

LAW ENFORCEMENT NEWSLETTER

November 2009

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

As many of you in Alachua County may already know, and as others will see elsewhere in this issue, I've taken an opportunity to re-structure some of our functioning at the SAO in order to take better advantage of our limited manpower and some personnel changes that have oc-

curred. At times like this when economic concerns seem to dominate what we all must think about, opportunities to make meaningful changes don't come around often and need to be taken advantage of when they do.

To begin with, I have elimi-

nated what was formerly a Special Prosecutions Unit in Alachua County. By no means does this signal any less of a commitment to the requirements that the kinds of cases (most especially homicides) that were previously handled by this unit required. To the contrary, those cases will now be spread out among all of the senior lawyers in the Felony divisions. This will allow the office to take advantage of the talents of many of those senior prosecutors in handling those cases as well as to facilitate the involvement of newer felony prosecutors in handling cases of that sort so that they are better prepared to do so on their own in the future. It will also lessen the problems

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Any changes in agency email addresses should be reported to our office at treadwayr@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 ASA Rose Mary Treadway at the SAO at 352-374-3672.



SAO PERSONNEL CHANGES

SAO Levy/Gilchrist County Investigator **JENNIFER LANGSTON** has resigned from her position to return to school. Her position has been assumed by **BOBBY SCHULTZ** upon his return from Afghanistan. Former

GPD Officer **DARRY LLOYD** has joined the Gainesville office as an investigator.

ASA **JESSE IRBY** has been re-assigned to the Levy County Misdemeanor division. Jesse is assuming

the caseload of **CHRISTINE STEPHENS**, who has been re-assigned to the Domestic Violence division in Gainesville.

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MESSAGE FROM BILL CERVONE CONTINUED

created when a few lawyers have the majority of those cases and have to deal with the inevitable scheduling problems that come up.

To take advantage of the resources freed up in this way, I have created a new unit that will specialize in the prosecution of sex crimes against both child and adult victims. We

have always had felony lawyers whose primary assignment was to cases of this sort, but those lawyers usually have had to handle other types of cases as well.

If there is an area where specialization is important, it is cases of this sort. Not only are the legal issues unique but also the realities of dealing with victims of sexual assaults, especially children, are different. Additionally, Florida statutes mandate special attention to these cases and we will now be more fully compliant with the spirit of those requirements of law. This unit will now have attorneys dedicated solely to these

cases in each of the Gainesville Felony trial divisions, and those lawyers will also be assigned to assist with similar cases in the regional counties of the circuit. This will enhance our ability to provide the same services to those five counties as we do for Alachua County.

The framework for these changes is in place now, and everything will be fully operational before the end of the year. My expectation is that these moves will make us a stronger office in the handling of all of our serious cases, and I would welcome your feedback as we go forward.

“The person’s words alone can rarely if ever, rise to the level of an obstruction”
-Fourth DCA



CONGRATULATIONS!!!

In May the Baker County Sheriff’s Office awarded Detention Deputy of the Year honors to **DAVID LAURAMORE**. Co-winners of the Joseph Burtner Memorial Award and Scholarship were **ERIK DELOACH** and **JIMMY NICKLES**. The Morris Fish Award winner and Deputy of the Year was **PATRICK MCGAULEY**.



Also in May, Union County Sheriff’s Lt. **TOMMIE FRITH** was honored with the Distinguished Service Award for his service to UCSO.

In October, the University Police Department promoted **JAKE PRUITT** to Sergeant; **SCOTT SUMMERS** to Lieutenant; and **DARREN BAXLEY** to Captain.

SAO PERSONNEL CHANGES CONTINUED

ASA **FRANK SLAVICHAK** has been transferred to Gainesville to fill **STACEY STEINBERG'S** felony position. **ANDREA MUIRHEAD** has returned to Levy County to take Frank's caseload there. **ROBERT WILLIS** has rejoined the Gilchrist County office as an ASA.

ASA **PAT MCCLINTOCK** has resigned in Baker County to take a position with the Federal government in Texas. **RALPH YAZDIYA** is the new lead attorney in Baker County. **MICKEY**

BEVILLE-LAMBERT is now assigned to the Baker County Felony division and **DUANE TRIPLETT** has rejoined the SAO as a felony attorney in Bradford County.

New ASA **CAMARIA PETTIS** is now in County Court in Gainesville. Camaria was in the Gainesville office several years ago in various support positions before she decided to attend law school.

Recent UF Law grad **ERIN SIMENDINGER** is a new

ASA in Gainesville County Court. **ADAM URRA** has been hired as a new ASA in the Gainesville Felony Division. Adam joins us from the Fourth Circuit State Attorney's Office.

