Office of the
State Attorney
Eighth Judicial Circuit

# Law Enforcement Newsletter

January 2012

## A Message from Bill Cervone State Attorney

Welcome to another year. At this point they start to blur, at least to me. I hope that each of you had a happy holiday season and that 2012 brings peace and safety to you and your families.

This year's legislative session will start in January, which means that issues of budget will be front and center earlier than usual. As I write this, it's safe to say that no one has any real idea what may be in store for each of our agencies. I think we can all assume, however, that at best we will all be trying to hold our own again. That goes not just for state funded agencies but for those that are funded locally. At the state level, I am already seeing a continuation of the mantra that privatizing is the way to go, especially in the DOC budget. Those of us who disagree with that may have little real voice, as we can expect to have little voice in budget cutting measures that eliminate benefits, either outright or by converting them from free to being paid for by the worker. One plus for state workers is that 2012 is an election year for the legislators, meaning that they might be a little more reluctant than otherwise to impose more of a burden on an already understaffed state work force than they have in the last few years. Popular senti-

Continued Page 2

## SAO Personnel Changes

Effective in November several attorney re-assignments occurred at the SAO. David Margulies was re-assigned to the Alachua County Intake Division. Brian Rodgers was re-assigned to the Alachua County Court Division, as was Adam Lee. Brian will be handling domestic violence cases and Adam will handle general misdemeanor cases. Angela Pritchett and Erin Simendinger were re-assigned to handle Alachua County traffic cases. Marcus Cathey

Continued Page 2

### INSIDE THIS ISSUE:

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# Message From Bill Cervone Continued

ment, however, is more driven by the perception that state workers are overpaid and underworked than the reality, which is that Florida has, by national standards, a small per capita state work force that is not paid competitively with the private sector, much less in anything approaching an extravagant fashion.

I say all of this to say that once again we will all be in the position of trying to make ends meet with fewer resources. So far, belt tightening has not caused any appreciable reduction in the services that we provide, and I hope that that will continue to be the case.

# SAO Personnel Changes

was re-assigned to the Bradford County Court Division, where he will handle all county court and juvenile cases.

Effective at the end of December, ASA Greg Edwards resigned to pursue other opportunities. Greg's felony position in Baker County was filled by Lorelie Papel. John Nilon was hired in December to replace Lorelie in the Baker County Court division. John is a recent graduate of Florida Coastal Law School and previously interned in the Macclenny office.

# Congratulations to...

ASAs Brian Rodgers and Julie Fine, who both passed the Florida Bar exam in September and were sworn as a Bar members.

Chief Ed Book of the Santa Fe College Police Department, who was appointed to that position in October after a 25+ year career at the Gainesville Police Department.

Former Santa Fe College Chief Daryl Johnston, who will remain with the College as Director of the Kirkpatrick Institute of Public Safety.

ASA Lua Mellman, who was married in October to former GPD Officer David Lepianka.

SAO Intelligence Analyst Louis Hindery, who completed the most recent SFC Police Academy Program and has been promoted to an Investigator position.

# Gun Division Re-Named

The Alachua County gun prosecution division has a new name and will now be called the State Attorney Firearms Enforcement (SAFE) Unit. Moving forward into 2012, the SAFE Unit consists of Division Chief Adam Urra, ASA Chris Elsey, and SA Investigator Darry Lloyd, and is provided clerical support by Valarie Merrifield. The unit enjoyed great success in 2011 - look for specifics about that and our plans going forward in the next Legal Bulletin as we continue to work with GPD, ASO, and other agencies to combat gun violence.

## Is Videotaping the Police a Crime?
## Contributed by Assistant State Attorney George Wright

Within the last ten years, technology has advanced to the degree that nearly every cell phone and electronic device is capable of recording video and audio. The prevalence of this technology has allowed ordinary people to record events immediately as they occur. Often this includes videotaping law enforcement officers in the performance of their duties. Throughout the state and the country, conflicts are emerging as more and more citizens record law enforcement officers against their wishes. Under the First Amendment, a citizen in most situations has the right to film the police in public. This article will address several aspect of this.

