

LAW ENFORCEMENT NEWSLETTER

January 2014

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

Elsewhere in this issue you will find a brief recognition concerning an award received by Gainesville Police Department Chief Tony Jones. At the local presentation for that, Quincey, FL, Police Chief Walter McNeil, who some of you will know, spoke about Chief Jones as being a true Peace Office. That is, of course, not a term that is used often anymore, but it struck me as one that probably should be. All of us tend to focus on the

immediacy of the problems we are called upon to address, and for the officer on the street those usually involve anything but peaceful behavior. We should never lose sight of our greater role in our communities, however, in facilitating safety and security for our communities by what we do that prevents problems. Law enforcement will always necessarily be primarily reactive, but it is as important to be proactive when possible. Community in-

volvement and awareness is the only way we can actually impact prevention. I like to think that the continually falling crime rates across our circuit and state reflect a combination of things, and that those things not only include our successes in locking up the worst among our offenders but also our increasing attention to community involvement and when appropriate diversion.

As we enter yet another new year it might be well for all of us to look at how we can improve general relations with our various constituencies. Doing so will never put us out of business but it surely will improve the quality of life in our neighborhoods and towns, big and small.

Happy New Year to all!



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Any changes in agency email addresses should be reported to our office at clendeninp@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 Chief Investigator Paul Clendenin at the SAO at 352-374-3670.

SAO PERSONNEL CHANGES

ASA Jacob McCrae resigned from his position in the Gainesville felony division to take a similar position with the Jacksonville SAO on October 1st.

Jacob's felony position has been filled by ASA Ken Keith. Replacing Ken in the Gainesville County Court division is David Byron, who started on October 1st. David is a May graduate of the University of Florida College of Law and recently passed the Bar exam. David also interned with the SAO prior to his graduation.

ASA Marcus Cathey resigned on November 30th to re-locate to Tennessee, where his wife has taken a college teaching position. ASA Harlan McGuire has been re-assigned to handle Bradford County Court cases.

ASA Nicole Chiappini has resigned effective January 10th and will return to south Florida, where she anticipates entering private practice. Nicole's Gainesville felony position will be taken by Lindsay Morauer.

New to the County Court division in Gainesville are Wayne Ferguson and Kate Artman. Wayne started on December 30th after working for several years in private practice doing commercial and business litigation in Jacksonville and Naples. Kate starts on January 6th and has been interning with the SAO for the last several months until her graduation from the University of Florida Law School in December, 2013.

CONGRATULATIONS TO...

ASA Ken Keith, who became a third time father on September 10th with the birth of a son, Dylan .

ASA Lua Lapianka, who welcomed her firstborn, Christopher Bryce, on September 23rd.

ASA Deb Hunt, who also became a first time mom on October 15th when Anabelle Sarah was born.

ASA Dan Owen, who became a first time father on November 16th with the birth of a son, Cade.

ASA Jon Ramsey, who was married to his now wife Loni on September 28th.

The Baker County Sheriff's Office held its 1st Annual Awards Banquet on August 22nd, at which time several recognitions were made. Receiving the newly established Archie T. Roberson Law Enforcement Legacy Award recognizing professional excellence was Dep. Steve Harvey. Receiving the initial Laura M. Roberts Loyalty Award designated for a civilian employee exemplifying loyalty and commitment to the BCSO was Pam Davis. The Detention Deputy of the Year was Casey Gordon, and the Detention Supervisor of the Year was Mike Lagle. The Communications Operator of the Year was Whitney Crews. The Explorer of the Year was

Ashley Brown. Special Service Awards went to Lynn Taylor and Carl Wheeler. The Sheriff's Commendation Award for professional promotion of the agency's goals and mission went to Gerald Gonzalez, John Finley and Brian Bishop. The Sheriff's Past Service Award recognizing individuals who had previously retired from the BCSO after long and distinguished careers went to Joe Barber, Clois Stafford, Kenneth Roberts, Vernon Prevatt, Earl Gonzalez, Bill Watson and



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CONGRATULATIONS TO...

