

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

WILLIAM P. CERVONE, STATE ATTORNEY

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A MESSAGE FROM

STATE ATTORNEY

BILL CERVONE

While it seems like just yesterday that we were all celebrating the arrival of a new millennium - and waiting for the supposed Y2K bug that never arrived - here it is 2003 already. Though a bit late, Happy New Year to each of you and to all of your families.

The start of each year is always a time for looking back as well as forward. From my perspective, as I've often said in the past, we do best when we focus on the future but we need to do that with the benefit of what we have learned from the past. There are a couple of areas that I always look at in gauging where we've been and where we're going and although I don't have final numbers on 2002 cases and trials yet, I am encouraged by what I do know.

To start with, I usually look at our success rate in felony trials as an indicator of whether or not we are making good cases, trying them well, and generally succeeding in our

mission. Trials and convictions are, of course, not a perfect measure of this for many reasons. No matter how good the police work or the lawyering, cases are still largely won or lost on the basis of the available evidence more than anything else, and we cannot always control that. There is also never going to be a way to totally understand much less deal with the idiosyncrasies of juries. In addition, it is not only unrealistic to expect to win every trial, it would also, to me, not necessarily be a good sign if we did. An attorney who claims never to lose a trial is probably not trying anything even close to a debatable case. In my view, while we should certainly win the majority of the cases we choose to try, we should also be trying cases that are by no means certain convictions. In the right circumstances, those cases, those victims, and those defendants deserve their day in court just as much as the sure winner cases, and if we aren't trying them then we are short-changing the entire criminal justice system.

All of that is to say that early figures for 2002 felony trials indicate a

good year, especially in the months from July through December. In addition, we have consciously decided to put more emphasis on violent offenders, and the result has been a significant number of enhanced sentences, both before and after trial. My goal for 2003 is to continue this approach. With your help, we can learn from both our successes and our failures and improve what we do even more.

That leads me to one last point. I am convinced from what I see that relationships throughout the 8th Circuit law enforcement community have never been better than they are now. Communication is the key to that. Please let me hear from you with your issues and concerns. If you can't reach me, call Jeanne Singer, my Chief Assistant, Paul Usina, my Chief Investigator, or Spencer Mann, my PIO. If we keep talking to each other we will all do a better job.

SAO PERSONNEL CHANGES

ASA **JOHN BROLING** has been reassigned to Bradford County to take the position formerly held by **MELISSA RICH**, who left in November to enter private practice in Naples/Ft. Myers.

Bradford County ASA **MARK MOSELEY** has returned to

Gainesville to cover **JOHN BROLING'S** felony caseload and other special assignments.

Gainesville ASA **OMAR HECHAVARRIA** has transferred to the Starke Office as the lead ASA.

Trenton ASA **PHIL PENA** has been reassigned to Gainesville inheriting **OMAR HECHAVARRIA'S** felony caseload.

Gainesville felony assistant **KRISTIN SLAUGHTER** has transferred to the Trenton Office to handle Gilchrist County.

New ASA **GABE HAMLETT**, who has been with the Ocala SAO for several years, will replace Levy County ASA **TODD HINGSON**, who left to take a position in the Third Circuit SAO.

New ASA **GREG WILSON**, a December UF Law grad, has been assigned to the Alachua County Misdemeanor Division.

Also, new ASA and recent UF Law grad **BYRON FLAGG** starts in January in the Alachua County Juvenile Division.

ASA **KIRSTIN STINSON** is shifting out of her current felony traffic position and into **KRISTIN SLAUGHTER'S** felony domestic and sex crimes position.

ASA **KEVIN ROBERTSON** has moved into the felony

traffic position previously held by **KIRSTIN STINSON**.

Misdemeanor Domestic Violence ASA **JOSH SILVERMAN** moves to ASA **STEVE WALKER'S** misdemeanor traffic position and **STEVE WALKER** moves to **KEVIN ROBERTSON'S** felony drug division.

