STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT
WILLIAM P. CERVONE, STATE ATTORNEY

Legal Bulletin 2007-01 **January 2007**
Editor: Rose Mary Treadway

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

Happy New Year to each of you. I hope that your holidays were restful, quiet and enjoyable and that you and your families have a wonderful and safe 2007.

The start of a new year is always a time for reflection on where we've been and planning for where we hope to be. In looking back at 2006, there are, as always, successes and failures for all of us, hopefully more of the former than the latter. The execution of Danny Rolling, in particular, should remind us of not only the importance of what we do but also the necessity of perseverance as we go about our jobs. We should always look at the ultimate goal of making our communities a safer place and the lives of our citizens better, and we should always seek to do so with the highest of ethical and professional standards. After all, if those of us in law enforcement don't scrupulously follow the rules, how can we expect anyone else to?

In 2007, there will be several changes in focus for the SAO. Those of you in the Circuit's regional counties will, for example, see more of our senior ASAs in your counties assisting with serious cases. As all of our counties continue to grow, the day when we could expect one or two Assistants to handle everything in a county have gone the way of the days when we tried to serve those counties without a local office and staff. Limited resources prevent assigning additional positions to the regional counties, so enhancing services through assistance as needed from the main office in Gainesville is the best solution.

Across the board we will also be directing attention to the rising number of serious homicides and violent robberies that seem to be occurring not just in our Circuit but state and nationwide. The reasons for

those increases are subject to conjecture and debate, but our response is not. Within the constraints of the law and the evidence, we should be as vigorous in prosecuting those who do real harm to our communities as possible.

Speaking of limited resources, beginning with this issue of the Legal Bulletin, we will change to a three rather than four times a year schedule. The next issue will be in May rather than April, as in the past. If your agency is interested in electronic distribution, please let me know—I would like to move us in that direction. We will also provide any live training on any topic that any agency might want- just give us a call.

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SAO PERSONNEL CHANGES

JENNIFER LANGSTON has joined the SAO-Gainesville as an Investigator. Jennifer most recently worked as a detective for the Department of Financial Services Fraud Division and the State Fire Marshall's Office.

ROGERS WALKER, **FRANK SLAVICHAK** and **CHRISTINE CHRISTY** have joined the SAO as Assistant State Attorneys. Rogers is a December graduate of the University of Florida Law School and a former intern with the office. Frank is also a UF Law grad and has been with the Public Defender's Office for several months. Christine is a graduate of the FSU Law School. Rogers and Frank will be in the County Court division in Gainesville and Christine will be assigned to County Court in Levy County.

ASA **BRIAN KRAMER,** formerly temporarily assigned to Trenton, has returned to Gainesville in a felony position.

ASA **JOSH SILVERMAN** has resigned his Gainesville felony position to enter into private practice. Josh's caseload will be assumed by **ZACH JAMES**, who has been transferred from a misdemeanor/traffic position to felony.

ASA **VIC SAINI** resigned his Gainesville misdemeanor position in December as did **STACEY STEINBERG** in November. Vic is pursuing other academic interests, and Stacey has re-located to South Florida.

ROBERT WILLIS re-joined the office in December and will handle all cases in Gilchrist County as the lead attorney there.

CONGRATULATIONS!

PAUL CLENDENIN of the University Police Department has been promoted to Lieutenant.

Detective **MATT BARR** of the Alachua County Sheriff's Office has retired after serving 26.5 years with the agency.

In November, Retired ASO Sheriff **STEVE OELRICH** was elected State Senator for District 14, encompassing Alachua, Bradford, Columbia, Gilchrist, Union, Marion, Levy and Putnam Counties.

Also in November, former Gainesville Police Department Captain **SADIE DARNELL** was elected Alachua County Sheriff replacing interim Sheriff Dale Wise who replaced Retired

Sheriff Steve Oelrich.

In October, the Gainesville Exchange Club recognized ASO deputies **TOM LATIMER** and **AARON BRAMI** as Officer of the Year award recipients.

In December, the City of High Springs recognized High Springs Police Sergeant **GORDON FULWOOD** as Employee of the Year.

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FLORIDA CASE LAW

RETENTION OF ID DURING WARRANT CHECK

NOTE: The written opinion in this case includes a detailed review of Fourth Amendment requirements in various situations of so-called consensual encounters. Copies of this opinion can be requested from the SAO or found at 31 FLW 835.