Tommy Kent. Congratulations to all!

November 19th.

Cooke, Dep. James Ferguson, and Dep. Barrett Boyette.

Gainesville Police Department Chief Tony Jones, who was recognized by the International Association of Chiefs of Police with their 2013 Individual Achievement Award For Civil Rights for his outstanding achievements in protecting civil and human rights, first in Baltimore earlier this year and then locally at a reception held in Gainesville on No-

Alachua County Sheriff's Office's SWAT Team, which won the 31st Annual SWAT Round-Up International competition held in Orlando in November, besting 56 other teams from both the United States and around the world. Members of the team are Sgt. John Schabrunch, Sgt. Joe VanGorder, Dep. Chris Drake, Dep. Marvin Gunn, Dep. Stephen



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 Law Enforcement Newsletter, please call Chief Investigator Paul Clendenin at the SAO at 352-374-3670.

In Memorium

The passing of Union County Sheriff Jerry Whitehead in December leaves an unfillable void in not just our 8th Circuit law enforcement community but across the state. Sheriff Whitehead was more than a colleague to many of us - he was a strong and trusted friend. He served as Sheriff in his beloved Union County from 1985 when he started his first elected term until his death, by which point he was Florida's longest actively tenured sheriff.

Like his father, Sheriff John Whitehead, before him and as he was eulogized, Jerry was a mighty oak in his community.

His position has been filled by Major Gary Seay, who was appointed Interim Sheriff by the Governor.



FDLE OFFICE OF GENERAL COUNSEL

FLORIDA CASE LAW UPDATE 13-08

Case: Greenwade v. State, 2013 WL 5641794 (Fla. 2013)
Date: October 17, 2013
Subject: Testing individual baggies for drugs in trafficking cases

FACTS: Officers executed a search warrant at a Jacksonville home. The officers found and detained Mr. Greenwade while executing the warrant. After he was detained, Greenwade told the officers, "I know why you're here.... What you are looking for is in the garage." He then led the detectives to the garage, and showed them a digital scale sitting next to a green bag; white residue could be seen on top of the bag. Greenwade admitted that he owned the bag, and he admitted that the bag contained cocaine. When the detectives searched the bag, they found nine smaller one-ounce baggies inside the larger green bag. Each of the smaller baggies contained a white powder. All nine baggies were individually field tested; however, the records do not reveal the results of this test. The baggies were then submitted to FDLE for testing. However, the FDLE chemist did not receive nine individual bags; instead, she received one Ziploc bag that comingled or contained the entire contents of each of the individual bags. It is unclear from the record how or when the individual bags were comingled. Ultimately, FDLE detected the presence of cocaine in the Ziploc bag, and calculated the total weight all contents as 234.5 grams.

The defendant was charged with Trafficking in Cocaine in an amount exceeding 200 grams. Greenwade was later convicted at trial and sentenced to fifteen years in prison. On appeal, Greenwade argued that he was entitled to a judgment of acquittal because the State never tested each individual bag for cocaine before comingling the contents and weighing them. The First District Court of Appeals affirmed his conviction. However, the Florida Supreme Court reversed the conviction for Trafficking and ordered that the defendant be convicted of and sentenced on the lesser charge of Possession of Cocaine.

RULING: If a defendant is charged with Trafficking based on multiple containers of a white, powdery substance, the State is required to prove that each individual packet contains a controlled substance.

DISCUSSION: This opinion resolves a conflict among Florida's intermediate appellate courts. In this case, the First District Court of Appeal had upheld Greenwade's conviction. The First District emphasized that Greenwade admitted to owning the green bag that was found in the garage, and he admitted that the bag contained cocaine. Thus, the First District concluded that the defendant had implicitly admitted that all of the individual, smaller baggies contained cocaine.