Misdemeanor ASA **RICH CHANG** has been reassigned to **BRANDE SMITH'S** misdemeanor traffic caseload now that she has left the office for full time motherhood.

CONGRATULATIONS!

On December 2, the Fraternal Order of Police Gator Lodge 67 presented its **Law Enforcement Officer of the Year Award** to Alachua County Sheriff's Deputy **JEREMY ECKDAHL** at the first annual Law Enforcement Gala held at the Sheraton Hotel in Gainesville.

Others nominated included Officer Richard LaLonde of the Gainesville Police Department, Officer David Ferguson of the Florida Fish and Wildlife Conservation Commission, Sergeant William H. Brown of the Starke Police Department, and Investigator Ernest B. Hale of the University of Florida Police Department.

CUSTODY FOR MIRANDA

PURPOSES

The Defendant was a passenger in a car stopped for suspicion of drugs. A detective arrived and asked to speak to the Defendant about an unrelated robbery advising him that he was a suspect. The Defendant agreed to accompany the detective back to the station for an interview. Pursuant to police policy, the Defendant was cuffed and placed in the back of a marked unit for transportation.

At the station, the Defendant was placed in a ten by ten room and his cuffs were removed. He was provided with food and drink. The Defendant made statements to the detective. No Miranda warning were given. The Defendant was transported back home after the interview.

The Defendant was subsequently charged with a robbery and moved to suppress his statements to the detective because he was not given Miranda warnings prior to questioning. The Fourth DCA in **McDougle v St suppressed** the statements holding that the Defendant was in custody and should have been Mirandized prior to the interrogation.

In determining whether a reasonable person would consider himself to be in custody, the court advised that four factors should be considered: how the police summoned the suspect for

questioning; why , where, and how the subject is questioned; the extent to which the police confront the suspect with evidence of his/her guilt; and whether the police inform the suspect that he/she is free to leave.

Here, the court found that the police summoned the Defendant from a vehicle stopped by police for an unrelated matter. The Defendant was handcuffed and transported to the station, placed in a small interview room and confronted with certain facts relating him to the crime, and advised that he was a suspect. And finally while the detective testified that the Defendant was free to leave, he never advised the Defendant of that.

**FORFEITURE ADVERSARIAL
HEARING-STRICT TIMELINES**

**By STEVE BRADY
Regional Legal Advisor
FDLE, Orlando**

As part of an ongoing money laundering investigation, Homestead Police Department (HPD) seized \$380,000.00 from Wayne Chuck. Respondent (Chuck) wrote HPD and requested an adversarial preliminary hearing. HPD immediately filed a pleading with the court asking that a preliminary hearing be scheduled within 10 days or as soon as practicable. This request, made on

November 28, 2001, was in accordance with the forfeiture statute. The court set the hearing for December 17. Chuck moved to have the forfeiture proceeding dismissed because the hearing did not take place within 10 days of HPD receiving his request for an adversarial preliminary hearing. The judge denied Chuck's motion.

Incredibly, the appellate court in **Chuck v in re forfeiture of \$380,000.00** reversed and ruled that the motion to dismiss the forfeiture should have been granted. The Court recognized that HPD did everything it could to make sure the hearing took place within 10 days. But they chastised the judge for setting the hearing 19 days after HPD filed its petition, despite the fact that he was in jury trial and could not schedule the hearing any sooner. So because the judge was unable to conduct the preliminary hearing within 10 days as stated by statute, Chuck got to keep his \$380,000.

A motion for rehearing is pending, but for the time being, the case stands. This is not just a "judge" problem. First of all, remember that the 10 day period starts to run when the request for a hearing is received by the seizing agency. Secondly, a judge is not assigned the case (and therefore cannot schedule a hearing) until

the seizing agency files a petition for forfeiture. However, a petition cannot be filed until the seizing officer or agent provides the attorney filing the case with a sworn affidavit. Therefore, it is imperative that the affidavit should be prepared as soon as property is seized in expectation of the owner asking for a hearing. Seizing officers should not wait until the request is actually made before preparing the affidavit since any delay in getting the affidavit to the agency attorney cuts into the 10 day period. Once the request for hearing is made, the agency attorney should seek a hearing within the time frame, making it an "emergency hearing" if need be, citing to this case as the grounds for the expedited handling of the issue.