ADAM LEE is a new ASA in Bradford County where he is assigned to County Court. Adam is also a recent UF Law grad. ASA **ANGIE CHESSER** has been re-assigned from Bradford County to the Gainesville Juvenile Division.

Gainesville ASA **TIM**

BROWNING has resigned from the SAO to pursue a pending judicial appointment. Also, ASA **JAMES COLAW** has transferred to a felony position in the Fourth Judicial Circuit.



DUI AND PERSONAL INJURY UPDATE

The crime of DUI is serious under any facts but especially so when circumstances raising it to a felony exist. The SAO needs the help of law enforcement so that we do not inadvertently overlook those circumstances. The following article is submitted by SAO Sean Eaton to update Law Enforcement in this area.



Any person who commits the crime of DUI and thereby causes or contributes to causing "serious

bodily injury" to another, as defined in S. 316.1933, commits a felony of the third degree. The term "serious bodily injury" means an injury to any person that consists of a physical condition that creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

All too often, the extent of the injuries to the victim of DUI is unknown or overlooked. In some instances, the victims will have been transported to receive medical treatment before law enforcement arrives on scene or while the investigation is ongoing. A box checked "no serious bodily injury" on a DUI cita-

tion by itself tells very little about the extent of the injury and gives no insight into the possibility of serious bodily injury that may later be discovered at a hospital. A written description of the injuries in the crash report and/or police report narrative would assist further investigation of the case and, most importantly, would greatly reduce the chance of inaccurately reporting injuries.

If law enforcement is uncertain of the extent of the injuries, this must be reflected in the written report to alert the prosecutor to further investigate the case. If there is uncertainty in whether an injury is 'serious bodily injury', it is better to err on the side of caution, that is, serious bodily injury,

and allow the prosecutor more time to investigate the case.

Also, any person who has two prior convictions for DUI and commits a third DUI within 10 years of the last conviction commits a third degree felony. (s.316.193(2)(a)(3)) The time between the first and second conviction does not matter. It's the time between the second conviction and the commission of the third DUI that needs to be within 10 years of each other.

Any person who has three prior convictions for DUI and commits a fourth DUI commits a third degree felony.

NEW VICTIM SERVICES POSITION

The State Attorney's Office has added a new Circuit-wide Victim Services position that will proactively follow-up with all serious violent felony cases involving serious or permanent injury or aggravated stalking. This position will act as a liaison between ALL criminal justice agencies in our circuit, victims, and Victim Advocates.

Rachel Gallagher and Kris Kelly will work with each law enforcement agency and victim services provider in the circuit in an effort to coordinate services, making certain that together we meet the needs of all victims of serious violent felonies involving injury or aggravated stalking in a timely manner.

Using input and suggestions from all of these agencies (law enforcement and victim services), Rachel and Kris will develop a Victim Advocate Response protocol for our circuit.

If you are working a case with a victim of serious violent felonies involving injury or aggravated stalking and you would like for Rachel and Kris to help coordinate victim services, please call them at (352) 374-3670.

**Office of the
State Attorney
Eighth Judicial
Circuit**

120 West University Avenue
Gainesville, Florida 32601

Phone: 352-374-3670

CASE LAW UPDATE POLICE LIGHTS AND SEIZURE

Whether police lights are used in stopping a suspect is "only one important factor" in determining whether a seizure has occurred for Fourth Amendment purposes, the Florida Supreme Court ruled in G.M. v St. Because a determination whether a seizure has occurred is based on the totality of the circumstances, there is no per se rule that the use of police lights means that the person has been seized.

The Defendant was sitting in a legally parked car rolling a joint when the police, with emergency lights on, pulled up behind him. The officer smelled burning



marijuana and arrested the defendant. The trial judge denied a motion to suppress, ruling that the incident was an encounter for which no reasonable suspicion was required.

The Third DCA ruled that the defendant was not seized until after the officer smelled the marijuana, at

which point he had probable cause to arrest. In dissent, Judge Green stated that a seizure occurs when the officers parked behind the defendant with the emergency lights on, and "it is both patently unreasonable and potentially dangerous for any citizen to believe that he or she was immediately free to drive, run, or walk away from these police officers."

In agreeing with that sentiment, the Florida Supreme Court wrote, "It would be both dangerous and irresponsible for this Court to

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CASE LAW UPDATE CONTINUED

advise Florida citizens that they should feel free to simply ignore the officers, walk away, and refuse to interact with these officers under such circumstances. Instead, as a matter of safety for both the public and law enforcement officers, we conclude that a citizen who is aware of the police presence under the specific facts presented by this case is seized for Fourth Amendment purposes and should not attempt to walk away from the police or refuse to comply with lawful instructions.”