## The First Amendment Allows Citizens to Film Public Officials in Public Places in the Execution of their Duties

The issue is what rights do private citizens have to record police officers. Courts have ruled that the First Amendment protects citizens in recording police activity in a "public forum." In Smith v. City of Cumming (2000), the Court of Appeals for the Eleventh Circuit held that:

*As to the First Amendment claim under Section 1983, we agree with the Smiths that they had a First Amendment right . . . to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.*

Public forums are government-owned properties that the government is constitutionally obligated to make available for speech, traditionally parks or sidewalks. Any interference with First Amendment activity in a public forum is reviewed by courts with the highest scrutiny. Private property, however, is not a public forum unless the owner invites the public to use it for that purpose. Therefore, if the recording takes place in public, the Constitution generally protects this recording from government interference.

A person engaging in free speech activity must still obey the law, and merely holding a camera does not immunize them from arrest. The First Amendment clearly does not protect acts such as inciting a riot, obstructing an arrest, or aiding an escape. If the basis for the arrest has no connection to the free speech activity, then the First Amendment does not shield the person from criminal liability.

## The Florida Law against Interception of Oral Communication Does Not Apply where there is no Reasonable Expectation of Privacy

In several Florida cases, law enforcement officers have responded to people recording them by arresting the person either under the Florida wiretap statute, F.S. § 934.03, or for resisting arrest without violence, F.S. § 843.02. Juries and the court system have not reacted to these arrests positively, acquitting those charged of criminal offenses, and ruling against the police agencies in civil suits. For an oral conversation to be protected under § 934.03(1)(a), Florida courts have stated that the person recorded must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable. The more public a space is, the less courts will be willing to view an officer's expectation of privacy as reasonable.

In State v. Keen, 384 So.2d 284 (4th DCA 1980), the Fourth District found that the police had probable cause to believe that a violation of § 934.03 occurred where the Defendant entered the Martin County Jail and secretly recorded a conversation with a Deputy. Since this was a private conversation recorded without the consent of the deputy in a restricted area away from other people, the Fourth District was willing to find an arguable basis for the violation of § 934.03. The court in Keen stressed that this determination will vary case by case. In most cases, there is likely no expectation of privacy for police activity in a public place, especially if there are bystanders.

## Courts are Holding Law Enforcement Officers Individually Liable in Civil Suits

Ordinarily public officials, such as law enforcement, are protected from being sued in their individual capacity by the doctrine of qualified immunity, which shields government officials from actions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." In Glik v. Cunniffe, et al., the United States Court of Appeals for the First Circuit held that officers were not entitled to qualified immunity when they arrested a bystander for filming them in a public space, ruling that this was exercising a clearly-established First Amendment right. While no Florida court has ruled similarly, the threat still exists that an officer arresting someone for recording them could be personal sued.

## Key Principles in Dealing with Citizens Recording Police Activity

- The First Amendment protects the right of citizens to videotape government officials, such as the police, carrying out their duties in public.

- On traditional public spaces, such as parks and sidewalks, the government must allow free speech activities like videotaping with few restrictions.

- A reasonable expectation of privacy must exist for an unwanted videotaping to rise to the level of illegal interception of a communication under § 934.03. In a public space with bystanders, there is likely no reasonable expectation of privacy.

- There must be a reason—other than the act of recording itself—to justify preventing a citizen from recording public law enforcement activity.

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# Security of Communications
# Chapter 934, Florida Statutes (2009)

*Tracey v. State*, 36 Fla. L. Weekly D1961
(Fla. 4th DCA 2011)

Contributed by Assistant State Attorney Lee Libby

Obtaining information from cell phones has become a valuable tool for locating wanted suspects and proving crimes. There are differing requirements for the degree of proof required depending on the information you are seeking. The *Tracey* case recently set forth an excellent summary of the different types of information obtainable from cell phones and the corresponding degree of proof required to obtain the information.

In *Tracey,* law enforcement officers applied for a pen register and trap and trace order for Tracey's cell phone. The application did not mention anything about obtaining historical or real time cell site location information (CSLI). The court issued an Order (likely prepared by law enforcement and presented to the court) as requested. The Order additionally authorized the release of historical CSLI, even though the Application did not request it. During the subsequent investigation, law enforcement also obtained real time CSLI, without any court authorization. Based upon law enforcement obtaining more information than authorized, the fourth DCA held that the "additional information" was obtained unlawfully.

