

STATE ATTORNEY'S OFFICE

EIGHTH JUDICIAL CIRCUIT

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Legal Bulletin 2008-02
Editor: Rose Mary Treadway

MAY 2008

A MESSAGE FROM

BILL CERVONE
State Attorney

As I write, we are approaching the several law enforcement memorials that our various communities will hold in May.

You'll find information in this issue as to the dates, times, and locations of those. I hope all of you will be able to attend the memorial in your area. For those of you who will not, I would like to take just a moment to share with you my gratitude for what you do.

I would never suggest that I walk in your shoes- I don't and I won't pretend that I can fully understand what you deal with on every shift, whether you patrol our streets and highways, whether you guard those awaiting trial or serving time, or whether you serve in some other way. I do know that your duty shift may be mostly filled with the

mundane but that it also on occasion can be difficult and even dangerous. I also know that all too often those who you serve ignore, criticize, or actively oppose you. And I know the many sacrifices you make because you believe in what you do.

Our society could not survive with any degree of stability without you. I wish it was within my power to see that you earned what you deserve, in ways from financial to the simple support of the community. I can't do that. What I can do is at least offer you this brief acknowledgement and word of appreciation. Thank you.

LAW ENFORCEMENT MEMORIAL

The Bradford/Union County Law Enforcement Memorial will be held on May 1 at 6 pm at the Bradford County Fairgrounds, Building #1.

The Alachua County Law Enforcement Memorial is May 9 at 6 pm at the Memorial Park off of Tower Road in Gainesville. The scheduled guest speaker is Lt. Governor Jeff Kottkamp.

Congratulations to **ROGERS WALKER** who passed the Bar exam and became a Florida Bar member in April. Rogers is now re-assigned to the Gainesville Misdemeanor division.

Baker County will hold its annual Police Memorial Day Service at 7 pm on May 1 at the Baker County Sheriff's Office. The service will include a candlelight vigil and the presentation of special awards.

CONGRATULATIONS!

Congratulations to the Alachua County Sheriff's Office Combined Communications Center, that received Re-accredited status from the Commission On Accreditation for Law Enforcement Agencies, in March.

SAO PERSONNEL CHANGES

ASA **ANDY MOREY** resigned as of April 29th to enter private practice. Andy had been working traffic/DUI cases in Alachua County.

SAM BENNETT resigned on March 3 to pursue other options. Sam had been in the Alachua County Misdemeanor division.

JIM FISHER resigned effective May 2 from his position handling narcotics cases in Alachua County. Jim will be a candidate for an Alachua County judgeship in the Fall.

The Gainesville Police Department has announced the following promotions:

Lt **MATT NECHODOM**, promoted from Sergeant; Cpl **TRACY PLANK**, promoted from Officer; and Cpl **DAVID BLIZZARD**, promoted from Officer.

Also, **RICHARD HANNA** has been promoted to Major; **EDWARD POSEY** promoted to Captain; **ARTHUR ADKINS**, **MICHAEL SCHIBUOLA**, and **STEPHEN WEAVER** promoted to Lieutenant; **JORGE COMPOS**, **MICHAEL DOUGLAS**, and **J. LANCE YARBROUGH** promoted to Sergeant; and Officer **AUDREY MAZZUCA** promoted to Corporal.

FLORIDA CASE LAW

SEARCH AND SEIZURE: AUTOMOBILE

Sarasota Police Officer Perna was patrolling in Bay Island Park around 11 pm when he saw a small black sedan parked in a legal parking space. Vehicles are permitted in the park until midnight.

The officer saw that there were "towels rolled up in the window so you couldn't see inside the vehicle" and described the towels hanging "like curtains" outside of the car on both sides. The officer parked directly behind the black car but did not activate the overhead lights on his police car.

The officer testified that he was concerned for the welfare of any potential occupants. On cross-examination, the officer remembered that he actually first approached the passenger side of Defendant Greider's car to determine if anyone was inside. Greider rolled down the passenger window and responded that he was fine but that someone in a red car had chased him from Manatee County. The officer testified that Greider said the red car was now parked on the other side of the bridge.

Having just patrolled that side of the bridge, the officer knew there was no red car parked over there.

