Office of the State Attorney
Eighth Judicial Circuit

Law Enforcement Newsletter

JANUARY 2019

A Message from Bill Cervone State Attorney

As we start 2019 what I have to alert you to is much like a broken record. That means, of course, the upcoming legislative session, which this year is in March and April. Preliminary work for that has already begun, however, including legislative meetings that will set the stage for both budgetary and substantive law discussions in the next few months.

In terms of substantive law, the buzzword remains criminal justice reform, an amorphous concept that is ill defined at best. Regardless, the so-called reform movement is not just a local phenomenon. It is playing out across the country in multiple ways. In Florida, expect many legislative proposals ranging from increasing the threshold for Grand Theft versus petit theft to re-evaluating the meaning of 85% in terms of the portion of a prison sentence that must be served. Many of these proposals are actually going to be in their second year as they were put forth but did not pass last year. Some are innocuous - the last time the value limit for Grand Theft was addressed was in the 80s and few people could argue that $300 then isn't the same as $300 now. What 85% means and whether it should be changed, however, is a significant debate, as are other matters dealing with mandatory sentences and juvenile prosecutions. Anyone who is interested in these things should monitor the goings on in Tallahassee, either on line, through the SAO, or through your own associations, such as the sheriffs and police chiefs legislative panels.

A final problem as we enter the new year: Marcy's Law, the victim's rights constitutional amendment that was passed by voters in November, goes into effect on January 8th. It's impact may be wide reaching in even simple things like notification of victims that now has a far greater impact. To no small measure this is an agency problem as everything begins with arrest or complaint paperwork generated by individual officers and agencies. To comply with provisions of Marcy's Law we must be alert to preventing the dissemination of information identifying victims. One suggest is that a single sheet be generated with victim contact data and that there be no reference in any other document or report to any specific information. That would ease the problem of redaction. Each agency, however, must determine how it will comply. The SAO will be trying to co-ordinate all of that, and there will be both legislative and other statewide efforts underway to seek consistency. More information will no doubt follow as we all work to comply with what is now required.

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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.

Congratulations To...

ASA Zouzouko Doualehi, who became the proud father of baby Caleb on December 1st.

ASA Britanee McCausland, who passed the Florida Bar exam in September and has now been sworn in as a full Bar member.

Former Baker County Sheriff's Office Chief Deputy Chuck Brannan, who was elected to the Florida House of Representatives in November.

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

Password Production

G.A.Q.L., a juvenile, wrecked the vehicle he was operating while speeding. One of the passengers in his car died in the crash. At the hospital, the police had a blood test performed showing that G.A.Q.L. had a .086 blood-alcohol content.

After obtaining a search warrant for the vehicle, the police located two iPhones. One iPhone belonged to a surviving passenger. The surviving passenger told police that the group had been drinking vodka earlier in the day and that she had been communicating with the driver on her iPhone. The second phone, an iPhone 7, was alleged to have belonged to G.A.Q.L. The police obtained a warrant to search the phone for data, photographs, assigned numbers, content, applications, text messages, and other information. After obtaining a warrant to search this iPhone, the police sought a court order compelling the driver to provide the passcode for the iPhone and the password for an iTunes account associated with it. This was necessary, the State argued, because the phone could not be searched before receiving a software update from Apple's iTunes service. Thus, the State needed both the passcode to access the phone and the iTunes password to update it.

At a hearing on the motions, the State noted that the surviving passenger from the car crash had provided a sworn statement that on the day of the crash and in the days following the crash, she had communicated with the minor via text and Snapchat. The passenger had also told police that she and the minor had been consuming alcoholic beverages the day of the crash. As such, the State needed the phone passcode and iTunes password to obtain any possible [incriminating] communications between the defendant and the surviving passenger.

The defendant argued that compelling disclosure of the iPhone passcode and iTunes password violated his rights under the Fifth Amendment to the United States Constitution. The trial court disagreed and concluded in its order that the defendant's passcodes were not testimonial in and of themselves. The passcodes merely allow the State to access the phone, which the State had a warrant to search. On appeal to the 4th D.C.A. that order was reversed.

