

LAW ENFORCEMENT NEWSLETTER

January 2015

A MESSAGE FROM BILL CERVONE STATE ATTORNEY

Another Happy New Year to everyone, my 15th as your State Attorney and I am indeed happy to keep serving with you as we continue to pursue justice and safety for our citizens and communities. For all of you, I hope for a productive, prosperous and above all else safe 2015.

As they always do, each new year will bring change, debate and controversy. Why should 2015 be any different than the last few decades? For those of us in law enforcement something to watch for will be growing talk about the use of body cams as standard equipment for police personnel. This is, of

course, an offshoot of events in Ferguson, Missouri, and other places across the country in 2014. A bill has already been introduced for consideration by the Florida legislature this year that would require this.

There are many arguments, pro and con, on this topic and it's a discussion worth putting some thought into ahead of time. Proponents urge that a body cam will tell the indisputable truth about a contested event. Opponents will remind us that so much depends on angles, lighting, and other uncontrollable circumstances that this won't always, if ever, be true. Proponents will talk about greater

visibility and accountability through the collection of data. Opponents will respond that the volume of such data is quite possibly impossible to manage effectively, at least within existing or likely agency budgets. Proponents will say that no law enforcement officer should ever fear such a video. Opponents will say that no officer should be presumed to be in the wrong such as to be mandated to have this kind of equipment. Everyone will say that the time and technology are here already. Agencies will say yes, but who's going to pay for all of it? Remember that just like an audio recording or a 911 call everything captured on a body cam is potentially evidence that must be collected, preserved, and disclosed to the defense - it's not just a matter of having officers equipped this way, it's also a matter of storing, retrieving, transferring, and indexing what could be a very large amount of data, and that may well be easier said than done.

There will be no easy or quick answer to this, which will be reminiscent of debates over other topics like how to conduct lineups and when interviews must be audiotaped. You'll recall those discussion a few years ago when Florida's Innocence Commission was in session, and how the idea of one size fits all for



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mandates directed at Florida agencies created so much controversy.

All of this will bear watching, thinking and discussing as we enter 2015.



CONGRATULATIONS TO...

...ASA Frank Slavichak and his wife, Elisa, on the birth of their third child, baby Zoe Noel, who arrived on December 16.

...ASA George Wright and his wife Ashleigh on the birth of their second child, baby George, on December 29th.



WELCOME

New High Springs Police Chief Jack Anterio, who will fill that position in late January. Chief Anterio comes to High Springs after service for more than 25 years with the Hollywood, Florida, Police Department.

SAO Staff Changes

ASA Deb Hunt has resigned from her Alachua County felony position effective January 9th. Deb has taken a position with DCF in Gainesville. She will be replaced by ASA Tory Armstrong, who has been promoted from the County Court Division in Alachua County.

ASA Duane Triplett has resigned his Alachua County felony position effective January 16th in order to pursue a private business position in Kentucky. Duane's Alachua County case load will be taken by ASA Glenn Bryan, who has

been working in Levy and Bradford Counties since 2002, most recently as the Division Chief in Starke.

Glenn will be replaced as the Bradford County Division Chief by Luis Bustamante. Luis comes to SAO8 with a rich background, having served as an ASA in the 7th Circuit after his graduation from FSU Law School in 1993 until 1997, when he became Chief Assistant Statewide Prosecutor under the Attorney General's office until 2009. In 2009, Luis returned to the 7th Circuit State Attorney's

Office, where he served as Chief Assistant State Attorney and, more recently, Executive Director. Some of you may know Luis from cases he has prosecuted in the past, in particular in our northern counties, with the Statewide Prosecutor's Office.



Any changes in agency email addresses should be reported to our office at clendeninp@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 Chief Investigator Paul Clendenin at the SAO at 352-374-3670.

Parole Commission Re-Named

In case you missed it in last year's legislative changes the Florida Parole Commission was re-named as the Florida Commission On Offender Review. This change was effective on July 1, 2014. With the decreasing number of parole eligible inmates the new name was thought to

better reflect the agency's core mission. Nothing else has changed and as you start to see this new name you'll know what it is.