Officer Perna testified that this initial discussion through the passenger window dispelled his concerns about Greider's well being. The officer testified that although it was strange that Greider was in a car with towels covering the windows, he did not think that Greider had committed or was about to commit a crime. The officer said that he then walked around to the driver's side of the car and ordered Greider to roll down the window, causing the towel on that side to fall. The officer shined his flashlight into the car and saw what appeared to be a glass crack pipe in the center console next to the gear shift and an opaque orange vial in between Greider's legs. The officer opened Greider's door and directed him to step out.

The officer arrested Greider for possession of cocaine and drug paraphernalia. The trial court denied Greider's Motion to Suppress, holding that the officer was correct in approaching the car to see if the Defendant was alright or what was going on in the vehicle at that time of night.

The Second DCA reversed the conviction in Greider v State, holding that although the officer acted legally in approaching the vehicle to

determine whether anyone was inside, once it was determined that the occupant was okay and was not involved in criminal activity, the officer lacked authority to order the defendant to lower the driver's side window. "While the conduct of sitting in an automobile with towels covering the windows is unusual and may cause an officer to be suspicious of such behavior, the law requires more than mere suspicion; it requires that the conduct create an articulable suspicion of criminal activity."

BUSINESS FRAUD CAN BE CRIMINAL

Weaver operated a paralegal business. He promised clients that he would complete legal work within a short period of time, usually less than 10 days. At the time he made these promises and took the clients' money, he did not intend to perform within such a time frame.

To most of the clients, the time for performance was an important part of the contract. Weaver developed an elaborate set of fake excuses for his assistant to tell clients when he failed to timely produce the legal work. Even while he was not performing as promised for

existing clients, Weaver continued to make the same bogus promises to prospective clients to get them to enter into contracts and pay him money. Most of the clients who testified at trial said they never heard or received legal work from Weaver after they paid him. Weaver performed on some contracts, but he did so well beyond the promised time frame.

Weaver defended on the theory that he ran a legitimate business, that he had merely fallen behind in his work, and that the case was proper for the civil court system, but was not a criminal matter. Weaver pointed to the written contracts signed by the clients, which provided that there was no guarantee on how quickly the business would produce legal documents. In an instant message to his secretary, Weaver was confident that his business practices were not criminal: "If you call the cops on a business, it's a civil matter. It's not a criminal matter. They don't deal with that and neither does the State Attorney."

After Weaver was convicted of Scheme to Defraud, he appealed to the Fourth DCA. The DCA *affirmed* his conviction in Weaver v State, holding that a defendant's operation of a business does not insulate him from criminal charges as the State's evidence demonstrated that his business practices crossed the line that

converted them from legal to illegal activities.

The defendant temporarily deprived victims of the use of their money by falsely representing that he would perform his side of the contract within a specific time, when he had no intention of performing his promises at the time he made them, so that he willfully misrepresented a future act within the meaning of the statute. The Court distinguished Stramaglia v State where a Scheme to Defraud conviction was reversed. Stramaglia arose from the Defendant contractor obtaining labor and materials from subcontractors on road construction projects. But there was no evidence that the contractor "tricked the subcontractors into entering into or performing their contracts."

FRONT AND REAR APPROACH
NOT CONSENSUAL

Police approached Taj Jevon Dixon at the Amtrak train station. Ultimately, Dixon was searched, police found marijuana in his pocket and he was charged with possession. Dixon filed a motion to suppress the drugs, arguing he was stopped in the absence of reasonable suspicion and any subsequent consent to search was not voluntary. The trial

court granted the motion and the Fourth DCA in St v Dixon affirmed the suppression.

Narcotics detectives Camilo and Murray were working at the Amtrak station in plain clothes and were not there pursuant to any tip of criminal activity. They saw Dixon exit a cab and proceed to the ticket booth. Detective Murray said that on his approach, Dixon looked at him and the surrounding passengers and continued to do so as he exited the booth. Murray and Dixon had had a prior encounter. Detective Camilo saw nothing unusual about Dixon's behavior, only that he was a little nervous.

Detective Murray decided to make contact with Dixon. As Dixon exited the ticket booth, Camilo approached Dixon from the front and Detective Murray approached him from the rear, walking past Dixon and turning to Dixon face to face with the result that the two officers were standing in front of Dixon face to face.