Issue:

Is requiring a suspect/defendant to provide and disclose the password to his cell phone testimonial in nature, and therefor protected speech under the 5th Amendment? **Yes**.

Compelled Production of Passcodes:

The Fifth Amendment to the United States Constitution states: "No person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. Const. amend. V; see also Fla. Const. Art. I, § 9. The Fifth Amendment prohibits the compelled production of an incriminating testimonial communication. See, *Fisher v. United States*, (S.Ct.1976). The Court explained, "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, (S.Ct.1988). As such, acts like furnishing a blood sample, providing a voice exemplar, wearing an item of clothing, or standing in a line-up are not covered by the Fifth Amendment protection, for they do not require the suspect to "disclose any knowledge he might have" or "speak his guilt." In other words, the Fifth Amendment is triggered when the act compelled would require the suspect "to disclose the contents of his own mind" to explicitly or implicitly communicate some statement of fact. *Curcio v. United States*, (S.Ct.1957).

A Supreme Court Justice utilized this analogy to describe the scope of the Fifth Amendment protection against self-incrimination: "A defendant may in some cases be forced to surrender a key to a strongbox containing incriminating documents, but I do not believe he can be compelled to reveal the combination to his wall safe—by word or deed." Applying this analogy to the act of producing documents in response to a subpoena, the Supreme Court observed, "the assembly of those documents was like telling an inquisitor the combination to a wall safe, not like being forced to surrender the key to a strongbox." *United States v. Hubbell*, (S.Ct.2000). *Thus, when the compelled act is one of testimony rather than simple surrender, the Fifth Amendment applies.*

Numerous cases have grappled with whether being forced to produce a phone password is more akin to surrendering a key or revealing a combination. Thus, courts have reasoned that revealing one's password requires more than just a physical act; instead, it probes into the contents of an individual's mind and therefore implicates the Fifth Amendment. More importantly, the very act of revealing a password asserts a fact: that the defendant knows the password. Thus, being forced to produce a password is testimonial and can violate the Fifth Amendment privilege against compelled self-incrimination. "Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Doe v. United States*, (S.Ct.1988).

Court's Ruling:

The 4th D.C.A. referenced a decision by the Second District that explicitly rejected the notion of passcode-as-combination under the *Doe* case analogy and determined that, although it did require the use of the defendant's mind, compelled unlocking of the phone via passcode was not a protected testimonial communication under the Fifth Amendment. The 4th D.C.A. in the present case disagreed.

"We find the Eleventh Circuit's decision in *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, (11th Cir. 2012) to be instructive. In that case, John Doe was served a subpoena requiring him to decrypt several hard drives in his possession. There, the court determined that compelled decryption of hard drives was testimonial in nature. In reaching this conclusion, the court noted that 'decryption and production would be tantamount to testimony by Doe of his knowledge of the existence and location of potentially incriminating files; of his possession, control, and access to the encrypted portions of the drives; and of his capability to decrypt the files.' Specifically addressing the 'key' and 'combination' analogy, the court likened the forced decryption to production of a combination because it is 'accompanied by ... implied factual statements' and utilized the contents of the mind with the *final objective not of obtaining the decryption for its own sake, but for the purpose of obtaining the* [incriminating] *files protected by the encryption.*"

"Thus, this case is analogous to *In re Grand Jury Subpoena*. Here, the State seeks the phone passcode not because it wants the passcode itself, but because it wants to know what communications lie beyond the passcode wall. If the [Defendant] were to reveal this passcode, he would be engaging in a testimonial act utilizing the 'contents of his mind' and demonstrating as a factual matter that he knows how to access the phone. As such, the compelled production of the phone passcode or the iTunes password here would be testimonial and covered by the Fifth Amendment."