In December, the Florida Supreme Court held that under the totality of the circumstances, Fourth Amendment Constitutional safeguards were not implicated when, during the course of a consensual encounter, an officer held the identification that the defendant had voluntarily provided while the officer checked for outstanding warrants.

Officers were patrolling in Daytona Beach in an area well known for prostitution and narcotics traffic. The officers had been dispatched to conduct field interviews of possible prostitutes and others in this area. Upon seeing a group of approximately five men on a street corner, the officers parked on the opposite side of the street, exited their vehicle, walked across the street and approached the group. As the officers approached, some began to leave the area, but at least one (Golphin) ultimately remained to speak with the officers.

One officer approached Defendant Golphin, who never attempted to walk away. The officer requested Golphin's identification, which he voluntarily provided, and the officer commenced a computer check for outstanding warrants. An officer who was part of a K-9 unit also arrived on the scene as the events were unfolding, although apparently after identification had been consensually produced.

After the officer had initiated the computer check, but prior to obtaining any results, Golphin made a statement that he might have an open warrant. The system reported that there was an outstanding warrant and Golphin was arrested. The K-9 officer then assisted with the search incident to arrest, which revealed drugs giving rise to the charges.

Golphin moved to suppress the drugs arguing that the encounter was not consensual and that he had been unlawfully seized when the officer held his ID while initiating the computer check process. Golphin further argued that the unlawful seizure resulted in the discovery of the arrest warrant, subsequent arrest, and incidental search which revealed the drug evidence. The trial court upheld the

search and seizure, which was appealed to the Fifth DCA who also upheld the trial court finding the search was lawful. This Fifth DCA opinion conflicted with a holding from the Fourth DCA and the Florida Supreme Court then ruled in **Golphin v State** siding with the Fifth DCA in upholding the trial court's ruling as proper.

The Florida Supreme Court held that the encounter was consensual and not a seizure even though the officer held onto the ID while checking for warrants. The Court stated that while a noncompulsory request for an individual's ID has been unlikely to implicate the Fourth Amendment in isolation, the retention of ID during the course of further interrogation or search certainly factors into whether a seizure has occurred.

Here, Golphin's encounter with the police was consensual in nature, and did not mature into a seizure on the facts presented simply by virtue of the officer retaining and using Golphin's ID to conduct a warrant check . The officers approached a group of men in a casual manner, without use of sirens, lights, or weapons, and without blocking the egress from the area. Some of the men opted not to talk with the officers and walked away. Golphin interacted primarily with a single officer in a casual manner. Golphin was polite and cooperative throughout the encounter. The Court noted that Golphin's ID was not retained while seeking consent to search his person or effects, nor was there any threats or intimidation. The defendant did not manifest any desire to leave, nor did he request that his ID be returned. Upon finding an outstanding warrant, the officer was obligated by judicial order to arrest the defendant wherever he was located. The search incident to that arrest was lawful. The discovery of the arrest warrant, the arrest of the defendant, and the subsequent search incident to that arrest were not fruits of an illicit seizure.

Finally, the Court noted that even if the original encounter was an illegal seizure, any misconduct by the officers did not outweigh the intervening cause of the outstanding arrest warrant.

INVALID CONSENT BY SUBMISSION TO AUTHORITY

A car in which Davis was a passenger was stopped for running a stop sign by an Escambia County deputy. A second deputy arrived to assist. The car was a rental, with a Maryland tag. Upon request, the driver produced the rental contract and his driver's license. The deputy asked passenger Davis for identification. Davis said he did not have it with him, but gave his correct name. Finding nothing out of order, instead of giving the driver a citation and permitting the car to proceed on its way, the deputy asked the driver "if he had anything illegal on his person or in the car." The driver responded that he did not, whereupon the deputy asked for consent to search the car. The driver gave his consent.

The deputy then walked to the passenger side of the car, and "asked" Davis to step out so that he might search the car. As soon as Davis opened the door, the deputy asked Davis to "place his hands on top of the car." While Davis was in that position, the deputy asked him if he "had anything illegal on his person." Davis responded that he did not, whereupon the deputy "asked for consent to search his person." Davis gave his consent, whereupon the deputy proceeded to frisk him. During the frisk, a bag fell out of Davis's pant leg. The deputy asked what was in the bag, and Davis said that it contained a quarter pound of marijuana. Davis was arrested, and the driver was given a citation for running a stop sign.

