

LAW ENFORCEMENT NEWSLETTER

August 2010

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

Welcome to summer and the start of another fiscal year for many of us, including the SAO. With it comes a warning: batten down the hatches - if you thought budget problems were an issue over the last few years you may be in for something even worse.

Even at the end of the legislative session last Spring we

were cautioned in Tallahassee that Fiscal Year 2011-12 could be tighter regardless of any slow improvement then being forecast for economic recovery in Florida. That was for several reasons, not the least of which was that federal stimulus money used to offset shortages for the last two years won't be around next year. Now comes the Gulf oil spill with its uncertain

effect on tourism dollars and tax revenue. The first oil fueled salvo has already been fired in Tallahassee: be prepared to address a 5% cut for FY 10-11. In other words, once again, what you thought you had isn't necessarily what you're going to get. This all trickles down to our counties and municipalities, of course, and that leaves virtually none of us un-touched.

For the SAO, you may have noticed that there are fewer lawyers around and that things take a little longer to get done. This Legal Bulletin, for example, has de facto become a twice a year rather than quarterly publication since our time must be prioritized towards case work. That's a small thing, but it is symptomatic of where we are.

I don't have a crystal ball but I can say these things: the SAO has and will continue to strive

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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

Gainesville ASA **BYRON FLAGG** has resigned to enroll in a graduate environmental program at UF. ASA **STEVE FRISCO** will take Byron's Felony caseload.

ASA **ANGIE CHESSER** has resigned to be a stay at home mom. ASA **PAM BROCKWAY** will move to her Juvenile caseload in September.

ASA **DAVID KREIDER** has been appointed by the Governor as Alachua County's newest County Court judge. Bradford

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MESSAGE FROM BILL CERVONE CONTINUED

to provide you and all of our citizens the best service possible with the resources we have. We will be looking for new and better ways to do that. Some won't really affect most of you who read this. For example, our conversion to a file-less system is now moving into the five regional counties, and should be completed by year's end. Like it or not, the digital age has arrived for us, and we'll be trying to drag you along as we can. We have already seen noticeable improvements in efficiency and significant cost reductions through this proc-

ess. Others you will more likely notice. Again like it or not, we have increased our use of diversionary options in order to move cases and allow lawyer time to be spent where it is most needed. If we can get to the same bottom line quicker in at least some cases, even if that is on the basis of a voluntary diversion agreement as opposed to standing in front of a judge, we are pretty much compelled to do so. This option applies, of course, only when there is no risk of harm or compromise to public safety.

At one point I thought that 2011 would be the start of a brighter economic time. Now I'm not sure. It will come,



though. Until it does, your continued help as we all work together to protect our citizens is greatly appreciated.

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

120 West University Avenue
Gainesville, Florida 32601

Phone: 352-374-3670

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Www.sao8.org**

CONGRATULATIONS!!!

Long-time GPD Officer **JULIO POMAR** is retiring on July 30. Detective Pomar served GPD for 30 years

In June, Levy County Sheriff's Investigator **TOM MARTIN** brought home the gold medal in bench press at the 25th



annual Florida Police & Fire Games.

Williston Police Chief Davis has announced the following promotions: **CLAY CONNELLY** promoted to Captain, **MATT FOR-**

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SAO PERSONNEL CHANGES CONTINUED

County ASA **DUANE TRIPPLET** has been promoted to Division Chief in Bradford County.

Baker County ASA **MICKEY BEVILLE-LAMBERT** is resigning to explore other opportunities. ASA **GREG EDWARDS** will assume her felony caseload.

HARLAN MCGUIRE has been hired as a new ASA in the Alachua County Misdemeanor Division beginning in August. Harlan is a UF Law grad. He replaces ASA **SEAN EATON**, who is entering the JAG Corps. Also in County Court ASA



Levy County Misdemeanor ASA **JESSE IRBY** will be transferring from Bronson to the Alachua County SAO Misdemeanor Division. **BRAD McVAY** has joined the SAO in Levy County as the new misdemeanor/traffic attorney replacing **JESSE IRBY**. Brad is a UF graduate and a FSU Law Graduate.

DAVID MARGULIES and **JACOB MCCRAE** will move to the Traffic Division.

CONGRATULATIONS CONTINUED

NEY promoted to Lieutenant, **JAMES BOND** promoted to Corporal, and **MIKE BRACAGLIA**, promoted to Corporal.

FISH; Communications Officer of the Year Award to **LAUREN MARKER**; and Explorer of the Year Award to Lt. **BRITTANY LARSON**.

Police Officer **ADAM JOY**; Alachua County Sheriff's Lieutenant **MIKE HANSON**; and Florida Wildlife Commission Officer **MICHAEL "BRAD" STANLEY**.