"The State here seeks to force the [Defendant] to produce the passcode and iTunes password for an iPhone. To do so would be to compel testimonial communications in violation of the minor's invocation of his Fifth Amendment rights. See, *In re Grand Jury Subpoena.* … As such, we grant the [Defendant's] petition … and quash the order of the trial court."

Lessons Learned:

In essence the 4th D.C.A. was ruling that the State was not seeking the passwords "*for its own sake, but for the purpose of obtaining the* [incriminating] *files protected by the [passwords]*."

"The Fifth Amendment privilege can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, (S.Ct.1972).

The *In re Grand Jury* case referred to by the D.C.A. in the present case involved seeking a court order to require a defendant to decrypt his hard drive believed to contain child pornography. The 11th Circuit stated, "Even if the decryption and production of the contents of the hard drives themselves are not incriminatory, they are a 'link in the chain of evidence' that is designed to lead to incriminating evidence; this is sufficient to invoke the Fifth Amendment privilege. See, *Hoffman v. United States*, (S.Ct.1951) ('The privilege afforded [by the Fifth Amendment] not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would *furnish a link in the chain of evidence needed to prosecute* the claimant for a federal crime.'); see also *United States v. Hubbell*, (S.Ct.2000) ('Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory.' "

The touchstone of whether an act of production is testimonial is whether the government compels the individual to use "the contents of his own mind" to explicitly or implicitly communicate some statement of fact. *Curcio v. United States*, (S.Ct.1957).

G.A.Q.L. v. State
4th D.C.A.
(October 24, 2018)

Recent Case Law

Offense Against K-9

Two officers and a K-9, Kona, responded to a vehicle accident involving a juvenile, R.N. Kona was instructed to conduct an exterior narcotics search of the vehicle. Kona conducted the exterior search and alerted. Based on Kona's alert, the two officers conducted an interior search of the vehicle. When the officers began the interior search of the vehicle, R.N. interrupted them, "became loud and belligerent," and told them they "couldn't do that." The officers testified that the juvenile was "loud," "belligerent," and "disruptive." However, neither officer could identify the exact words the defendant used to distract Kona. And at no point was the juvenile closer than five to ten feet from Kona.

The officers warned the defendant two times to stop distracting Kona, and they ultimately arrested him. Both officers testified they conducted the search with no further interruptions or distractions after they made the arrest. The entire search lasted around five minutes. At trial the defendant argued that the State failed to show that defendant either maliciously harassed, teased, interfered or attempted to interfere with K-9 Kona. The trial court denied the motion to dismiss. On appeal, the 4th D.C.A. reversed that ruling and the defendant's conviction.

Issue:

Did the State establish that the defendant acted "in a knowingly malicious manner towards the police dog."? **No.**

The Definition of Malice in Section 843.19(4):

Section 843.19(4), F.S., states: "Any person who intentionally or knowingly *maliciously* harasses, teases, interferes with, or attempts to interfere with a police dog, fire dog, SAR dog, or police horse while the animal is in the performance of its duties commits a misdemeanor of the second degree, …"

"Maliciously" is not defined in the statute, so it "must be understood as a word of common usage having its plain and ordinary sense." *State v. Hagan*, (Fla. 1980); *State v. Mitro*, (Fla. 1997).

In law, malice can be defined in two ways. The first is legal malice, which means "wrongfully, intentionally, without legal justification or excuse." The second is actual malice, which means "ill will, hatred, spite, an evil intent."

In an earlier stalking case the D.C.A. explained that "we take the text of the statute 'as a whole.' And 'considering its context and the discernible purposes of the legislature, we concluded that the plain meaning of the statutory term *maliciously* is legal malice. We concluded that the statute used legal malice 'because the essence of this entire subsection is to criminalize the stalker who violates a court order prohibiting the contact with the subject.'"

Court's Ruling:

The D.C.A. found that the facts clearly reflect that "the police dog, Kona, was undeniably in the performance of its duties at the times in question. So, the issue is limited to whether the juvenile had the requisite intent under the statute. That analysis revolves around the word 'maliciously.'"