Davis argued that when he was "asked" to get out of the car and put his hands on the roof, he was "seized" for Fourth Amendment purposes because a reasonable person in that position would not have felt free to leave. Therefore his "consent" to search his person which was given while he was standing with his hands on the roof of the car was nothing more than a submission to authority and, therefore, the marijuana found during the search must be suppressed.

The First DCA in **Davis v State** agreed and *reversed* his conviction. "Common sense leads us to conclude that a reasonable person told by an armed, uniformed deputy to exit a vehicle and place his or her hands on the roof of the vehicle would not feel free to decline and walk away." "Whether the directive is characterized as a request or an order is not determinative; the question remains whether the directive constituted a show of authority with which a reasonable person would feel obliged to comply."

CONSTRUCTIVE POSSESSION: OCCUPANT VS GUEST

After receiving a report from a confidential source that a drug party was under way at a Tampa hotel, several Hillsborough County deputies discovered juvenile J.S.M. and three others at 3:30 am in a room redolent of burnt marijuana. At least three bags of marijuana were in plain view, and J.S.M. was ultimately charged with misdemeanor possession of cannabis.

The Second DCA in **J.S.M. v State** *reversed* his conviction for possession, holding that the State failed to prove that the juvenile had dominion and control over the contraband.

In a constructive possession case, the State must prove "(1) the accused's dominion and control over the contraband; (2) the accused's knowledge that the contraband is within his or her presence; and (3) the accused's knowledge of the illicit nature of the contraband." The court held that the State "utterly failed" to prove that J.S.M. had dominion and control over the contraband. "There was no evidence that J.S.M. was an occupant of the room rather than a guest, and could not infer that he had

the ability to control the contraband simply because it was in plain view." None of the information that the deputies had gleaned from the CI related to J.S.M. Although one of the deputies stated that J.S.M. was 'staying' in the room, his comment was unsupported by any evidence and is too conclusory to establish that J.S.M. actually occupied the premises. "Case law has sharply distinguished the culpability of mere visitors from that of owners or occupants of premises containing openly-displayed illicit drugs." "It is up to the State… to adduce independent proof connecting the defendant to control of the drugs."

"Here, the State presented no proof that the deputies ever saw J.S.M. touching or handling the marijuana. Neither of the deputies testified that J.S.M. smelled as if he had been smoking the drug. If fingerprints were found on the baggies, they were not admitted into evidence. Neither J.S.M nor any of the other people in that hotel room made any statements connecting him to ownership of the marijuana; instead, they claimed that it belonged to someone else. And, most significantly, no evidence proved how long J.S.M had been at the hotel, whether he rented the room or whether he jointly occupied it with the person who did. 'Proof of mere proximity of the defendant to the drugs is insufficient to sustain a conviction for constructive possession.'"

Finally, the court said that the decision should not be construed to mean that teenagers found together in situations where it is obvious that they have been smoking marijuana cannot be convicted of possession of cannabis. Rather, it should be construed to mean that the State must strictly adhere to every element of proof in constructive possession cases.

METH LABS AND EXIGENT CIRCUMSTANCES

Two Sarasota Sheriff's detectives were engaged in surveillance at a residence as part of an ongoing investigation of meth production and sales in the area. During their surveillance, the detectives saw Barth and an accomplice depart the residence in a pickup truck. The detectives and other members of the Sheriff's Office followed their movements and saw the two men travel to several stores where they purchased items commonly used in the production of meth, after which they returned to the residence.

Based on the information developed during the ongoing investigation, the immediate surveillance, and the detective's knowledge and experience, the detectives had reason to believe that materials necessary for the production of meth were present in the residence and that a meth lab was likely to be in operation there. Because the process involved in the production of meth is highly dangerous and presented an unacceptable level of risk to the occupants and

neighbors, the detectives made the decision to enter the residence prior to obtaining a search warrant solely for the purpose of evacuating the persons inside.

They entered Barth's residence, evacuated its residents, and contacted the fire department. Once the occupants were removed from the residence and fire department investigators had determined the residence was safe, the detectives refrained from reentering to conduct a search until the warrant had been obtained. The subsequent search resulted in the seizure of meth chemicals used in the production of meth and drug paraphernalia.

Barth argued that the initial warrantless entry into his home was without probable cause or exigent circumstances; therefore, the subsequent search was illegal and the evidence seized should be suppressed.

The Second DCA in **Barth v State** *upheld* the conviction, ruling that the dangers inherent in the operation of a meth lab, which include handling of hazardous and volatile chemicals, poisonous fumes, fire, and explosion, present sufficient exigent circumstances to justify entry without a warrant.