In May, at the Law Enforcement Memorial Service, the Baker County Sheriff's Office announced the following award recipients: Morris Fish Award to Deputy **CHRISTOPHER WALKER**; the Joseph Burtner Award to Corporal **JOHN HARDIN AND DEPUTY DAN NICHOLS**; Corrections Officer of the Year Award to Classifications Officer **LORINDA**

In May, at the 2010 Law Enforcement Heroes Ball, the Fraternal Order of Police awarded its TOP COP Award to Detective **TODD CARD** of the Alachua County Sheriff's Office. Detective Card was cited for his life saving actions in assisting seriously injured traffic accident victims. Others nominees included GPD Officers **ARIEL LUGO** and **JUSTIN TORRES**; Alachua



DETAINMENT OF DUI DRIVERS UNDER 21

By ASA SEAN EATON

While you all may be familiar with a law enforcement officer's authority to require a person to submit to a lawful breath test "if the person is lawfully arrested for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages" (F.S. 316.1932(1)(a)), there is also a basis for detaining someone under the age of 21 to determine that person's breath-alcohol level. Under F.S. 322.2616 a law enforcement officer who has probable cause to believe that a person under 21 was driving with **any** breath alcohol level may detain that person to determine his

or her actual breath alcohol level. In addition, a law enforcement officer must suspend that person's driving privilege if he or she has refused to submit to the test. For the suspension to be upheld, the person must be informed that a refusal will result in a suspension in the same way DUI suspects must be read implied consent. Finally, a violation of F.S. 322.2616 is neither a traffic infraction nor a criminal offense, nor does being detained pursuant to this section constitute an arrest. See F.S. 316.2616 for further details.



TO ALL LAW ENFORCEMENT AGENCIES From Bill Cervone, State Attorney

As you may recall, last year the United States Supreme Court issued an opinion, Montejo v Louisiana, 129 S Ct 2079 (2009), which held that a law enforcement officer may re-approach a suspect and seek to question him even after he has invoked his constitutional right to counsel.

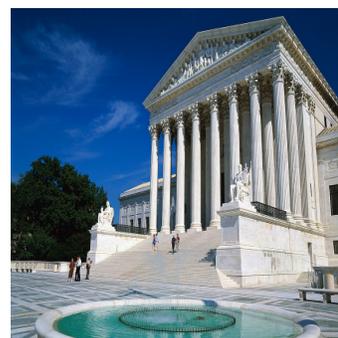
In February, the Supreme Court issued a follow-up opinion styled Maryland v Shatzer, which holds that in order to do so you must wait 14 days from when the right to counsel has originally been invoked before re-approaching the suspect. The Court seldom imposes firm time limits like this, but reasoned that the passage of two weeks would be sufficient time to allow a suspect to reflect on his situation and would sufficiently prevent any sort of unfair intimidation.

The Court also stated that a firm time limit would be helpful so that law enforcement, the courts and others would not have to grapple with various issues related to what might be appropriate timing.

Please be aware of this new requirement. Should you attempt to re-initiate contact with a suspect after 14 days, you must still give appropriate Miranda warnings and obtain a waiver. I would suggest that when doing so you specifically acknowledge the prior invocation and obtain a clear statement from the suspect that he is waiving (if he chooses to do so) despite having previously invoked his right to counsel or to remain silent.

Any agency having questions or want-

ing a full copy of these two important decisions can locate them on the Supreme Court's website or can call my Intake lawyers in the Gainesville office at 352-374-3670.



FLEEING THE MARKED PATROL CAR

Defendant Slack was charged with violating section 326.1935, Fleeing and Attempting to Elude. The State attempted to show guilt by offering the testimony of Deputy Stone who testified that he was driving a "marked patrol car, lights on top" and in ordering Slack to stop, he engaged his exterior lights and activated his siren.

The First DCA in Slack v State held that was insufficient to convict Slack

of Fleeing where there was no testimony that the Agency vehicle contained "agency insignia prominently displayed." The deputy's testimony that he was driving a "marked patrol car" with "lights on top" was insufficient to establish that there were "agency insignia and other jurisdictional markings prominently displayed on the vehicle."



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“FRUITS OF HOPE” AND THE INADMISSIBLE CONFESSION

**“Confessions are equally inadmissible when they are the fruits of hope as when they are the product of fear”
Fourth DCA**

Giving a suspect unwarranted hope that confessing will benefit him can result in a determination that the confession is involuntary, just as instilling fear in the suspect, the Fourth DCA held in Day v State.

Day was a suspect in various sex offenses. The investigating officer Mirandized him and elicited a statement based on repeated pleas to help the officer and to help himself. The officer said things such as “If something happened and its accidental-then we can work some-

thing out.” “ I just want to know what happened. If there’s something that we can fix and we can work with, then that’s what I want to know, okay.” “I’m trying to give you the opportunity for you to help yourself so that I can work something out for you.” “Well, this is why you’re here, to help yourself.” And ultimately, “trust me, trust me.”