"A review of section 843.19, Florida Statutes, shows that different subsections within the section employ different terms. …Using different terms in different portions of the same statute can convey different meanings. …We have explained that using different terms in the same statute is 'strong evidence' that the terms have different meanings."

"Thus, the use of the legal definition of malice in section 843.19 (2), and the different use in section 843.19(4), is 'strong evidence' that the definition of malice in section 843.19(4) means actual malice. In other words, section 843.19(4) requires the State to prove beyond a reasonable doubt that the juvenile intentionally or knowingly *maliciously* harassed Kona, meaning with 'ill will, hatred, spite, [or] an evil intent.'"

On appeal the State argued that the statute provides: ". . . intentionally or knowingly *maliciously harasses*, teases, interferes with, or attempts to interfere with a police dog." Thus, the State argued the word "maliciously" modified only the act of harassing and not the acts of teasing or interfering with a police dog. In other words, the State did not

have to prove malice at all, only interference. The D.C.A. disagreed.

"We must apply the word maliciously in the statute, and we conclude it *modifies each of the words in the series that follows it.* In *Porto Rico Ry., Light & Power Co. v. Mor*, (S.Ct.1920), the Supreme Court explained that 'when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.' "

"Section 843.19(4), Florida Statutes, therefore, requires the State to establish that a defendant 'intentionally or knowingly *maliciously* harasses, [*maliciously*] teases, [*maliciously*] interferes with, or [*maliciously*] attempts to interfere with a police dog, fire dog, SAR dog, or police horse while the animal is in the performance of its duties.'"

Interpreting the facts with the law as stated the D.C.A. concluded, "The officers testified that the juvenile was 'getting loud and belligerent' and 'projecting his voice in the direction of the dog.' But neither officer could recall the words used by the juvenile. One officer testified the juvenile was six to eight feet from Kona, and the other officer testified the juvenile was five to ten feet from Kona. A witness testified the juvenile was about ten steps behind Kona during the incident."

"Although the State established that the juvenile 'interfered' with the police dog, more was required—evil intent or ill will. Thus, the motion for judgment of dismissal must be granted. REVERSED."

Lessons Learned:

In *Yarn v. State*, (2DCA 2013), the defendant intentionally rammed a police vehicle transporting a police dog. He was charged with Aggravated Battery on the deputy as well as Battery on a Police Dog. The defendant argued that while he was aware the vehicle he struck was a marked police vehicle he did not know there was a police dog inside. The D.C.A. reversed his conviction for Battery on Police Dog because the State did not prove he struck the police car with the *specific intent* of battering the K-9.

"To prove that Yarn intended to strike or harm the dog, it would be necessary to prove that Yarn knew a police dog was in Deputy Wolfinger's Tahoe. Yarn testified that he did not know there was a dog in the Tahoe he struck. He further testified that he did not pay attention to any markings on the vehicle and that he could not even see markings because all he could see were 'lights flashing everywhere.' He knew the vehicles were patrol cars, but he did not know what was in the vehicle he hit."

"The State's evidence showed that Yarn caused a head-on collision with the Tahoe. Deputy Wolfinger testified that his Chevy Tahoe had 'warning police K-9' on the side windows and back and rear window. But there is no evidence that Yarn ever saw the side or back of Deputy Wolfinger's Tahoe. Rather, Yarn hit the Tahoe head on, and there was no evidence that there were K-9 markings on the front. Yarn's testimony that he did not see any markings on the Tahoe because there were lights flashing everywhere is consistent with the State's evidence that the deputies' vehicles had their lights flashing. Based on the evidence presented, the State failed to prove that Yarn knew that there was a police dog in the vehicle he struck and that he *intended to strike or cause harm to the police dog*."