The court held that the initial entry into the residence was based on clear exigent circumstances and was therefore lawful. "Because the detectives took the precaution of waiting until the search warrant arrived before reentering the residence and conducting their search, we need not examine whether the exigent circumstances justifying the initial entry also justified the subsequent search and seizure of the evidence…" Instead, the search was conducted pursuant to a properly executed warrant, and the evidence discovered during that search was therefore admissible.

WINDOW TINTING COVERS ALL WINDOWS

Section 316.2954(1): "A person shall not operate any motor vehicle on any public highway, road, or street on which vehicle any windows behind the driver are composed of, covered by, or treated with any sunscreening material, or other product or material which has the effect of making the window nontransparent or which would alter the window's color, increase its reflectivity, or reduce its light transmittance…"

Lawrence was driving a four door Acura when he was stopped by a deputy who saw what he thought were windows with illegal tinting. The deputy placed a tint meter on the passenger- side door window in the rear seating compartment, which yielded a reading outside the permitted range established in section 316.2954. As a result of the stop, Lawrence was also charged with driving while his license had been revoked and for possession of cannabis, in addition to the improper equipment citation issued for the window tint violation.

Lawrence argued that another statute (316.2953) limits window tinting on all windows forward of, or adjacent to, the operator's seat;

therefore, the "behind the driver" text in 316.2954 does not encompass the window located in the rear seating compartment, the one behind the passenger, because it is not in a straight line behind the driver.

In what it held as a case of first impression, the Fourth DCA in **Lawrence v State** held that section 316.2954 and section 316.2953 must be read together, for they were meant to cover all windows in a vehicle. "The text of 316.2954(1) was meant to include all windows in the vehicle rearward of the driver, whether on the doors or in the middle rear of the vehicle."

UNPROVOKED FLIGHT

A police officer saw juvenile J.R.P. and another juvenile run from a convenience store, get in to a car, and drive off at an unspecified "rate of speed." The officer thought that the juveniles had robbed the convenience store. In fact, no robbery had occurred. Not knowing that, however, the officer gave chase, activating his patrol car's lights and sirens. The driver, who was not J.R.P., did not stop. The car pulled into a parking lot, and the two juveniles jumped from the car before it came to a complete stop.

The officer chased and eventually caught J.R.P., who was charged with Obstructing An Officer Without Violence.

The Second DCA in **J.R.P. v State** *reversed* his conviction, holding that the officer had no reasonable suspicion that J.R.P. had committed a crime and therefore, no basis to detain him.

"Unprovoked flight in a high crime area may provide reasonable suspicion to justify an investigatory stop…however the record is silent as to whether the incident occurred in a high crime area. Further, the officer did not articulate a reasonable suspicion that J.R.P. had broken the law. The officer did not see J.R.P. commit any crime. There is no indication that the juveniles ran or sped away because they saw the officer. There was no report of a robbery, the officer saw no items or money in the juveniles' hands as they left the store, and no one was chasing them from the store. Any suspicion that J.R.P. had robbed the convenience store was unfounded."

The court noted that perhaps the officer had a basis to stop the driver for traffic infractions, but J.R.P. was a passenger who had the right to leave the scene of the traffic stop. There was no articulable suspicion that J.R.P. posed a threat or danger to officer safety. Therefore, J.R.P.'s conduct did not constitute the crime of resisting the officer.

MORE UNPROVOKED FLIGHT

Juvenile D.R. and her cousin, who was pushing a baby stroller, were walking in the center of the street in D.R.'s grandmother's neighborhood, an area lacking sidewalks. Two officers coming from an unspecified police operation encountered the two girls.

The officers wore clothing that identified them as police. They drove their unmarked car alongside D.R. and her cousin with the intent to advise them not to walk in the middle of the street but to use the side of the road.

D.R., apparently noticing that the occupants of the car were law enforcement officers, began running away from the vehicle while shouting "POLICE!" The officers gave chase on foot, calling out to D.R. to stop and return to them, which they did. As they were speaking with her, one officer smelled the odor of marijuana in her mouth, which he required her to remove.

D.R. was charged and convicted of possession of marijuana and appealed to the Second DCA. The Second DCA in **D.R. v State** *reversed* the conviction finding that the officers did not have reasonable suspicion to stop the juveniles.