The court found that the investigator’s constant offers of help, followed by requests for information, and the lack of clarity on the real limits of the investigator’s authority certainly

added to the defendant’s unrealistic hope that the investigator would truly help him. “It must be remembered that confessions, as such, are equally inadmissible when they are the fruits of hope as when they are the product of fear.” In the present case, based on the totality of circumstances, the many offers of help and the statements implying authority to influence the process rendered the defendant’s confession inadmissible as improper “fruits of hope.”



HOW LONG IS TOO LONG FOR TRAFFIC STOP

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.



FOR COPIES OF CASES...

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The Fifth DCA explored that question in Whitfield v State and found that the FHP trooper delayed too long, thus justifying the suppression of the cocaine found in the vehicle.

An FHP trooper stopped Whitfield for speeding on the turnpike, driving a rental car. Whitfield seemed nervous and to "calm him down" the trooper engaged in idle conversation. The entire traffic stop was recorded, so the court was able to time specifically how long it took for the officer to obtain the license and other documents, and how long it took for the drug dog to arrive. A written warning was given Whitfield 27.26 minutes after the stop, and the drug dog began his search 28.57 minutes after the stop.

The court found no issue with the propriety of the stop itself finding that once a vehicle is lawfully stopped, a law enforcement officer may conduct an investigation reasonably related in scope to the circumstances that justified the traffic stop. This investigation may include asking the driver for a license, insurance and registration. Also, the officer may run a computer check to see if

the vehicle has been stolen and whether the driver has any outstanding warrants. However, absent an articulable suspicion of criminal activity, the time an officer takes to issue a citation should last no longer than is necessary to make any required license or registration checks and to write the citation.

Here, Trooper Barley stopped Whitfield's car for speeding and immediately indicated that he was issuing him a written warning for speeding. Whitfield's car could be properly subjected to a canine search as long as the search was done within the time required to issue the citation, provided the time was not unreasonably prolonged. The record in this case reflects that the routine investigation had been completed within approximately 12 minutes after the vehicle was stopped and that the amount of time reasonably required to do the necessary license/warrant checks and issue the citation, even including the several minutes expended on verifying Whitfield's authority to drive the car, was significantly less than the 29 minutes expended.

"This investigation ex-

tended the traffic stop to more than 28 minutes, which, coincidentally or not, was exactly the same amount of time it took Trooper Barley to get a drug sniff dog on the scene. We do not see how the length of this stop could be justified by the circumstances. This court has previously disapproved of such desultory, wide-ranging interrogation of the motorist that has nothing to do with the ostensible purpose of the stop."

The court affirmed that Florida does not recognize a rule used in some federal circuits that allows a traffic stop to be extended to get a dog sniff if the delay is "de minimus". In Florida, a sniff search can be conducted before the traffic stop has been concluded, but not after.



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NO SEARCH WARRANTS FOR PHARMACY RECORDS

In State v Tamulonis, the Second DCA has held that law enforcement officers do not need to seek a search warrant or a subpoena to obtain controlled substance records from pharmacies.

Officers received information that Tamulonis was involved in doctor shopping. A Detective contacted various pharmacies and obtained Tamulonis's patient profiles, which are "computer printouts that show the date, the prescription medication, and the doctor who prescribed it." Based on the patient profiles, it was determined that Tamulonis had visited multiple doctors within a thirty-day period and had obtained prescriptions for Oxycodone and

Oxycontin. Upon showing these records to various physicians, it was determined that all doctors involved were unaware that other doctors had been issuing the same prescriptions.

Tamulonis argued that pharmacy records are medical records and that patients have a reasonable expectation of privacy in the records. The Second DCA disagreed, pointing to Fla Statute 893.07 that requires pharmacists to maintain controlled substance records, including prescription records, and to make the records "available for a period of at least 2 years for inspection and copying by law enforcement officers...." The court

agreed with the First DCA in State v. Carter that held that the statute does not require a subpoena, warrant, or prior notice to the patient



THE EFFECTS OF ARIZONA V GANT

The effects of Arizona v Gant, last year's most important 4th Amendment case from the U.S. Supreme Court, have arrived in Florida's appellate courts.

In State v K.S., a police officer sought to stop a car for a traffic violation and the driver sped off. He was stopped and arrested, and a search of the car revealed a gun. The Second DCA affirmed the trial court's suppression of the gun.

"In Gant, the Supreme Court held that the search of Gant's vehicle was unreasonable where Gant 'clearly was not within reaching distance of his car,' because he was handcuffed in a patrol car at the time of the search. The Court

also found that police could not reasonably have believed they would find evidence relevant to Gant's crime of driving with a suspended license. Similarly here, despite the State's argument that K.S.'s 'furtive movements towards the glove compartment' justified the search based on officer safety concerns, at the time of the search K.S. was separated from his car, placed in handcuffs, and under the supervision of additional backup officers. Further, the officer could not reasonably have believed he would find evidence of K.S.'s crime of fleeing and eluding. Under these circumstances, where K.S. was secured by officers and not within reaching distance of his car, we conclude the officer's

search of K.S.'s car was unreasonable."