R.N. v. State
4th D.C.A.
(Nov. 7, 2018)

Miranda Waiver

Aaron Richardson was sentenced to time served and three years of supervised release for an unrelated offense. The sentence affected his enrollment at a university, so he sought to end the supervised release. Judge Corrigan denied the request. Richardson then set out on a crime spree which included burglary of a sporting goods store, theft of a rifle and ammunition, culminating in the attempted murder of Judge Corrigan by shooting into the judge's home while he was sitting in his living room.

Two days later Richardson was arrested for missing a court hearing. Police found the stolen rifle and noted that defendant had a fresh injury on his eye that looked like a "scope bite": an injury that occurs when a rifle's recoil causes the scope to strike the shooter's face. Finally, the police found a sham order with Judge Corrigan's forged signature that ostensibly pardoned Richardson's entire criminal history.

Defendant was ultimately taken to a local sheriff's office to be questioned by the FBI. An agent presented defendant with an advice of rights card, and the agent read the card aloud to him. After each line, the agent asked defendant if he understood and defendant either nod-

ded or said 'yes.' Richardson then refused to sign the waiver card but said he would answer questions. Richardson was ultimately indicted for 25 felonies.

Defendant's competency was then questioned, and the judge ordered a psychiatric evaluation. The judge later held a competency hearing finding Richardson competent to stand trial. The next day the judge held a suppression hearing regarding Richardson's statements to the FBI. The judge ultimately found that defendant was competent and recommended not suppressing the statements at issue. After trial the jury convicted defendant of twenty-four of the twenty-five counts in the indictment. The Court sentenced Richardson to 4,116 months' imprisonment. On appeal to the 11th Circuit, the suppression ruling was upheld, and the convictions affirmed. [The lesson is: don't try to kill a judge].

Issue:

Did the totality of the circumstances support the finding that the defendant's statements were voluntary and knowingly made? **Yes.**

Self-Incrimination:

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Absent certain procedural safeguards, a statement given during *custodial interrogation* is presumed to be compelled in violation of the Constitution. See, *Miranda v. Arizona*, (S.Ct.1966). To overcome that presumption of compulsion, the person in custody must be advised of certain rights:

"You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to speak to an attorney, and to have an attorney present during any questioning. If you cannot afford a lawyer, one will be provided for you at government expense."

However, there is no magic to the form or sequence of the warnings, as the Supreme Court has stated, "We have never insisted that *Miranda* warnings be given in the exact form described in that decision. Reviewing courts therefore need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably convey to a suspect his rights [in a general fashion] as required by *Miranda*." See, *Duckworth v. Eagan*, (S.Ct.1989); *Florida v. Powell*, (S.Ct.2010).

The person in custody may then waive his rights, but to be an effective waiver it must be made voluntarily, knowingly, and intelligently. Thus, merely reading *Miranda* rights followed by threats or promises directed at the suspect, or his immediate family members, will not be viewed as a voluntary waiver. The 11th Circuit previously ruled, "... certain promises, if not kept, are so attractive that they render a resulting confession involuntary . . . A promise of immediate release or that any statement will not be used against the accused is such a promise." Thus, "if the government feeds the defendant false information that seriously distorts his choice . . . then the confession must go out." *U.S. v. Lall*, (11th Cir.2010). Thus, the rule is, "If the Government violates a person's right against compelled self-incrimination, then generally the compelled statements must be suppressed." *Missouri v. Seibert*, (S.Ct.2004).

In the present case the U.S. Court of Appeals found that Defendant's constitutional right against compelled self-incrimination was not violated, so his statements need not be suppressed. Once the *Miranda* protections attach as a result of incustodial interrogation, and the *Miranda* warnings have been given, the police are not obligated to stop asking questions. *Berghuis v. Thompkins*, (S.Ct.2010). Rather, the suspect must affirmatively either invoke or waive his rights. A waiver can be implied when, as here, the suspect is advised of his rights and acts in a manner inconsistent with the exercising of those rights. The Court reasoned that because Defendant answered the FBI's questions, there was at least an implied waiver of his Fifth Amendment rights.