However, the Florida Supreme Court rejected this reasoning. The Court was worried that if the State is allowed to comingle individual baggies without testing each bag, there is a significant risk that one or more of the smaller containers may contain a non-controlled substance or a counterfeit controlled substance. According to the Court, that risk is especially great when the suspected substance is white powder: the white powder could be anything, including many non-controlled substances. Therefore, when law enforcement seizes multiple containers of white powder, each container must be tested to ensure the presence of a controlled substance. In reaching this conclusion, the Court emphasized that this rule applies only to white powder or other substances that carry a substantial risk of misidentification. Earlier cases held that marijuana and even rock cocaine do not carry a substantial risk of misidentification and do not need to be tested individually. The Court's opinion leaves those cases intact.

David H. Margolis
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 Florida Department of Law Enforcement

REMINDER: _____
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The SAO Is Now On Twitter

The SAO has established a Twitter feed to better disseminate information to the media and others such as law enforcement agencies. Like us at at #8THCIRCUITSAO. For more information contact Deputy Chief Investigator Darry Lloyd at 352-374-3670.

Victims of Human Trafficking Expunction

House Bill 1325, which passed in the 2013 Legislative session, creates new s 943.0583 Human Trafficking Victim Expunction. Beginning January 1, 2014, a Human Trafficking Victim may petition court for expunction of a conviction for an offense that was part of the human trafficking scheme. Note that this new law allows a conviction to be expunged by court order. While no Certificate of Eligibility is required from FDLE, the Human Trafficking Expunction is not available for the violent offenses listed in s. 775.084(1)(b)1. The State Attorney or the arresting agency may respond to the court regarding a petition filed under this section. The court of original jurisdiction may grant the Human Trafficking Expunction at its discretion.

If relief is granted by the court, the order to expunge is certified to the State Attorney or Statewide Prosecutor and the arresting agency, which is responsible for forwarding it to the other agencies listed in the order. Many Clerks forward seal and expunge orders directly to FDLE as well, which allows us to comply with the orders more quickly.

FDLE and other agencies have until

March 1, 2014, to begin complying with expunction orders under this new statute. FDLE will retain the record, but all other agencies must physically destroy or obliterate the record. A subject granted a Human Trafficking Expunction can deny the criminal history except when a candidate for employment with a criminal justice agency or a defendant in a criminal prosecution or when applying for another seal or expunction.

FDLE requests that the Clerks provide as much identifying information as possible for us to locate and act on the correct record in our criminal history file. That includes name, aliases, date(s) of birth, Social Security Number(s), State ID Number (SID or FDLE Number) if available, court case number(s), date(s) of arrest, OBTS Number(s), and charge(s).



School Gun Safety

K.P. v. State

3rd D.C.A. (Dec. 26, 2013)

Facts:

Gregory Williams, an officer with the Miami-Dade County Schools Police Department, received a telephone call from the Department's Gun Bounty Program that a student at Northwestern identified as K.P., "was possibly in possession of a firearm." Based on this information, Officer Williams checked a public school's database and confirmed that K.P., then fifteen years old, was a student at Northwestern. After printing a copy of K.P.'s class schedule, Officer Williams notified the assistant principal and school security of the information he had received. Because of the upcoming class change and lunch break, they decided that it would be best not to approach K.P. until after his lunch break was over and he was in his next classroom.

After K.P. was in his next class, the assistant principal and two security officers went to K.P.'s classroom, took possession of his backpack, and escorted K.P., without discussion, to the principal's conference room. Upon entering the conference room, the backpack was handed to Officer Williams who immediately opened it and found a loaded .380 caliber semi-automatic handgun.

K.P. subsequently was charged with carrying a concealed weapon, possession of a firearm on school grounds, and possession of a firearm by a minor. K.P. filed a motion to suppress the anonymous tip search. The trial court denied the motion, and the 3rd D.C.A. agreed.

