FOR THE LAW ENFORCEMENT AGENCIES OF MIAMI-DADE COUNTY

The Rap Sheet

KATHERINE FERNANDEZ RUNDLE — MIAMI-DADE STATE ATTORNEY

June 2014

POLICE-PROSECUTOR COORDINATING COMMITTEE

Steering Committee:

Marie Jo Toussaint, Deputy Chief ASA
State Attorney's Office
(305) 547-0220
e-mail: MarieJoToussaint@MiamiSAO.com

José Arrojo, Chief ASA
State Attorney's Office
(305) 547-0309
e-mail: JoseArrojo@MiamiSAO.com

Assistant Director Randy Heller
Miami-Dade Police Department
(305) 471-2625
e-mail: rheller@mdpd.com

Frank Ledee, ASA
State Attorney's Office
(305) 547-0853
e-mail: FrankLedee@MiamiSAO.com

Chief Fred Maas
Sunny Isles Beach PD
(305) 947-4440
e-mail: fmaas@sibfl.net

Members of the Crimes Against Law Enforcement Officers Subcommittee are listed on the back page

IN THIS ISSUE: **PAGE**

There will be no
Police-Prosecutor Coordinating Committee
Meeting in July or August

The next scheduled meeting after the summer hiatus
will be on September 17, 2014 at 2:00 p.m.
and will include the annual Legislative Update

Summary of PPCC Meeting May, 2014

Agencies represented: SAO, Miami-Dade PD, Miami PD, Miami Springs PD, Aventura PD, Sunny Isles Beach PD, Pinecrest PD, Miami Gardens PD, and University of Miami PD.

Agenda Items:

Criminal Use or Possession of Personal Identification Information

Oftentimes, as a result of a search, lists containing personal identifying information of numerous individuals are recovered. This generally results in an arrest where a defendant is charged with numerous counts of criminal use or possession of personal identification information. We must have victim contact information to properly screen these cases and determine whether they are prosecutable. In the last few months we have no-actioned several hundred-count cases where victim information was not provided by the 31st day after the arrest. It would be more efficient to arrest the defendant on non-identification related charges and turn over the identification materials to a detective for follow-up investigation. Conducting an investigation after an arrest can be problematic in view of arraignment and speedy trial limitations.

Continued on next page

IMPORTANT!

Next PPCC meeting, **Wednesday, June 18, 2014, at 2:00 p.m.**
State Attorney's Office • 1350 NW 12 Avenue • Miami FL 33136
All are invited to attend

Continued from previous page

Defendants' statements

A defendant's statement or a summary of the statement must be provided to the defense in discovery. Therefore, it is imperative that a factual account of the defendant's statement be included in the arrest-affidavit, particularly if it is an incriminating statement. It can be difficult to explain why an incriminating statement is not mentioned in an offense incident report or the A-form written at the time of arrest, particularly if any non-incriminating statement is included. Saying that the defendant confessed to his involvement in the crime is a conclusion that often times only means the defendant admitted to being at the scene but denied committing the crime.

Arrest Affidavits

We had another long discussion about the substance of arrest affidavits, particularly in light of Preston v. Gee, (2nd DCA) 39FLW D564. The narrative must contain a rendition of the facts that link the defendant to the crime and to evidence recovered as well as statements of witnesses. They must not contain conclusions, the applicable law or an officer's opinion as to the guilt of the defendant. A Judge will not find probable cause for the arrest if the affidavit is full of conclusory statements and short on facts, which will result in the setting of a probable cause hearing and the release of the defendant on his/her own recognizance if the officer does not appear for the hearing.

Officers' E-mail Addresses

FSU attorneys have requested that officers provide their work email addresses in order to be able to contact them directly. They can be listed on the back of the arrest form. This would reduce the number of cases reset and ultimately dropped because of an officer's failure to appear.

Failure to Schedule Pre-filing Conferences

We are still dealing with officers not calling to schedule their pre-filing conferences. We provided stats to representatives of the agencies involved.