The Defendant here was apparently not aware that the police had pulled up behind him. He testified that he was rolling a ‘blunt’ and apparently was not aware of the police presence until they appeared at his window, by which time the police had obtained probable cause as a result of perceiving the smell of burning marijuana.

“Thus, under applicable case law, G.M. was not seized for Fourth Amendment purposes...”



LEGAL DETENTION AND TRESPASS

A private security guard saw juveniles S.N.J. and S.F. in the parking lot of an apartment complex. The apartment lease contained a no loitering policy, but had no posted “no loitering/trespassing” signs. Upon questioning, the juveniles refused to identify themselves to the guard. He escorted one off the property and called police to issue trespass warnings to the others. The juveniles were not engaged in any criminal or suspicious activities.

When the police officer arrived, he repeatedly asked S.N.J. and S.F. their names and addresses, intending to only issue a trespass warning. In vulgar terms, the juveniles refused and were arrested for Resisting without Violence.

The trial court ruled that the officer was engaged in the lawful execution of a legal duty when he attempted to issue a trespass warning. The officer claimed to

have been unable to issue the warnings without names. Thus, the juveniles’ refusal to identify themselves constituted an obstruction of the officer’s duty.

The Second DCA in [S.N.J. v State](#) reversed the conviction, holding that the officer was not engaged in a legal duty.

The Court held that the juveniles could only be legally detained for trespassing if they were first warned to leave the property. When attempting to issue a trespass warning, the officer acted as the property owner’s agent, not in an official police capacity, and the officer could have asked the juveniles to leave the property, thereby giving them a warning under the statute, without knowing their names. Because the officer did not issue the warning, the juveniles were not guilty of trespassing and no sufficient cause existed to detain them.

The Court found that the fact that the apartment complex had a “no loitering” policy in leases did not validate the detention of juveniles where there was no indication that juveniles knew of the policy.

NOTE: See also [Rodriguez v State](#), also a Second DCA case issued this year holding that the Defendant’s refusal to provide the officer with her real name, after the officer determined she had given a false name during a stop investigating a trespass after warning incident, was a valid Resisting without Violence. This case is distinguished from the above case because the officer had a reasonable basis to believe that the Defendant had already committed Trespass after warning, as the owners had warned the Defendant not to come back on the property and she came back. The officer had authority to conduct an investigatory stop to investigate this trespass committed outside of his presence.

SEARCH AND SEIZURE AND EXIGENT CIRCUMSTANCES



Detective Mijal of the Fort Lauderdale Police Department received an anonymous complaint regarding narcotics activity at a particular address. The detective responded to the address and noticed that the door to the apartment was open. Defendant Cote was in the kitchen, two to five feet in front of the detective, wiping down the counter with a paper towel. The detective also saw a digital scale on the kitchen counter with a white powdery substance and a straw on it. Based on his training, the detective recognized the powdery substance as suspect powder cocaine and immediately entered the apartment and handcuffed Cote.

The detective testified that he entered the apartment without first seeking a warrant because he did not want Cote to wipe off the substance from the digital scale and destroy the potential evidence. Cote was searched and two bags of cocaine were found in his pants pocket. Cote also admitted that earlier that day he snorted some of the cocaine.

Cote argued to the trial court that the evidence should be suppressed because the detective failed to corroborate the anonymous tip and to obtain a warrant to search the apartment. The State responded that exigent circumstances existed in this

case to excuse the lack of a warrant because the detective entered the apartment to prevent Cote from potentially destroying the evidence.

The trial court denied the defendant's motion to suppress and the defendant entered a no contest plea. The Fourth DCA in **Cote v State** reversed the conviction.

An item may be seized from a constitutionally protected place without a warrant, if (1) the police view the contraband from a place they have a legitimate right to be, (2) the incriminating character of the contraband is immediately apparent to the officer, and (3) the officer had a lawful right of access to the contraband. If one of these requirements is not met, then the State must establish an exception to the warrant requirement such as consent or exigent circumstances.

Here, the Court found, when the detective arrived at Cote's apartment and saw the contraband through the open door, the record does not support that Cote was aware of the detective's presence. In addition, although Cote was seen wiping down the kitchen counter where the digital scale and the white powdery substance were located, the Court could not infer from that that he was in the process of de-

stroying the evidence. "We cannot tell from this record what Cote was wiping from the counter. (Perhaps it was peanut butter and jelly from his lunch sandwich.) It is just as reasonable to infer that, unlike whatever Cote was wiping from the counter, the cocaine on the scale had a certain value to him—a cocaine user—and that he had no intention of destroying it, being unaware at that point of the police presence outside. Thus, when the detectives entered Cote's apartment without a warrant, they—not Cote—created the exigent circumstance."