Court's Ruling:

The Court of Appeals stated the issue as whether the waiver was effective in light of Defendant's mental health history. "Although a waiver must be made voluntarily, knowingly, and intelligently, the Supreme Court has essentially bifurcated the analysis into whether the waiver was: (1) uncoerced (i.e. voluntary), and (2) made with the requisite level of comprehension (i.e. knowingly and intelligently). See, *Moran v. Burbine*, (S.Ct. 1986). When performing the analysis, courts evaluate the totality of the circumstances."

"Defendant's waiver was voluntary. This Court has previously recognized that 'a mental disability does not, by itself, render a waiver involuntary.' Instead, courts look to see whether there was coercion by an official actor; for example, if police take advantage of a suspect's mental

disability. The only mention of Defendant's mental health at the suppression hearing came when Defendant's attorney asked an FBI agent if he knew that part of Defendant's prior supervised release 'had involved mental health treatment.' The agent responded that at the time of the interrogation, 'I don't believe I knew that.' The agent then explained that he learned of Defendant's mental health problems while preparing for trial. Based on the record before us, the [trial] court did not err by concluding that Defendant's waiver was voluntary."

"Nor did the [trial] court err by concluding that Defendant's waiver was made knowingly and intelligently. When determining whether a waiver was competently made, courts consider mental health as part of the totality of the circumstances. To do so, we 'rely on the objective indicia of a defendant's mental state.' The objective indicia here support the [trial] court's conclusion that Defendant was sufficiently competent to waive his rights. The record shows that an FBI agent read all the *Miranda* rights to Defendant, and after each line Defendant acknowledged his understanding. Defendant even asked clarifying questions (which the agents answered) and carried on a conversation with his interrogators. Near the end, Defendant observed that he knew the video recording of his answers could be used in court and that 'I can ask for an attorney but I haven't said anything incriminating.' Based on this record, the [trial] court did not clearly err by finding that Richardson had the capacity to waive his *Miranda* rights."

"For these reasons, we affirm the [trial] court's conclusion that Defendant's constitutional rights were not violated and therefore his statements need not be suppressed."

Lessons Learned:

While the Supreme Court has stated there is no magical formula to the *Miranda* rights as set out in that seminal case, to neutralize a suppression motion a more expansive version of those warnings can be read:

You have the right to remain silent and refuse to answer questions. Do you understand?

Anything you do say may be used against you in a court of law. Do you understand?

You have the right to consult an attorney before speaking to the police *and to have an attorney present during questioning now or in the future*. Do you understand?

If you cannot afford an attorney, one will be appointed for you before any questioning if you wish. Do you understand?

If you decide to answer questions now without an attorney present you will still have the right to stop answering at any time until you talk to an attorney. Do you understand?

Knowing and understanding your rights as I have explained them to you, are you willing to answer my questions without an attorney present?

While it is common practice, it should be remembered that the last question posed, "With your rights in mind, are you willing to answer any questions right now ..." is not required by the Supreme Court's ruling in *Miranda v. Arizona*. Once the suspect acknowledges that he understands his rights the officer can proceed with his questions.

In *Berghuis v. Thompkins*, (S.Ct.2010), the Court ruled that merely sitting mute after acknowledging *Miranda* rights does not invoke the right to stop police questioning. Instead the Court ruled, "If Thompkins wanted to remain silent, he could have said nothing in response to [the detective's] questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation." In other-words, the Court held that unless and until the suspect affirmatively asserts his desire to remain silent his subsequent silence does not end police questioning. His ensuing statements can be used in court and police may continue questioning him until he actually states that he wants a lawyer or to remain silent. The mere act of remaining silent is, on its own, insufficient to imply the suspect has invoked his rights.

Lastly, remember this simple caution from the Florida Supreme Court, "Whenever constitutional rights are in issue, the ultimate *bright line in the interrogation room is honesty and common sense*." *Almeida v. State*, (Fla. 1999).