In other news related to the Commission, Chair Tena Pate was re-appointed to a third two year term by the Gover-

nor and Cabinet. Chair Pate has been a great friend to law enforcement during her tenure and her re-appointment should ensure that the Commission continues to be responsive to the safety concerns of Florida's citizens and visitors.



**REMINDER:
LAW ENFORCEMENT
NEWSLETTER NOW ON-LINE**

The Law Enforcement Newsletter is now available on-line, including old issues beginning with calendar year 2000. To access the Law Enforcement Newsletter go to the SAO website at <www.sao8.org> and click on the "Law Enforcement Newsletter" box.



The SAO Is Now On Twitter

The SAO has established a Twitter feed to better disseminate information to the media and others such as law enforcement agencies. Like us at #8THCIRCUITSAO. For more information contact Deputy Chief Investigator Darry Lloyd at 352-374-3670.



IN MEMORIAM

Nathaniel Jones, known to many in the Alachua County law enforcement community especially, passed away on November 27th, 2014, at the age of 91. Nathaniel was a retired University of Florida Police Department officer and a mentor to many within UPD, the Gainesville Police Department, the Alachua County Sheriff's Office, and elsewhere. He was a founding member and past president of the Fraternal Order of Police Gator Lodge 67 in Gainesville. A true gentleman and a man of integrity and honor, he will be remembered and missed by many.

Retired Circuit Judge Osse Fagan, who many will recall not just from his days in presiding over a felony criminal docket but also from his long and distinguished career prior to taking the Bench, passed away on December 17th. Judge Fagan was a friend to the law enforcement community during his many years of service to the community.



**We're on the web:
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The Odor Of Cannabis...

Contributed by ASA Michael Becker

The odor of cannabis coming from a person or vehicle is commonly the beginning of an investigation for the source of the odor and results in the discovery of drugs or other evidence of a crime.

If, from your training and experience, you recognize the odor of burnt or fresh cannabis coming from a vehicle, you have PC to search both the vehicle and the occupants of the vehicle. “[T]he odor of burnt cannabis emanating from a vehicle constitutes probable cause to search all occupants of that vehicle.” State v. Williams, 967 So.2d 941 (Fla. 1st DCA 2007). If you can articulate that the smell is also coming from a specific person, please put that fact in your report.

Since the Carroll Doctrine is no longer good law, the post-arrest search of a vehicle is no longer automatically valid. However, if you smell cannabis coming from a vehicle, you can search the vehicle even after the arrest of the occupant. “Once Officer Abrahamson detected the distinct odor of raw cannabis, he had probable cause to search the car and arrest the [Defendant]; it did not matter if he arrested first and searched later.” State v. Sarria, 97 So.3d 282 (Fla. 4th DCA 2012). (You have to be searching for the cannabis.) Sarria also says, “For the purpose of providing a basis for probable cause, we see no reason to distinguish the odor of burnt marijuana from the odor of raw marijuana.” Again, more facts in your report about the case and why you took action is better; the appellate courts love detail.

So, you smell the odor of burnt or fresh cannabis coming from the vehicle, does it matter where you search

first? If it is a strong odor of fresh cannabis, can you just start at the trunk? Don’t start at the trunk, you need more than just odor, and fresh cannabis is better than burnt cannabis; you have to be able to explain what besides the odor caused your suspicion. “[T]he strong odor of ‘raw’ marijuana coming from the vehicle when the deputy arrived at the passenger window provided probable cause to search. The fact that a search of the driver revealed only a small quantity of marijuana on his person, coupled with the ‘excessive’ or furtive movement of the other vehicle occupants after being stopped, and the strong order of ‘raw’ marijuana still being present, resulted in the totality of the circumstances providing probable cause for the deputy to believe additional marijuana was located in the vehicle, permitting him to search the entire vehicle, including the trunk, as it was reasonable to believe the additional marijuana could be found there.” Kimball v. State, 951 So.2d 35 (Fla. 1st DCA 2007). If you search the passenger compartment, and you still smell the cannabis that you haven’t found, then you can search the trunk. Just make sure your report has all the facts causing your reasonable suspicion.