The detectives showed Dixon their badges and told him they were narcotics detectives. Detective Murray asked Dixon if he was riding the train and asked to see his ticket. Dixon handed Murray the ticket which was then returned to Dixon. Murray told Dixon they were investigating drug smuggling on the trains; Dixon then became nervous and his hands began to shake. The

detectives testified that they then asked Dixon for consent to search his person and he responded "yeah, go ahead." A bag of marijuana was found in the defendant's pocket.

Dixon contended that the manner in which the officers approached him was such that the contact constituted an investigatory stop absent the required reasonable suspicion, not a consensual encounter; and that his consent was the product of this illegal detention and not voluntary.

The DCA agreed with the trial court that the consent was not voluntary and specifically noted the approach of the detectives in contacting Dixon. The Court stated that the manner in which the detectives approached Dixon, one from the front and another from the rear who passed Dixon with the result being that both officers stood in his path, would not produce in a reasonable person the feeling that he had the right to disregard the detective's questions and request to produce a ticket and simply proceed on his way. The Court emphasized that the stance of the detectives actually blocked Dixon's path.

SHOW UPS DURING TERRY STOP

When an officer stops a person based on a reasonable suspicion that the person was involved in a crime, the officer is not permitted to transport the person to a show up as part of his investigation, the First DCA ruled in Kollmer v State.

After Jacksonville Police Officer Propper, a K-9 handler, was called to the scene of car burglaries and was informed that the suspect fled into the woods, the Officer deployed his dog, Chico, to track the suspect. Chico located a portable CD player and a black container on the path in the woods. Chico tracked the scent from those items to a yard, and discovered a man lying on his back on the ground. The man made some movement away from the dog, and Chico responded with "pain compliance," biting Defendant Kollmer on the stomach.

Kollmer was then handcuffed, placed in a police car and transported back to the scene of the burglary for the Victim to identify. Kollmer was convicted and appealed the denial of his motion to suppress the identification, alleging that the officers exceeded the scope of a lawful investigatory stop in this case. The First DCA agreed with the Defendant and

reversed his conviction.

**SEARCH AND SEIZURE BY
RUSE AND CONSENT**

"To detain an individual for an investigatory stop the State need only demonstrate that police officers had a reasonable suspicion that the individual was involved in the commission of a crime...In this case, the officers reasonably suspected appellant was the individual who committed the burglaries, sufficient to justify the investigatory stop," the Court ruled.

However, the Court stated that Ch 901.151 provides that "no person shall be temporarily detained...longer than is reasonably necessary to effect the purposes of that subsection. *Such temporary detention shall not extend beyond the place where it was first effected or the immediate vicinity thereof.*"

Here the arresting officer cuffed the Defendant, placed him in the police car, and transported him away from the place where he was initially apprehended, presumably for the victim to identify him. There was no probable cause to arrest Kollmer at that time, nor did Kollmer consent to being transported. "Accordingly, we hold the officers exceeded the scope of a lawful investigatory stop, in violation of appellant's Fourth and Fourteenth Amendment Rights."

At 3 am Highlands County Detective Feliciano and others approached the residence of Defendant Luna-Martinez and his wife to conduct a "knock and talk" interview with the Defendant. After initial contact by English speaking officers stalled, Feliciano approached the defendant and his wife and asked for consent to enter the residence and search for contraband that police had received a tip was present in the house. The defendant was polite and cooperative and gave consent.

The Detective engaged the defendant and his wife in conversation in the kitchen. The Defendant did not withdraw his consent for the search or limit the scope of the search at any time. After a trafficking amount of heroin was found, the defendant made spontaneous statements that the narcotics belonged to him and that his wife was unaware of their presence.

Investigator Tyson testified that initial contact with the defendant and his wife was made by a ruse. A uniformed deputy approached the residence at 3 am and told the defendant and his wife that their car had been burglarized in the parking lot. Once contact was made with all adult members of the home, Inv Tyson told the defendant and

his wife of the ruse, stated the real purpose for being there, and asked for consent to search. Tyson's contact was unsatisfactory due to the language barrier, so Tyson turned the interview over to Detective Feliciano, where consent to search was obtained.

The defendant argued that his consent was involuntary due to the 3 am hour, the deception used by the police and the number of officers involved in the encounter. He also objected to the absence of an express warning that he was free to refuse consent, the absence of a written consent and the circumstance that he was given his Miranda rights and was informed that he was the target of an investigation.