Issue:

Was the anonymous tip that a named student in a certain school possibly possessed a gun enough to justify the search of K.P.'s book bag? **Yes.**

Fourth Amendment:

Anonymous tips - which are more susceptible to abuse than a tip by a known informant, may be less reliable than other investigative leads. *Florida v. J.L.*, (S.Ct.2000). Generally, a search based upon an anonymous tip withstands scrutiny under the Fourth Amendment only if the tip contains sufficient details and information that can be independently corroborated by the police to establish a level of comfort regarding the reliability of the information in the tip. An anonymous tip must show "that the tipster has some inside knowledge about the suspect, and that the tipster's accusation of illegal activity is entitled to some credence." Usually this requirement is met by the informant predicting future events involving the target.

For this reason, the Court in *J.L.* expressly declined to make "an automatic firearm exception to our established reliability analysis," whereby a stop and frisk would always be justified by any anonymous tip indicating a person was carrying a firearm. "Firearms are dangerous ... [but] the Fourth Amendment is not so easily satisfied."

However, the Court recognized

that a search may be justified under the Fourth Amendment based upon an anonymous tip reflecting a lesser level of reliability than the tip in *J.L.* if the tip concerned a greater danger than possession of a firearm on a public street. The Court noted: "The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. *We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.*"

In addition, the Court in *J.L.* explained that the level of reliability that it established for the anonymous tip of a gun on the street was not necessarily intended to apply in schools: "Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports and schools, cannot conduct protective searches."

School searches - must be analyzed by the seminal case, *New Jersey v. T.L.O.*, (S.Ct.1985). There the United States Supreme Court held that searches by school officials in public schools "should depend simply on the reasonableness, under all of the circumstances, of the search." *Thus, the search of a student on school grounds is not governed by probable cause, but is instead*

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governed by the less demanding standard of reasonable suspicion.

The Court reasoned that the child's legitimate expectation of privacy must be weighed against the interest of the school to maintain order and to protect children from violence in schools: "Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Therefore, "*while children assuredly do not shed their constitutional rights... at the school-house gate, the nature of those rights is what is appropriate for children at school.*"

Gun Violence in Schools:

The 3rd D.C.A. in reaching their conclusion that the search of K.P.'s book bag was reasonable looked beyond the Fourth Amendment to the reality of gun violence in schools. "The need to protect children in schools from violence rests not only on common sense-on 'what every parent knows'-but has been expressly recognized by the highest court in the land. As noted above, the majority opinion in *T.L.O.* is based upon the recognition of the need for school officials to address 'violence in the schools.'"

"Justice Blackmun's concurrence in *T.L.O.* also emphasized the need for a lower Fourth Amendment stand-

ard in schools to protect students and teachers from violence: 'Government has a heightened obligation to safeguard students whom it compels to attend school. The special need for an immediate response to behavior that threatens either the safety of school children and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests.'"

"Since *T.L.O.* was written, our Country has experienced an outbreak of catastrophic mass shootings of children in schools. In light of this grim development, no reasonable person would contest that the government's interest in protecting students from gun violence is entitled to substantial weight when deciding whether a particular search at a school is reasonable under all of the circumstances." "Judges cannot ignore what everybody else knows: violence and the threat of violence are present in the public schools.... The incidences of violence in our schools have reached alarming proportions." *State v. J.A.*, (3DCA 1996).

Court's Ruling:

"First, while K.P. had a reasonable expectation of privacy in the contents of his book bag on school property, K.P.'s expectation of privacy was tempered by the special characteristics of the school setting. Schools are one of the 'quarters where the reasonable expectation of Fourth Amendment

privacy is diminished' such that 'public safety officials' may well 'conduct protective searches on the basis of information insufficient to justify searches elsewhere.'"

"Second, the search was only moderately intrusive. The search of a book bag carried onto school grounds is certainly invasive. Some book bags will contain children's personal diaries, letters, photographs, items of personal hygiene, or other effects of a private nature whose public disclosure could offend a student's reasonable expectations of privacy. Here, however, the search of K.P.'s bag was conducted in the privacy of the principal's conference room. Only school officials, no students, were present."