I know that a lot of cases occur with more than one person in the car and drugs in the car but not on a person. Who can you arrest? The answer is: at this point you can’t arrest anyone. Thankfully, your Terry Stop is not over. If you locate any narcotics inside of the vehicle either by a consent search, plain view, or plain smell you CANNOT automatically arrest the occupants of the vehicle. The narcotics located in the vehicle creates most of the PC to arrest any person who was in the vehicle (and could have put the drugs there), but

you still needs to do the rest of the investigation. See Perry v. State, 916 So.2d 835 (Fla. 2nd DCA 2005), and Maryland v. Pringle, 124 S.Ct. 795 (2003). Judge Al-tenbernd, my favorite appellate judge, wrote Perry and it is worth reading just for fun, but the key sentence is, “Perhaps if the officers had performed the same investigative inquiry in this case that was performed in Pringle, they could have arrested both Senior and Mr. Perry if neither of them admitted ownership of the paraphernalia in the black bag.” Due process requires a complete investigation, talk with the occupants, record their conflicting stories, get details... back to the love of detail.

For our ‘don’t get sued moment’, please remember that a K-9 alert on a vehicle will let you search the vehicle, but NOT the people in the vehicle. State v. Giffin, 949 So.2d 309 (Fla. 1st DCA 2007). .



Search And Seizure: A Review

A recent case from the 1st DCA provides a good review of many issues that come up almost every day for officers on the street. Especially since the 1st DCA governs cases in 8th Circuit counties and courts, the case provides much guidance. The case, Griffin v State, which occurred in Escambia County, directly holds that mere presence of an individual in a high crime area does not provide reasonable suspicion for a stop and frisk.

The facts of the case are simple. An officer approached a man in a high crime area. The man was standing in a driveway with one of his hands in his pocket. Although he had no reason to suspect criminal activity of any sort, the officer immediately demanded that the man remove his hand from his pocket. When the man did not do so and refused to consent to a search, the officer conducted a weapons pat down, during which he grabbed the man's pocket and felt what he described as a "squishy bag" with a small knot. The officer was immediately "almost certain" that the item was a baggie of cocaine. Of course, it was and an arrest and prosecution followed.

In beginning its discussion of these facts the 1DCA noted that police-citizen encounters come in three forms: voluntary/consensual encounters, investigatory stops, and arrests. An arrest, of course, requires probable cause that a crime has been or is being committed, facts not present or even suggested in the Griffin case. A completely voluntary and consensual encounter can be initiated by an officer at any time but can also be terminated at will by the citizen. In fact, it may never even start if the citizen simply walks away or refuses to engage in interaction with the officer. A citizen has no obligation to engage with an officer or respond to him.

When an officer has a "reasonable suspicion that a person has committed, is

committing, or is about to commit a crime," however, the officer may temporarily detain that person to confirm or refute his suspicions. Additionally, when an officer has permissibly detained an individual for such an investigatory stop, or is about to do so, he may conduct a limited search of the person "only to the extent necessary to disclose, and for the purpose of disclosing, the presence of a weapon" if the officer has a "reasonable belief that the person detained is armed."

Which type of encounter exists turns on whether the officer "hindered or restricted the person's freedom to leave or freedom to refuse to answer inquiries. Ultimately, according to the 1DCA, the question is whether a reasonable person in the same circumstances "would conclude that he or she is not free to end the encounter and depart." Importantly, when an officer demands that a citizen remove his hands from his pockets those actions constitute a seizure of the person for constitutional search and seizure purposes. Such a demand is considered to be a directive or show of force that an individual is not free to disregard.

