenant.

ASA **STACEY STEINBERG** has received the Child Advocacy Center's 2008 Excellence in Service Award.

Retired SA Executive Director **CAROLE ZEGEL** was awarded CAC's Child Victim Advocate Award for 2008.

FLORIDA CASE LAW

SEARCH AND SEIZURE WHILE CUFFED

Deputy Snyder of the Okeechobee County Sheriff's Office stopped a car for speeding. The deputy confronted the driver and Williams who was the passenger. Both appeared nervous and had red, bloodshot eyes. Williams would not make eye contact with the deputy.

The deputy learned that the driver had a suspended license and, after a brief struggle, arrested the driver and placed him in the patrol car. From dispatch, the

deputy learned that Williams, owner of the car, had a valid license. The deputy asked Williams to step to the front of the car. In response to the deputy's questions, Williams said that he had no illegal narcotics, nor large amounts of cash, or weapons in the car. He further consented to a search of the car. Before searching, the deputy conducted a pat-down of Williams because of his "nervousness." The pat-down uncovered a wallet in Williams' rear pocket and a hard lump on his

ankle, that turned out to be a large amount of cash.

Deputy Snyder then told Williams that he was "...being detained at this point; you are not under arrest." and proceeded to place him in cuffs. Later, while still cuffed, Williams tossed something into a ditch. The thrown object contained marijuana. A more thorough pat-down later revealed a vial containing Meth in William's crotch. Drug paraphernalia was then found in the car.

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SEARCH AND SEIZURE WHILE CUFFED CONTD.

The use of handcuffs as part of a temporary detention is approved "where it is reasonably necessary to protect the officers' safety or to thwart a suspect's attempt to flee." -Fourth DCA

Williams moved to suppress the marijuana and Meth, arguing that the cuffing constituted an illegal detention and thus an illegal seizure. The Fourth DCA in Williams v State agreed and suppressed the seized marijuana and Meth.

The DCA quoted the Florida Supreme Court's directive that the use of handcuffs as part of a temporary detention is approved "where it is reasonably necessary to protect the officers' safety or to thwart a suspect's attempt to flee." Cuffs also were permissible when it was a reasonable response to the demands of the situation and lasted no longer than necessary to effectuate the purpose of the stop.

"The methods employed must be the least intrusive means reasonably available to verify or dispel in a short period of time the officer's suspicions that the suspect may be armed and dangerous. Absent other threatening circum-

stances, once the pat-down reveals the absence of weapons the handcuffs should be removed."

Some of the factors that bear on the use of handcuffs during temporary detention: (1) reasonable suspicion of a crime typically involving weapons. (2) the location of the arrest in a high crime area or in a neighborhood known for a high incidence of cocaine trafficking and use. (3) a night time arrest. (4) whether the handcuffing lasted too long because the police failed to diligently confirm or dispel their suspicion that the suspect might be armed and dangerous. (5) continued use of handcuffs even after a pat-down uncovered no weapons.

Here, the stop was for speeding, a traffic infraction not typically associated with firearms. Before the deputy cuffed Williams, the driver of the car was already in custody in the police car so he posed no threat. The deputy's

patdown, which uncovered no weapons, preceded the use of cuffs; the deputy resorted to the restraints even where the fear that Williams was armed should have been dispelled.

The discovery of the wallet and cash during the pat-down did not elevate the stop to something more sinister than an investigation of a traffic incident. "This is not a case where the circumstances justified the use of handcuffs during the temporary detention. The handcuffing of Williams constituted a seizure in violation of the Fourth Amendment." Williams attempted disposal of the marijuana and the discovery of the Meth followed the illegal seizure, so they should be suppressed as fruits of the poisonous tree.

However, the Court allowed the conviction for the drug paraphernalia found in the car, since the Defendant consented to the search of his car.

NO "RESISTING WITHOUT" BY LYING

A Martin County deputy was investigating a shoplifting incident where juvenile A.C. was seen stealing a drink from the Texaco station in Palm City. Upon speaking to A.C.'s father, they were directed to find A.C. at the home of his friend, juvenile Defendant W.W. When the deputy arrived at W.W.'s house, the deputy asked if A.C. was there and W.W. answered "No."

After hearing a door open and close, the deputy went around the rear of the house and ultimately apprehended A.C. W.W. admitted that he had lied when he denied to the deputy that A.C. was there. W.W. was charged with Resisting without Violence for lying about the suspect's whereabouts during the deputy's search for A.C.

The trial court convicted the defendant after denying the defendant's motion to dismiss on the grounds that the deputy was not executing

a legal duty at the time he questioned the defendant and that the defendant's words alone did not constitute obstruction or resistance of any lawful duty.

To convict a defendant of Obstructing or Resisting without Violence, the state must prove that (1) the officer was engaged in the lawful execution of a legal duty and (2) the defendant's actions constituted obstruction or resistance to that lawful duty.

The trial court held that the officer was executing a legal duty by investigating the crime, and thus the defendant was thwarting the investigation by giving false information to the officer. The Fourth DCA in W.W. v State reversed the conviction, holding that mere words, absent physical resistance, does not constitute Resisting.

Citing the First DCA opinion in Wilkerson v

State, the Fourth DCA reiterated that "We have no doubt that the use of "oppose" in conjunction with "obstruct" manifests a clear and unambiguous legislative intent to proscribe only acts or conduct that operate to physically oppose an officer in the performance of lawful duties." The DCA distinguished those lawful convictions which consisted of cursing but which were accompanied with acts of refusing to leave an area or interfering with execution of process.