The DCA went on to hold that violations of Section 934, such as this one, were subject to the **civil and criminal penalties** set forth in 943.21 and 943.27. The moral to the story is that you need to be sure that any court order you obtain authorizes the type of electronic surveillance you are requesting.

"Emergency" Provisions of Chapter 934

Also remember that Section 934.31(4), Florida Statutes sets forth the procedure and requirements to have a pen register put in place without a court order. Pursuant to Section 934.31(4)(a), Florida Statutes, in an emergency situation a law enforcement officer must FIRST get preauthorization from either the "Governor, the Attorney General, the statewide prosecutor, or a state attorney" BEFORE requesting the phone company to ping, trace, track, or in any other way to provide information about a cell phone, covered by Chapter 934.

The procedure to follow in our Judicial Circuit is for law enforcement to contact the on-call assistant state attorney (after hours) or Gainesville Intake (during business hours), who will then get in touch with Mr. Cervone. Mr. Cervone will then make the determination as to whether the facts meet the requirements of Section 934.31 for the use of the emergency provisions of chapter 934.

# DOG SNIFF FOLLOW-UP: COURTS CONTINUE TO TIGHTEN THE LEASH ON THE USE OF DRUG DETECTION DOGS BY LAW ENFORCEMENT

*Wiggs v. State*, 36 Fla. L. Weekly D1688 (Fla. 2d DCA, August 3, 2011)

Contributed by Assistant State Attorney Brian Rodgers

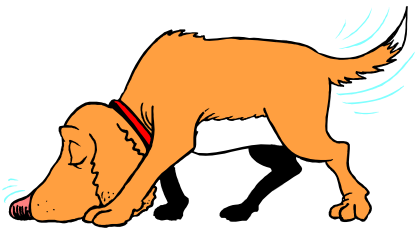
A Sarasota County deputy stopped Defendant James Wiggs for running a stop sign. While the deputy prepared a warning citation, K9 Deputy Indico arrived on scene and walked his dog, Zuul, around Wiggs' vehicle. The dog alerted and during the subsequent search, law enforcement officers discovered 21.4 grams of cocaine. Wiggs, already on probation for marijuana trafficking in Texas, was charged with possession with intent to sell or deliver. He moved to suppress the drugs claiming that Zuul's past reliability did not give rise to probable cause for a search. In Wiggs v. State, Florida's Second District Court of Appeals agreed in a decision that forecasts a tightening of the leash on the use of drug detection dogs by Florida's law enforcement agencies.

Questions about the training, accuracy, and reliability of drug detection dogs have surfaced in several recent cases, most notably Jardines v. State and Harris v. State, both out of Florida's Supreme Court (*see September's Law Enforcement Newsletter for more on these cases*). In each case, the court commented that something more than bare assertions by a handler that a dog is trained and certified is necessary to support a finding of probable cause used to justify a warrantless search of a defendant's person or car. If a search based on a dog sniff is challenged in court, the State is tasked with presenting evidence showing a totality of circumstances that reasonably explain why the on-scene officers believed in the reliability of the dog's alert. The court noted that a lack of uniform training and certification procedures for the drug detection dogs employed by Florida law enforcement agencies is problematic.

In Wiggs v. State, Zuul, a German Shepherd, was trained as an aggressive alert dog through an eighty (80) hour narcotics detection course, which was followed by a 400 hour patrol course and a regular weekly training regimen. He was certified to detect marijuana, cocaine, methamphetamine, and heroin by both the Florida Department of Law Enforcement (FDLE) and the National Police Canine Association (NPCA). He was exposed to narcotic weights as low as .1 grams and as high as 100 grams using techniques designed to ensure that he was not falsely alerting. Deputy Indico, Zuul's handler, kept organized training and field activity logs for the dog. In this case, the State was able to provide evidence beyond bare assertions of Zuul's qualifications.