Griffin, therefore was being subjected to an investigatory stop. As soon as the officer demanded that he remove his hand from his pocket anything consensual or voluntary about the encounter ceased. To justify that investigatory stop, the officer must have had a reasonable suspicion that he was "armed and dangerous" - otherwise no pat down was permitted. The 1DCA held that standing in a driveway with a hand in a pocket neither provides a reasonable suspicion that one is armed and potentially dangerous nor justifies an invasion of personal liberty such as the investigatory stop amounted to. Further, the officer's description of the area as a "high crime area" does not constitute a reasonable suspicion of illegal conduct. Even combined with the hand in the pocket the 1DCA rejected these facts as wholly insufficient to provide a reasonable suspicion for an investigatory stop. In doing so, the court noted that if mere presence in a

high crime area could constitute the reasonable suspicion needed for a weapons pat down, then anyone who for any reason was at any time in such an area could be considered armed and dangerous, something the Constitution does not allow. The officer's detention of Griffin was itself therefore illegal and anything that flowed from it was subject to suppression.

Beyond the illegality of the detention, the 1DCA went on to say that the pat down itself was illegal. In the court's opinion, the pat down described by the officer went beyond what the law allows. An officer may not squeeze, slide, or otherwise manipulate the contents of a person's pocket to determine the incriminating nature of an object. Rather, an officer may only conduct such a touching as immediately reveals to him the identity, perhaps by contour and mass, of an object. The 1DCA used the term "lightly patting" to describe what is allowed. The officer in Griffin said that he "grabbed a handful of the pocket," and the "bag" inside, which he then could feel "like, kind of a little squishy" and with "a small knot." To do those things, the court concluded, required that the officer squeeze or manipulate rather than engage in a light patting, and that was overreaching and impermissible.

Beyond that, even if what the officer did was permitted, the detection of a squishy, knotted bag was to the court insufficient to justify anything further because such an object "could be a host of legitimate property items," meaning that it would be impossible that the illegal nature of the object being felt was "immediately apparent," as is required. "Immediately apparent" requires more than that the officer "believed" and was "almost

Continued: Search And Seizure: A Review

certain" that he was dealing with a baggie of cocaine, which the court considered to be equivocal even when added to the officer's testimony that his belief was also based on his training and experience. Courts must require more than such conclusory statements in order to comply with the requires of the law that they "strictly circumscribe" plain feel discoveries during weapons pat downs.

In sum, the 1DCA held that Griffin had been seized when the officer demanded that he remove his hand from his pocket, moving the incident beyond a simple voluntary or consensual encounter and into the realm of an investigatory stop. Because simply being in a high crime area and putting his hand into his pocket cannot justify a reasonable suspicion of either criminal activity or of an armed and

dangerous person, the ensuing search was illegal. Even if the search had been permissible, the way in which it was conducted exceeded the scope of what is allowed. The result was the suppression of everything that was found.

Additional facts can, of course, entirely alter the outcome of such a case. For example, the Griffin court compared these facts to another case in which the defendant actually told the officer that he had a knife in his pocket, continuously reached into his pocket during his conversations with the officer, and became increasingly nervous upon revealing that he had a knife. These factors, however, must be present before the fact of a seizure. If they occur subsequent to seizure (in the Griffin case, remember that seizure had

legally occurred upon the officer directing Griffin to remove his hand from his pocket) they cannot be considered in evaluating whether the officer had the required reasonable suspicion to proceed.

If all of this seems to be dancing on the head of a pin and hyper-technical, it is. It is also the reality of search and seizure law. Circumstances must demonstrably happen in a certain order, each step being required before the next can follow. Precision in recording events as they unfold is also critical in convincing courts that they did in fact happen.



Crime Scene Protocol

With thanks to PoliceOne.com, which published the following on its website in June of 2014, here is an article containing some not totally tongue in cheek crime scene pointers:

Nothing destroys evidence at an outdoor crime scene faster than inclement weather, with the exception of maybe a nosy cop who has nothing to do with the case. Nothing destroys evidence at an indoor crime scene faster than allowing the brass - who has nothing to do with the case - to march around picking stuff up and asking "Hey, you see how this item is out of place?" "Yes, Sheriff, we do now."

In humor there is truth. With the help of some of my friends and PoliceOne colleagues I've compiled a list of ways to screw up a crime scene. Here are 20 funny - from real to surreal - ways to destroy a crime scene:

1. You put your foot next to the suspects foot print to see what size it is.
2. You post a crime scene photo on social media, soon discovering that the suddenly have a lot more time

for social media.