A person's presence in an area known for heavy narcotics trafficking, coupled with her unprovoked flight upon noticing the police, is a pertinent factor in determining whether an officer has reasonable suspicion to conduct a TERRY stop. While the court agreed the flight was unprovoked, it was unconvinced that the flight occurred in a "high crime area." Although the testifying officer offered his conclusion that the area was a known high crime or narcotics area, he also said that he hadn't worked in the area for a while. No other evidence was offered by the State. The only evidence adduced established that the officer's knowledge of the area was not current and that an undetermined number of narcotics arrests took place there at some unknown time. "This vague and presumptively stale evidence failed to confirm that crime or narcotics transactions were prevalent in the neighborhood at the time this officer encountered D.R."

The court further opined that there was no testimony about the "relevant characteristics" of the location that would determine "whether the circumstances were sufficiently suspicious to warrant further investigation." The court concluded by saying that the officer's testimony suggested strongly that more detailed evidence about the current status of the neighborhood could have been provided. "As it was, however, the officer's out of date conclusion, unreinforced by specific, contemporary information, was legally insufficient to satisfy the Fourth Amendment."

RESISTING "WITH" AFTER A CONSENSUAL ENCOUNTER

Lee County Sheriff's deputies were working a plain clothes detail in a "high burglary area". Around 10:45 pm, deputies saw Yarusso driving a pickup truck with his lights off in the parking lot of a closed auto dealership. The deputies, after parking their vehicle across the lot, approached Yarusso, who was walking in front of a row of cars. The deputies did not

consider Yarusso's actions necessarily unusual because the lights were on in the dealership and knew that some people stop to look at cars after the dealership is closed.

A deputy, who did not identify himself as law enforcement, asked Yarusso how he was doing and Yarusso responded that he was fine. The deputy asked if Yarusso worked at the dealership and Yarusso replied that he did not and asked the deputy if he did. The deputy asked Yarusso if he was just shopping and the Defendant said yes. The deputy then asked Yarusso for ID and Yarusso said he had it in his truck. Yarusso then asked the deputies if they were law enforcement; the deputies said they were and showed their badges. The Defendant then said he would get his ID out of the truck, walked to the truck, entered, locked the door, backed up, put his truck in drive, and while the deputies were yelling at him to stop, drove off, hitting one of the deputies in the hand with the truck's rearview mirror.

A high speed chase ensued and the Defendant was arrested and charged with Resisting With Violence.

The Second DCA in **Yarusso v State** *reversed* the conviction, holding that the deputy was no longer engaged in the execution of a lawful duty when he was hit and therefore the deputy had no right to detain Yarusso. Once the consensual encounter was ended by Yarusso entering into his truck, the act of hitting the officer with the mirror was not Resisting, although the Court pointed out that Yarusso's actions could have supported convictions for other crimes had the State properly charged them.

THE WARRANTLESS AUTOMOBILE SEARCH

Officers were patrolling an apartment complex and found LeRoy Green and a group of people gambling. Green was arrested for this offense and a search incident to his arrest revealed keys to a Ford Taurus. One officer began to look for the car that the keys would open and ultimately found Mr. Green's gold Ford Taurus. The officer shined a flashlight into the windows of the Taurus and saw a razor blade with white residue on it, lying on the center console. Believing the residue to be cocaine, the officer unlocked the car with the keys and seized contraband inside.

Green was charged with gambling and felony drug charges. His motion to suppress was granted by the trial court after he successfully argued that the officers were required to obtain a warrant prior to searching his vehicle and seizing the contraband inside.

The Second DCA in **State v Green** *reversed* the trial court, holding that that when the officer shined the flashlight into the windows of the car and saw a razor blade with white residue which the officer believed to be cocaine, the officer was authorized to enter the car

and seize the contraband. Shining a flashlight into a vehicle was not a search and did not implicate Fourth Amendment protections.

"…If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." "This 'automobile exception' to the warrant requirement is applicable, even though the owner of the vehicle was arrested and the vehicle was parked, thus making the movement of the vehicle highly unlikely." The court concluded by saying that once probable cause is established, the officers may search the vehicle even without exigent circumstances or a warrant.

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.

REMINDER: LEGAL BULLETIN NOW ON-LINE

The Legal Bulletin is now available on-line, including old issues beginning with calendar year 2000. To access the Legal Bulletin go to the SAO website at www.sao8.org and click on the "legal bulletin" box.

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PARKING ALERT

Law Enforcement officers are reminded to seek parking spaces in those areas designated for "Law Enforcement Only" at the Gainesville SAO in order to free up other spaces for the public.