United States v. Richardson
U.S. Court of Appeals, 11th Cir.
(May 1, 2018)

Legal Basis for Lawful Stop

A dispatcher from a Police Department received a 911 call mid-day from a person identifying herself as owning a restaurant. The caller reported that drug dealers were on the corner. She described them as three black males, two of whom were wearing white t-shirts. She did not describe any drug selling activity, but she said that as soon as they

would see a police vehicle, they would disappear and come back immediately.

An officer with some familiarity with the neighborhood, which she described as a high crime area, was dispatched to investigate a "suspicious person" call. According to the officer, she was told that there were three black males on the corner of 7th and Sapodilla possibly selling drugs. They were wearing t-shirts and shorts. When the officer and her partner got to the corner, she observed one adult black male in a white t-shirt. When this individual saw the police vehicle, he began walking to the rear of the building, an apartment complex. There were no other persons in the area. The officer followed. As the officer rounded the corner, she saw two black juvenile males, wearing no shirts. The officer recognized J.H., because he had been in the area on a prior call to which she had responded. The officer knew that J.H. lived in the apartment complex.

When the juveniles saw the officer, they began walking down the alley in the other direction. Then they saw another officer at the other end of the alley. At that point, they reached into their pockets, and the first officer ordered them to stop because she was nervous for her safety and that of other officers on the scene. The officer ordered J.H. to walk towards her and to take his hands out of his pocket. As he approached her, she saw a container in his hand. It was a white, cylindrical container with a red cap and appeared to be a Krazy Glue container with the label off. Based on her training and experience, she knew that these containers are commonly known to hold crack cocaine. She conducted a pat-down search of J.H. for weapons and found a handgun. She then arrested him. Prior to seeing the Krazy Glue container, the officer had witnessed no criminal behavior by J.H.

The trial court denied the motion to suppress. On appeal, the 4th D.C.A. reversed the trial court's ruling.

Issue:

Were the officer's observation coupled with the citizen informant's information sufficient to warrant an investigatory stop? **No**.

Investigatory Stop:

There are three levels of police-citizen encounters: consensual encounters, investigatory stops, and full-blown arrests. See, *Popple v. State*, (Fla. 1993). "During a consensual encounter a citizen may either voluntarily comply with a police officer's requests or choose to ignore them. Because the citizen is free to leave during a consensual encounter, constitutional safeguards are not invoked. During the second level of police-citizen encounter, an investigatory stop is involved. Police 'may reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime.' It 'requires a well-founded, articulable suspicion of criminal activity.' "

Where an officer ordered a juvenile suspect to get off his bicycle and sit down on the curb the court found that the juvenile had been seized at that point. "Under these circumstances, a reasonable person would not feel free to end the encounter and walk away and the officer's orders thus converted the consensual encounter into a stop. Since the stop was not supported by reasonable suspicion, the incriminating evidence [gun] was subject to suppression." *A.L. v. State*, (4DCA 2014).

To justify an investigatory stop, the officer must have a reasonable suspicion that the person detained has committed, is committing, or is about to commit a crime. F.S. 901.151(2). "The officer must possess a well-founded and articulable suspicion of criminal activity, rather than an unsubstantiated and unparticularized suspicion or hunch." Reasonable suspicion requires "some *factual foundation* in the circumstances observed by the officer, when the circumstances are interpreted in the light of the officer's knowledge." The court determines the stop's legitimacy by considering the *totality of the circumstances* surrounding the stop. An officer's reasonable suspicion justifies an investigatory stop even if there is no probable cause to justify an arrest. The courts define reasonable suspicion not by what it is, but by what it isn't. It is something more than a "mere hunch," but "considerably less" than a probable cause. A "mere hunch" is a suspicion based on bare intuition (police officer's 6th sense) without the ability to verbalize supporting facts.