The DCA adopted a list of legal duties, which when hindered and coupled with words alone, can result in an obstruction of justice charge: "If a police officer is not engaged in executing process on a person, is not legally detaining that person, or had not asked the person for assistance with an ongoing emergency that presents a serious threat of imminent harm to person or property, the person's words alone can rarely if ever, rise to the level of an obstruction."

"The person's words alone can rarely if ever, rise to the level of an obstruction"

-Fourth DCA

WEARING OF MILITARY INSIGNIA & UNIFORM STATUTE UNCONSTITUTIONAL

“The statute has the potential to criminalize wholly innocent conduct, and is not narrowly tailored to address its goal.” -Fifth DCA

The Fifth DCA has held in State v Montas that Chapter 250.43 Florida Statutes, which regulates the wearing of military uniforms and insignia, is unconstitutionally overbroad.

A Transportation Security Administration agent at the Orlando airport noticed Montas wearing a U.S. Army uniform, standing in an unmarked, expedited security lane utilized by military and security personnel. The agent considered it odd that Montas’s hair was longer than allowed in the military. When Montas could not produce a military ID, Montas admitted that he was not in the Army. Montas was arrested and charged with one count of Wearing a Uniform and Insignia of Rank, in violation of Ch 250.43.

The trial court held that Ch 250.43 was unconstitutionally overbroad and violated due process. The Fifth DCA agreed.

The State argued that Montas did not have a fundamental right to wear a military uniform; thus, his conduct was not protected by the First Amendment. Montas argued that he was wearing the uniform as an act of patriotism and to support members of his family who are in the military.

The DCA stated that while it doubted that such a message would be perceived by those observing him in uniform, it can conceive of situations when a person might wear some part of a military uniform to communicate a message. The court cited instances where a person might do so to express his support of the troops or to protest military action.

“Because section 250.43 potentially implicates protected speech or conduct, we must determine if it is supported by a compelling governmental interest and is narrowly drawn to protect that interest.” “We

agree with the trial court that the State has a compelling interest in ensuring that the public is not deceived by people impersonating members of the military. However, we also agree with the trial court’s determination that the statute has the potential to criminalize wholly innocent conduct, and is not narrowly tailored to address its goal.”

Because the statute fails to differentiate between innocent conduct and conduct intended to deceive the public by including a specific intent element, Ch 250.43 fails. “It contains no requirement that the action be taken with the intent to deceive a reasonable person or in an effort to impersonate a member of the military.”

K-9 SNIFF PC FOR SEARCH WARRANT

Miami-Dade law enforcement received a tip that marijuana was being grown inside a particular residence. A detective and K-9 Franky went to the premises to ask for consent to search. While at the front door, the detective detected the smell of live marijuana plants emanating from the front door. Franky also alerted.

The detective knocked on the door in an attempt to get a written consent to search but no one answered. The detective then sought and received a search warrant, which resulted in live plants being seized as well as grow equipment. Defendant Jardines was charged.

Jardines moved to suppress the evidence arguing that there was no probable cause to support the warrant because the dog's sniff constituted an illegal search; the officer's sniff was impermissibly tainted by Franky's prior sniff; and the remainder of the facts alleged in the affidavit were legally insufficient to give rise to probable cause.

The trial court granted the Motion to Suppress but the Third DCA in State v Jarnines reversed the suppression order, holding that there was sufficient probable cause to issue a warrant for a search of the home.

"We reverse the trial court's determination that 'the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search' and that the evidence seized at Jardines' home must be suppressed. We do so because, first, a canine sniff is not a Fourth Amendment search; second, the officer and the dog were lawfully present at the defendant's front door; and third, the evidence seized would inevitably have been discovered."



REMINDERS

Law Enforcement Officers are reminded to check in with the receptionist at the Gainesville SAO before entering the locked glass doors to see an attorney. The recep-

tionist will then telephone the attorney so that the officers can be met and escorted to their destinations.

Also, officers are reminded to either bring

their subpoenas or know the name of the attorney they are there to see.

Finally, 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 sao8.org and click on the "legal bulletin."

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We're on the web:
[Www.sao8.org](http://www.sao8.org)

FOUR FEET IN ONE STALL.

Two off duty police officers were providing security at a Fort Lauderdale restaurant when the bathroom attendant informed them that two men had entered a toilet stall together. The attendant advised that he asked the men to leave, and they refused. He asked the officers for assistance.

Officer Gross testified that he and his partner went into the bathroom and saw four feet in one closed stall. The officers could hear the sound of two male voices and could hear snorting "over and over again."

The officers knocked on the stall and instructed the occupants to leave, but they refused. One officer entered the adjoining stall, stood on the toilet, and looked over. Officer Rose saw two men leaning over a small garbage can apparently snorting a substance. Rose ordered the two men

to get out of the stall. As the men came out, the officers could see one suspect pass a clear plastic baggie with white residue. Also, the officers saw white powder on the nose of one of the suspects. The baggie with white residue tested positive for cocaine.

The trial court concluded that although the officers suspected criminal activity was taking place, there was not reasonable suspicion that a crime was being committed, noting correctly that mere suspicion is not enough to support intrusion into one's Fourth Amendment right to be free from unreasonable search and seizure.

The Fourth DCA in State v Powers, reversed the lower court's ruling, holding that although a person in a restroom stall is entitled to be free from *unwarranted* intrusion, here the circumstances reasonably indicated that the suspects were doing drugs. "The only evidence suppressed in

this case was the baggie of cocaine that the officers observed being passed as the two men exited the stall. The observation of this evidence is not the fruit of Officer Rose's overlook. Clearly, the officers had well-founded grounds to order the two men to come out of the stall, unrelated to that overlook and, in fact, they had ordered the men to exit before Officer Rose looked into the stall."