3. You enlarge the vomit stain on the rug with your own contribution.
4. You collect a dozen samples for DNA sampling, all while wearing the same gloves.
5. You wait ten weeks for a fingerprint or DNA check only to find out that the print belongs to you.
6. You bag up green leafy vegetation - and other moist, organic evidence - in a plastic sandwich bag and then leave it in there, unopened, until the case goes to trial.
7. You let the chief into the crime scene.
8. You fail to let the chief into the crime scene.
9. You use (and then flush)the toilet at the crime scene.
10. You allow the fire department) a.k.a. "the evidence eradication team") in first.
11. You let everyone present at the scene approach it from a different route, path, or door.
12. You tell the rookie that the only way to test the time of death of a bloated body is to poke it and see if the skin bounces back (and then

actually let him do it).

13. You start comingling your actual crime scene training with an episode of CSI you saw a few years ago.
14. You hear your captain tell you not to put his name on the list of people who entered the crime scene (and you actually leave him off the list).
15. You totally blow off procedure because "it started out as a petty call" - until you found the body
16. You pick up and examine an object, then put it back like you think you found it, and then decide to photograph it.
17. You pick up evidence firearms by sticking a pen or pencil into the barrel.
18. You unload all firearms found at the crime scene before placing them into evidence.
19. You dump all the ammunition from those firearms into the same bag or box.
20. You smell the container, which ultimately ends up with the coroner bagging two bodies rather than one.

From The "Exactly What Did You Expect?" Department

The following news story appeared just before Christmas:

Orville Smith, a store manager for Best Buy in Augusta, Ga., told police he observed a male customer, later identified as Tyrone Jackson of Augusta, on surveillance camera putting a laptop computer under his jacket. When confronted the man became irate, knocked down an employee, drew a knife and ran for the door.

Outside on the sidewalk were four Marines collecting toys for the Toys

For Tots program. Smith said the Marines stopped the man, but he stabbed one of the Marines, Cpl. Phillip Duggan, in the back; the injury did not appear to be severe.

After police and an ambulance arrived at the scene Cpl. Duggan was transported for treatment.

"The subject was also transported to the local hospital with two broken arms, a broken ankle, a broken leg, several missing teeth, possible broken ribs, multiple contusions, assort-

ed lacerations, a broken nose, and a broken jaw, injuries he sustained when he slipped and fell off of the curb after stabbing the Marine," according to a police report.

Evidence Tampering

The world of electronic everything is slowly reaching into the criminal court system, which is a long way from having caught up to the realities of the modern world but which keeps trying. An interesting new case is in point.

In the case, Costanzo, a Broward County deputy, had a video on his cellphone of statements being made by a suspect. After showing the video to a supervisor, forwarding it to another officer, and also sending it to a PBA rep, and shortly before his phone was seized as a part of an investigation that led to his being charged with several offenses, he deleted the video from his phone. He was convicted of a count of Tampering for having done so, but the 4th DCA reversed the conviction.

The court compared the deletion to merely dropping something when approached by the police, which is insufficient for a Tampering charge. Tampering requires an intent to destroy and thus interfere with an investigation. Most commonly, drug dealers who are being caught will try to get rid of what they are carrying. To be guilty of Tampering, their efforts must go beyond merely giving up possession of something, for example by dropping it where it is easily recovered. Throwing drugs into a bonfire, for example, would be far different from just dropping them.

The same applies to electronic data. Having been shared by Costanzo, the court could not conclude that the evidence had been destroyed. Indeed, it was ultimately recovered from his service provider and from the agency serv-

er. As the court noted, having shared the video as he did is actually the antithesis of an intent to destroy it.

The bottom line is the court's ruling that the Tampering statute does not criminalize deleting evidence existing in the memory of a particular electronic device, particularly when that evidence resides elsewhere in the electronic ether. An interesting question remains as to how a court would rule if that last fact, the sharing of the data with others, was not present, but that is for another case on another day.