SEARCH AND SEIZURE UPDATE

Tampa police observed three males standing by a building with a large cloud of smoke smelling of cannabis enveloping them. Officers saw one of the men smoking a joint and discarding a plastic baggie apparently containing cannabis; another man was seen also discarding a plastic baggie apparently containing cannabis; the third man, the Defendant Green, was not seen with any apparently illegal substances or paraphernalia,

he simply stood there.

Officers requested identification from each and advised that they were not free to leave. The other two men were arrested and Green was patted down for "officer safety" even though the officer did not suspect Green was dangerous or had a weapon. During the search, Green put his hand down his groin area. The officer asked Green if he had any drugs on his person and he said yes. The officer removed a pill bottle containing crack from Green's person and he was arrested. The officers also took car keys from him and he acknowledged that there were drugs in his car nearby. Officers recovered additional marijuana from the car.

The Second DCA in Green v St suppressed all of the drugs found on the Defendant's person as well as in his vehicle reasoning that the officers had no basis for search of the Defendant when they first saw him as he was simply standing with the other men and did or said nothing to give the officers probable cause to believe he possessed illegal drugs. The Court further ruled that the pat down search was illegal because there was no reason to believe that he possessed a weapon. The Defendant's statements admitting he was carrying drugs both on his person and in the car were involuntary, and nonconsensual as being the product of the illegal

pat-down.

POLICE TRICKERY

Detective Cahir suspected Defendant McCord of multiple robberies in the Palm Beach area where bricks were used to smash the front doors of convenience stores at gas stations. McCord became a suspect when he was stopped with a brick and bag while casing an Amoco station.

Cahir followed the Defendant around hoping to catch him in the act. Eventually McCord was arrested on unrelated charges and was in the county jail where the detective came to interview him. Cahir Mirandized the Defendant and advised him that he was a suspect in a rape investigation that had occurred at the same location of McCord's car on a certain date. This story was a complete fabrication as there was no rape or rape investigation. The detective convinced McCord to provide a saliva sample to exclude him from the "rape investigation". Cahir wanted the sample to make a DNA comparison with blood recovered from one of the scenes of the robberies. McCord was never told he was a suspect in the robberies.

McCord moved to suppress the DNA evidence which had linked him to one of the robberies and the Fourth DCA **agreed**, holding in St v

Green that the consent was involuntary and obtained in violation of due process as a result of the Detective's deceit. The Court distinguished deceit used in extracting a confession and that which seeks "consent" to search explaining that in confession deceit, the emphasis is on whether the deceit renders the confession unreliable, where in consent deceit, the issue is "fairness".

The Court held that the officer's deception undermined the voluntariness of the Defendant's consent.

CONSENT TO ENTER

The Second DCA has held recently in Moore V St that the warrantless search of a house was not supported by valid consent to enter where the unknown third party answering the door did not reasonably possess common authority over the premises to grant consent.

Tampa police were tipped off anonymously that drug activity was going on at a Tampa public housing apartment and that a mustang would arrive at the apartment in furtherance of the activity. Police staked out the apartment and saw the car arrive driven by a man with a paper bag. The man met a woman who had emerged from the apartment.

Police knew that Moore was at the apartment frequently although he was not on the lease. Only a woman and her two children were listed as legal tenants. Officers decided to "knock and talk".

A large man answered the door knock with either a "come in" or "I have no problem". The officers knew that this man was not Moore, whom they subsequently found in an upstairs bathroom. Two other people were found downstairs but none of these people were listed on the lease either. Police observed in plain view currency lying on the couch.