The State argued that in the absence of any indication of intimidation or coercion by the police, the factors relied on by the defendant were insufficient to establish that the consent was involuntary.

The Second DCA in Luna-Martinez v State held that the consent was voluntary and that the police did not use "overbearing tactics". "The circumstance that an encounter between the police and a defendant takes place in the middle of the night does not militate strongly toward the conclusion that the ensuing consent was involuntary. The late hour of the encounter is

a relevant factor to consider in the totality of the circumstances, but it does not carry the great weight suggested by the defense. Due to the exigencies of public safety, it is not unusual for the police in their investigative efforts to have late night encounters with individuals."

The Court also stated that even though the police came to the residence in the early morning hours suggesting urgency to their mission, such an impression of urgency did not in itself subject the defendant to a restraint on his freedom or communicate to him that he had no choice but to agree to the search. "It is also noteworthy here that any suggestion that the lateness of the hour implied a 'vulnerable subjective state' of the defendant was rebutted by the testimony that the defendant 'appeared to be alert and aware.'"

Further, the Court noted that the ruse was used only to initiate contact with the occupants of the Defendant's residence. Once the police explained their true purpose, any potential impact of the earlier deception on the Defendant's consent was either eliminated or substantially diminished.

The Court opined that there is not a necessary correlation between the number of officers present and the coerciveness of the encounter. "A suspect

is more likely to be overawed by one officer speaking in an insistent, demanding tone than is a suspect who is addressed in a low-key manner in an encounter with several officers." Nor did the Court attach any significance to the fact that Miranda warnings were given. "...The mere giving of Miranda warnings does not transform a suspect's status from noncustodial to custodial." There was no mere acquiescence to a show of authority.

Based on the totality of the circumstances, the Court found the consent voluntary.

GUNS AND MOTORCYCLES

There was a near traffic collision between a motorcycle driven by Defendant Doughty and an unmarked car occupied by three off-duty, out of state law enforcement officers. Doughty pulled up beside the car and said something to the effect of, "you almost ran me over," to which one of the officers responded, "you should not be driving in between traffic." The officers engaged in a verbal argument with Doughty until Doughty stated, "I have a gun, I'll kill you." He then lifted his shirt, reached into a leather pack that was around his waist, and grabbed

what the officers believed was a weapon. The officers quickly exited the vehicle with their guns drawn, announced that they were police, and ordered Doughty to the ground. Doughty attempted to flee, but one of the officers pursued and handcuffed him. By the time the local police arrived, the officers had recovered a loaded .40 caliber Smith & Wesson handgun from Doughty's waist pack.

Doughty was charged with Carrying a concealed firearm without a permit contrary to F.S. 790.01(2) which provides that "a person who carries a concealed firearm on or about his or her person commits a felony of the third degree."

Doughty moved to dismiss on the ground that his conduct fell within the private conveyance exception in Section 790.23(3)(1), which provides that it is lawful for a person to carry a concealed firearm without a license, if that person is "traveling by private conveyance when the weapon is securely encased." The Legislature detailed the private conveyance exception in Section 790.25(5), which permits the carrying of a concealed weapon "within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use."

Section 790.25(5) further

provides "nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person."

Mary Treadway at the SAO at 352-374-3672.

In Doughty v State, the Fourth DCA affirmed the denial of the Defendant's Motion to Dismiss, holding that although the handgun was securely encased in Doughty's zippered pack, even that does not fall into the private conveyance exception if it is carried "on the person." "The securely encased exception does not legalize the carrying of a concealed weapon on the person." The Court further noted that that holding is no less applicable where a defendant is riding a motorcycle. "We interpret this language to require a person carrying a concealed weapon without a permit, while riding a motorcycle, to keep the concealed weapon securely encased and in an interior compartment of the motorcycle.

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

**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 sao8.org and click on the "legal bulletin"

REMINDER

Law Enforcement Officers are reminded to check in with the receptionist at the Gainesville SAO before entering the locked glass doors to see an attorney. The receptionist will then telephone the attorney so that the officers can be met and escorted to their destinations.

Also, officers are reminded to either bring their subpoenas or know the name of the attorney they are there to see.