The Dissent argued that there were exigent circumstances justifying the entry, arguing that this was an "open view" case. The detectives stood outside where they had a lawful right to be and saw Cote, no more than five feet away wiping down the counter. A digital scale with cocaine and a straw were also on the counter. The dissenting judge argued that the detective entered the apartment and arrested the defendant because he was concerned that the defendant would wipe the substance off the scale and destroy the evidence.

The Dissent further faulted the majority with placing

SEARCH AND SEIZURE AND EXIGENT CIRCUMSTANCES CONTINUED

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.co.alachua.fl.us> and click on the "Legal Bulletin" box.

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the emphasis on the wrong fact, that Cote was not aware of the detective's presence, when in fact the issue was the fact that the evidence was about to be destroyed. "A defendant's knowledge of the police presence leads to the conclusion that the defendant would do something to destroy incriminating evidence before a search warrant could be obtained. Only for this reason is such knowledge relevant to the exigent circumstances inquiry. Here, the defendant was already cleaning up when the detective arrived,...

this was not a case where the exigent circumstance was created by the officers."

"The majority has placed Detective Mijal in a catch-22 dilemma. It tells him that he needed a warrant to enter the apartment and make an arrest. However, he would be unable to get a warrant; there would be no reason to believe that contraband would be found in the apartment because the defendant had destroyed it."



AN UNANSWERED FRONT DOOR KNOCK

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 352-374-3670.

Sheriff's deputies received a tip about possible ongoing criminal activity at Joel Lollie's residence, and they subsequently went to his home to question him about this. The deputies approached the front door and knocked there, but received no response. One then walked around to the back of the residence and knocked on a back door, where he also received no response. While there, that deputy saw incriminating evidence behind the residence and a search warrant was then obtained.

Defendant Lollie sought to

suppress the evidence which resulted from the incursion into his backyard, both before and after the warrant was obtained, arguing that the warrantless entry into the backyard area was an unlawful search. The First DCA in Lollie v State agreed and reversed his conviction.

The Court found that the officers were entitled to approach the front door of the residence, but the warrantless entry into the backyard was an unlawful search. The Court rejected the State's argument that visitors to homes in rural

areas where Lollie lived are sometimes received at the back door and that this custom should bear on Lollie's expectation of privacy and the reasonableness of the officer's actions. "The constitutional protection and expectation of privacy in the side and backyard area of the home does not depend on whether someone might be home, or if visitors may sometimes be received at a location other than at the front door."



2009 CRIMINAL LEGISLATION

- 2009-6** Amending 318.14 to eliminate reduced fines for attending traffic school in infraction cases; amending multiple sections to increase fines for infractions; amending 948.01 to provide that probation is permitted regardless of adjudication and that fines may be imposed without probation in non-felony cases.
EFFECTIVE DATE: January 27, 2009
- 2009-14** Amending 318.18 to increase fines for not paying infraction penalties within specified time frames. EFFECTIVE DATE: January 27, 2009
- 2009-22** Amending 687.071 to delete the terms "shylock" and "shylocking" from the usury and loan sharking statute. EFFECTIVE DATE: July 1, 2009
- 2009-33** Enacting as yet un-number new legislation designated Rachel's Law to require that a law enforcement agency that uses confidential informants must inform any potential CI that the agency cannot promise any inducement, must upon request provide an opportunity to consult with counsel prior to a person becoming a CI but not providing a right to the assistance of the Public Defender for such purpose, must provide training regarding agency policies and procedures to all personnel involved with CIs, must adopt policies and procedures prioritizing safety of all involved in operational decisions with specified requirements for such, establishing criteria that must be considered by an agency in assessing the suitability of potential CIs, and providing that any failure to abide by the requirements of this section does not create any substantive or procedural right to a defendant in a criminal proceeding. EFFECTIVE DATE: July 1, 2009
- 2009-34** Amending 39.00145 to allow agencies providing services to children or responsible for the safety of children may share information that would otherwise be confidential. EFFECTIVE DATE: July 1, 2009
- 2009-61** Amending 26.57 to allow temporary assignments of county court judges to circuit court dockets; amending 27.511 to allow Assistant Regional Counsel to accept private criminal cases; amending various provisions to impose new filing fee structures and clerk's office responsibilities. EFFECTIVE DATE: July 1, 2009
- 2009-63** Amending 775.082 to require that sentencing for offenses committed after July 1, 2009, for non-forcible felony, non-Chapter 810 3F offenses for which the defendant scores 22 point or less must be to non-state prison sanctions unless the court makes written findings that such a sentence would present a danger to the public; creating 921.00241 to establish a Prison Diversion Program under which defendants who would otherwise be sentenced to prison may be sentenced instead to a non-state prison sanction if DOC has established one in the circuit and if the offense is a 3F, they defendant scores no more than 48 points, or 54 points