No one claimed ownership of the money and officers seized it. Moore stated he needed to go upstairs for something and the officers followed. As the officer passed the bathroom, he saw plastic baggies of cocaine. Moore was arrested for possession.

The Court held that the consent to enter was unlawful. "An officer cannot always assume that the invitation to enter is authorized by a rightful occupant."... 'the mere fact that an unknown person opens the door when a officer knocks cannot, standing alone, support a reasonable belief that the person possesses authority to consent to the officer's entry.'". The Court pointed out that the officer did not know the status of the man responding; or his connection to the apartment.

**DRIVING WHILE LICENSE
SUSPENDED OR REVOKED**

By ASA Steve Walker

It seems that nearly all law enforcement officers, regardless of agency, rank, or assignment, write citations for DWLSR. While it is clear that the 1998 amendment to F.S. 322.34 requires that the State prove the Defendant was knowingly driving while his/her license or privilege to drive was suspended, revoked, cancelled, or disqualified, what is not so clear is what evidence is required to prove that the Defendant had knowledge.

According to F.S. 322.34, the knowledge requirement is satisfied if the person has been previously cited, the person admits knowledge, or the person has received notice. It is important to note that the driver's license record of a person may indicate that notice of a suspension or revocation was given pursuant to F.S. 322.251. This statute deals with the requirements placed on the DHSMV for notifying drivers that their license has been suspended or revoked. An indication that notice has been given does NOT satisfy the knowledge requirement that notice has been received.

The above mentioned problem is cured, in part, by a rebuttable presumption that

the knowledge requirement is satisfied if a judgment or order appears in the DHSMV records. However, this presumption only applies to cases that do not fines or for some other violation of a financial responsibility.

involve a suspension for failure to pay traffic In cases involving a suspension for failure to pay traffic fines or for violation of some other would not apply and we would have knowledge financial responsibility the presumption through a prior citation, an admission of knowledge, or proof that the person actually received knowledge. Understanding what may be the impossibility of proving the former, because the person may not have been previously cited, and the difficulty are stuck with what is in the middle.

The single best way to satisfy the knowledge requirement is through the Defendant's own of to prove proving the latter, we spontaneous or post-Miranda statement that he/she in fact has knowledge that his/her license is suspended or revoked. Short of that, a spontaneous or post-Miranda statement that he/she has been previously cited and/or received notice would suffice. A statement to the effect that any manner of proving knowledge has in fact been accomplished will prevent the Defendant from claiming there is some sort of mix up

with the DHSMV and/or US Postal Service, a claim that will fall on the sympathetic ears of six people who have had to deal with both of those agencies. Obtaining any one of these statements will certainly go a long way in proving a DWLSR before the judge or jury. Placing these statements on your UTC or sworn complaint/arrest mittimus will go a long way in securing guilty pleas and preventing these cases from clogging up the system.

URINE AND IMPLIED CONSENT

By ASA Walter Green

The Second DCA's opinion in St V Bodden has necessitated a change in procedure for law enforcement in this area while that case is being appealed. Bodden held that FDLE was required to make rules for the testing of urine in DUI cases, and that the results from any urine test taken under Implied Consent cannot be used in court.

Therefore law enforcement is directed to the following procedure:

- a. read implied consent warning for the breath sample.
- b. ask for a voluntary urine test (if drugs are suspected.)
- c. Read the implied consent warning if the

Defendant refuses to give a urine sample voluntarily.

If the Defendant volunteers the sample without the implied consent warning, then the results are likely to come in. If the Defendant refuses, then that refusal should be admissible. There is established case law finding that for license suspension purposes, the Defendant cannot argue that the test he refused to take was not an approved test. We have been pretty successful arguing that the refusal should come into evidence in the DUI trial as well. If they only give the sample after the implied consent warning is given, then the court battles begin.

FOR COPIES OF CASES...

For a copy of the complete text of any of the cases mentioned in this or an earlier issue of the Legal Bulletin, please call ASA Rose Mary Treadway at the SAO at 352-374-3672.