Relevant to the present case is the Supreme Court's ruling that, "Tips from known reliable informants, such as an identifiable citizen who observes criminal conduct and reports it, along with his own identity to the police, will almost invariably be found sufficient to justify police action." However, as the 4th D.C.A. pointed out, "founded suspicion is

dependent on both the informant's reliability and the *content of the information* she relays; courts consider both factors in determining whether the totality of the circumstances justifies a stop." *Ford v. State*, (2DCA 2001) (citing *Alabama v. White*, (S.Ct.1990)).

Court's Ruling:

The D.C.A. compared the facts of the present case with those in *Ford v. State*. In that case a citizen informant approached police and stated that she had just seen a black man approach an older white man in front of a store. The white man put something in his pocket and handed the black man cash. The informant believed she had witnessed a drug transaction. Officers located Ford, the white man, and they stopped him, searched him, and found drugs. In overturning the denial of a motion to suppress, the Second District determined that the citizen's information did not provide a founded suspicion to stop Ford. The only information that the citizen conveyed was observing a white man hand a black man money and receive something in return, *activity which was as consistent with legal behavior as it was with a drug transaction.* Thus, the officers did not have a founded suspicion to detain Ford.

"Applying the analysis of *Ford* to this case, the information provided by the citizen informant was that three drug dealers, who were black men, were standing on the corner near her restaurant. The informant did not state how she knew they were drug dealers, nor did she state that she saw them selling drugs. At least two were wearing white t-shirts. They would move up and down the block, and when they saw a police vehicle, they would disappear, only to reappear after the police vehicle passed. This information does not describe any criminal activity at all, whether it is information supplied by a citizen informant or witnessed by police. 'A hand-to-hand exchange can warrant a detention when a law enforcement officer sees what transpires and his training and experience lead him to believe he has witnessed a drug transaction.' However, if an officer merely saw individuals, whom the officer knew were involved with drugs, standing on a corner, and the only other activity that the officer witnessed were those individuals disappearing when a police vehicle passed, the officer may have a *bare suspicion but not a founded suspicion that criminal activity was occurring."*

Though the officer testified that she knew J.H. lived in the apartment complex she did not testify that J.H. was known to have previously engaged in drug dealing. "The fact that J.H. began to walk away from the officer, until he saw the other officer coming up the alley from the other direction, does not add anything to support founded suspicion, because '**reasonable suspicion of criminal activity is not established simply because a defendant leaves the scene when an officer nears**.' *R.J.C. v. State*, (4DCA 2012). While 'headlong flight' from an officer in a high crime area may warrant founded suspicion to justify a *Terry* stop, see *Illinois v. Wardlow*, (S.Ct.2000), this was not 'headlong flight.' See also *Lee v. State*, (4DCA 2004) (finding no evidence of 'headlong flight' where man walked quickly away from other suspects when police arrived, but there was no other suspicious activity). J.H. was walking away from the officer in an alley in which his home was located."

"The officer ordered J.H. to stop and then ordered him to take his hands out of his pocket before the officer observed the glue container which she testified was indicative of a drug container. She had no founded suspicion of criminal activity prior to seeing the container. In fact, she testified that she had seen nothing to suggest criminal behavior before seeing it. Thus, J.H. was detained when the officer ordered him to stop. Because the officer had no founded suspicion of criminal activity, the stop violated the Fourth Amendment. We therefore reverse..."

Lessons Learned:

Testimony supporting an investigatory stop should always relate back to the deputy's experience knowledge, and training.

For a LEO to justify an investigatory stop he must be able to verbalize facts that support a reasonable belief that criminal activity is afoot. Very often the difference between a mere hunch and reasonable suspicion is three to five minutes. When observing suspicious activity, maintaining one's position and visual surveillance of the suspect for 3 to 5 minutes, rather than rushing into effect the stop, will usually provide additional facts to support the resultant investigatory stop. It is necessary to support your instincts with facts that can be testified to at a motion to suppress.

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4th D.C.A.
(Oct. 31, 2018)