"In the Fourth Amendment context of special needs searches, examination of personal effects similar to the search of K.P.'s book bag have passed constitutional muster for airports, courthouses, government buildings, and public transportation, with some of the highest courts in the land characterizing such searches as 'minimally intrusive.'"

"In this regard, we note that alternative searches would not be as accurate or safe. Not every school has the budget to buy metal detectors; and detectors can be set off by many innocent metal objects often contained in a book bag like keys, cellphones, pens, coins,

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Continued

and pencil boxes. Frisking the outside of the bag to feel for a firearm would not discover a pistol located between bulky textbooks. Groping the bag could trigger an accidental discharge. Interrogating the suspected student to seek further information solely to justify the search may go nowhere if the child remains resistant and impassive. Summoning parents may prove useless if the parents are unavailable or uncooperative.”

“Finally, when judging the reasonableness of the search, courts must consider ‘the severity of the need’ and determine whether the government’s legitimate interest ‘appears important enough to justify the particular search at hand.’ As the Supreme Court has recognized time and again, the government’s interest in protecting juveniles assembled in the classroom under the aegis of governmental authority is ‘substantial.’ The danger of a juvenile

with a gun in a classroom is different in degree and kind even from the danger of a juvenile with a gun on a street. We have little difficulty holding that firearms at schools represent a heightened danger.”

“In this regard, while the school official did not know for certain that the book bag contained a gun, he was not operating on a mere ‘hunch.’ The anonymous tip at issue contained indicia of reliability. It accurately identified a student by name, K.P., and the specific school he attended. This aspect of the tip limited the discretion of school officials concerning who could be searched.”

“This aspect of the tip also demonstrated that the caller knew K.P., and was possibly a student attending the same high school, thereby ‘narrowing the likely class of informants’ and suggesting that the

caller had inside knowledge of K.P.’s activities. Next, school officials acted on the tip before it could become stale. Finally, the fact that the tipster contacted a gun bounty program, which offered monetary rewards to members of the community who report the whereabouts of illegal firearms, suggests that the caller had an incentive to offer an accurate report.”

“Given the reduced expectation of privacy, the relatively-moderate intrusiveness of search, the gravity of the threat, and the consequent reduced level of reliability necessary to justify a protective search, the decision to search K.P.’s book bag was reasonable.”



Proving Possession

The difficulty of proving possession, especially when multiple people are involved, is a common problem and has been the subject of much debate. A new case from the 2nd DCA provides some guidance on the kind of evidence that can carry the day.

In the case, K.D.T. v State, two Hillsborough County deputies smelled the odor of marijuana coming from a car that was parked and occupied by four people. They removed the occupants and searched the car, finding a handgun in the unlocked glove box. K.D.T., a juvenile, was sitting in the front passenger seat when the occupants were removed. He made spontaneous statements incriminating himself as the possessor of the gun. Based on both those statements and his proximity to the gun the 2nd DCA allowed his conviction for being a minor in possession of a firearm.

This is similar to another case, G.G. v State, but with a different result. G.G., also a juvenile, had left home after an argument with his parents and was

found sleeping in a wooded area of a public park, also by Hillsborough County deputies. There was a bag of some sort within a couple of feet of G.G., and sure enough drugs were found in the bag. In that case the 2nd DCA would not allow the conviction for possession of the drugs to stand.

The May 2013 issue of The Law Enforcement Newsletter contains other cases of this sort. The key, obviously, is some evidence beyond mere proximity that can tie knowledge or control of something to a particular defendant. In K.D.T. the defendant's statements were enough to save the case even in a circumstance where other people were involved. In G.G., even though the defendant was alone, proximity alone was not enough no matter how obvious the situation might appear from the point of view of common sense. Something must serve the purpose of linking a defendant to an illegal article.



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