that include 6 points for a VOP/VOCC not involving a new law violation, the defendant does not have a prior forcible felony or Chapter 810 conviction, and the offense does not carry a mandatory sentence, provided that the court must make written findings regarding eligibility for the program; amending 948.01 to require DOC to provide uniform probation orders to be used by all courts statewide.

EFFECTIVE DATE: July 1, 2009

- 2009-64** Amending 397.334 to significantly expand post-adjudicatory drug court programs, providing that defendants scoring 52 or less points on a non-forcible felony are eligible and providing additional criteria. EFFECTIVE DATE: July 1, 2009
- 2009-95** Creating an as yet un-numbered section to establish the Florida Statewide Task Force On Human Trafficking within DCF, which among other matters is tasked with reviewing and reporting to the legislature as to criminal prosecutions related thereto. EFFECTIVE DATE: June 1, 2009
- 2009-102** Amending 784.07 to re-classify assault, battery, aggravated assault, and aggravated battery against a law enforcement Explorer by one degree of offense. EFFECTIVE DATE: October 1, 2009
- 2009-105** Creating an as yet un-named section to be cited as Rachel's Law to establish non-criminal penalties for allowing children under 16 to ride a horse in a public place without a helmet. EFFECTIVE DATE: October 1, 2009
- 2009-158** Creating 538.31-37 to regulate mail-in second hand precious metal dealers as other such dealers are, including with record keeping and penalty provisions. EFFECTIVE DATE: October 1, 2009
- 2009-159** Amending 812.14 to create a 1M offense for an owner or leasor of property to allow utility theft to occur and providing that it is prima facie proof of intent to do so if a drug operation is on-going in the property; creating a 1M offense for theft of utilities to facilitate the manufacture of controlled substances and providing that it is prima facie proof thereof if the person accused committed theft of utilities and knew of the presence of controlled substances and material for the manufacture thereof. EFFECTIVE DATE: October 1, 2009
- 2009-160** Creating 787.07 to establish a 1M offense of Human Smuggling for transporting an illegal alien into the state. EFFECTIVE DATE: October 1, 2009
- 2009-162** Amending 538.21 to pre-empt to the State the regulation of hold notice requirements related to secondary metal recyclers, and duplicating other provisions of 2009-158. EFFECTIVE DATE: October 1, 2009

- 2009-184** Creating 794.052 to require law enforcement officers investigating alleged sexual battery offenses to assist the victim in obtaining medical treatment, a forensic examination, and advocacy/crisis intervention services, including by providing a form notice to be prepared by the Florida Council Against Sexual Violence. EFFECTIVE DATE: July 1, 2009
- 2009-190** Amending 943.325, the DNA Database Act, to substantially re-word provisions thereof. EFFECTIVE DATE: July 1, 2009
- 2009-194** Amending 775.21 to require home and cell phone numbers be provided as a part of sexual predator and offender registration requirements; amending 847.0135 and 847.0138 to remove residency requirements pertaining to internet pornography offenses. EFFECTIVE DATE: July 1, 2009
- 2009-200** Amending 112.532 to require that law enforcement officers subjected to internal investigations must be provided with all existing evidence prior to being interviewed. EFFECTIVE DATE: July 1, 2009
- 2009-215** Amending 784.046 and 901.15 to allow arrest without a warrant for violation of pretrial release conditions in dating violence cases when an officer has probable cause for such. EFFECTIVE DATE: July 1, 2009
- 2009-216** Amending 23.1225 regarding mutual aid agreements between law enforcement agencies to specify as an example thereof the authorization of university police to enforce laws in specified geographic areas; amending 316.640 to authorize university police enforcement of traffic laws "on or within 1000'" of university property, pursuant to a mutual aid agreement, or under hot pursuit originating on or within 1000' of university property. EFFECTIVE DATE: July 1, 2009
- 2009-223** Amending 409.920, Medicaid Provider Fraud, and 921.0022 to provide that the offense is a 3F Level 7 crime if the amount involved is \$10,000 or less, a 2F Level 7 crime if the amount involved is more than \$10,000 but less than \$50,000, and a 1F Level 9 crime if \$50,000 or more. EFFECTIVE DATE: July 1, 2009