The problem was that Zuul was not trained to refrain from alerting to residual narcotics odors. Indeed, in seventeen sniffs of cars over a four-month period, Zuul alerted fourteen times, but drugs were discovered only four times, an accuracy rate of only 29%. However, in each of the other ten cases, Deputy Indico was able to document some kind of drug history with either the vehicle or the occupants, or both. The court was ultimately not satisfied with the specificity of these histories with respect to how much time had passed since drugs had been handled, consumed, or stored. Therefore, Zuul's accuracy rate was simply not sufficiently reliable. It seems Zuul had an extraordinary sensitivity to even minute quantities of drugs. As noted by one of the deciding judges, Zuul's strength is also his weakness for it is not that he is alerting when there are no drugs to smell, but instead that he is alerting only to residual drug odors that do not lead to arrest.

If the courts continue this recent trend of heavily scrutinizing searches based on dog sniffs, Florida law enforcement agencies may find the very use of drug detection dogs to be difficult, at least until such time as a stringent uniform training and certification procedure for dogs is implemented statewide. In the meantime, drug detection dog handlers should keep documentation about and be well versed in the training and certification of their dogs. Even more importantly, handlers should maintain thorough field performance records that detail every time a dog is deployed to sniff for drugs. Records detailing alerts that lead to the discovery of drugs, alerts that yield no drugs, and non-alerts will allow courts to evaluate how a dog's inability to distinguish between residual odors and actual drugs bears on the reliability of the alert in establishing probable cause for a search.



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## LOUD CAR STEREO MAY NO LONGER BE VALID PROBABLE CAUSE FOR A TRAFFIC STOP

*State v. Catalano*, 60 So. 3d 1139 (Fla. 2d DCA 2011)

Contributed by Assistant State Attorney Brian Rodgers

Richard Catalano and Alexander Schermerhorn were each stopped and issued traffic citations for playing their car stereos too loudly in violation of section 316.3045 of the Florida Statutes. Both challenged the constitutionality of the law claiming that the language was vague and overbroad, and that the law on its face violated the First Amendment. The law in question prohibits a person who is driving or sitting in a vehicle from playing the stereo system so loudly that it is plainly audible twenty-five feet or more from the vehicle. Additionally, the law prohibits playing stereos louder than is necessary for the convenient hearing by persons inside the vehicle while the vehicle is in the vicinity of a church, school, or hospital. In State v. Catalano, Florida's Second District Court of Appeals held section 316.3045 to be unconstitutional because under the law people driving or occupying vehicles that are used for business or political purposes are permitted to play their stereos as loudly as they please. Due to this exception, the law runs afoul of the First Amendment because it does not apply equally to all citizens or to all types and contents of speech

In Davis v. State, a 1998 case, Florida's Fifth District Court of Appeals held the car stereo law to be constitutional on free speech grounds. That case was decided under an earlier version of the law, which prohibited playing a car stereo so loudly that it was plainly audible 100 feet or more from the vehicle. The older version of the law was otherwise identical in that it contained the same exceptions as the newer law for vehicles being used for business or political purposes. The court in Davis analyzed the law differently than the court in Catalano by holding that it was not regulating speech at all, but instead was meant to control noise pollution. The Second DCA and at least one federal court commented that the older case's finding that the law is constitutional no longer applies since the legislature shortened the plainly audible distance from 100 feet to twenty-five feet.

As for whether law enforcement agencies in the Eighth Circuit should continue stopping people who are playing their stereos too loudly, the answer is unclear. At this time, the Second District Court has asked Florida's Supreme Court to determine whether the statute is or is not constitutionally sound. The case will now slowly work its way through the system. The likely outcome though is that the law will be struck down as an unconstitutional infringement on First Amendment free speech rights because it does not apply equally to all types of speech, whether non-commercial, artistic, commercial, political, or otherwise. Moreover, if the law is meant as a safety regulation, there is no legally sound reason for the inconsistency between personal use and commercial use vehicles. After all, the law as written makes it acceptable for a person driving a vehicle that is used for business purposes to play political talk radio loud enough to be heard a quarter mile away, but a private citizen sitting stationary in a parking spot cannot play music that is clearly audible at twenty-five feet..