Automated A-Forms

Training is continuing

Case Law discussed - Navorette v. California, 572 U.S. ___ (2014) and Preston v. Gee, (2nd DCA) 39FLW D564

Recent Case Law

Compiled by Joe Robinson, Chief of the Felony Screening Unit

Finley v. State, 39 Fla. L. Weekly D1107a (Fourth Dist.)

The defendant's residence was burglarized during his absence. A neighbor reported the burglary to the police. The burglar was stopped shortly thereafter and was arrested. Upon entering the apartment the police found a handgun lying on a box spring left exposed by an overturned mattress. The police processed the firearm and magazine within it for fingerprints and DNA. No fingerprints were found, but DNA taken from the gun and magazine was found and was matched to the defendant. The defendant was charged with possession of a firearm by a convicted felon.

At trial a police forensic expert was called by the State. She testified "that Finley's DNA was the only sample she tested against the DNA found on the handgun and weapon (she did not test the sample against the burglary suspect's DNA), but that there was the presence of a second individual's DNA found on the handgun. *Most notably, when questioned on cross-examination, the forensic witness testified that "secondary transfer" is possible, whereby DNA can be transferred from one object to another, so that a person's DNA can be detected on both objects without the DNA contributor ever having touched the second object*." (emphasis added)

Continued on next page

Continued from previous page

The Court determined the case against the defendant was wholly circumstantial in nature, with the result that the State had the burden of rebutting every reasonable hypothesis of innocence put forth by the defendant; "In cases in which the evidence of guilt is wholly circumstantial, it is the trial judge's task to review the evidence in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences." *Ballard*, 923 So. 2d at 482 (citation omitted) (internal quotation marks omitted). Therefore "[t]he state is not required to rebut conclusively every possible variation of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the Defendant's theory of events."

The court then discussed the evidence and its import:

"Finley's theory was that it was the burglar, who put the handgun in Finley's apartment. The State did not present any evidence inconsistent with this theory. It is undisputed that the burglar was in Finley's home, and was the last person to be in the apartment before Officer M. discovered the handgun. **Although there was evidence that Finley's DNA was on the gun, and the jury was free to reject the DNA transfer theory, in order to survive a motion for judgment of acquittal, the State must present evidence inconsistent with Finley's reasonable hypothesis of innocence. Since Finley's reasonable hypothesis involved an explanation for the presence of his DNA on the gun, the State had to provide evidence inconsistent with this theory, something it failed to do.** The State did not put the burglar on the stand to deny possession of the gun, and even more, the investigators never even tested the burglar's DNA to compare to the handgun and magazine, which could have provided evidence that was inconsistent with the burglar ever having touched the handgun. To the contrary, the testimony at trial was that there *was* the presence of a second contributor of DNA on the handgun; evidence arguably in *support* of the defense's theory. The State also did not provide any evidence inconsistent with the theory of secondary transfer of DNA. In fact, the State's own forensic witness testified in the affirmative, that secondary transfer could have occurred. Additionally, the investigator who took the DNA sample from the handgun and magazine, testified that she used the cotton swabs to rub different portions of the handgun and magazine. Therefore, she could not testify as to the portion of the handgun, and more importantly the magazine, on which the DNA was found. It was therefore consistent with Finley's theory of innocence that the portion of the magazine that was exposed could have been the portion of the magazine which contained Finley's DNA because of secondary transfer. There was also no evidence provided as to *when* or *how* the DNA evidence became present on the handgun."

The Fourth DCA then reversed the defendant's conviction. This is a case where a fingerprint would have been more probative and useful to the State than the DNA evidence which was recovered.

McClamma v. State, 2014 FLW 1871510 (Fla.App. 2 Dist.)

This case involves an initial stop and arrest for loitering and prowling from the Second District Court of Appeal, with the following facts:

The officer was dispatched at 1:30 a.m. to a trailer park, in reference to a suspicious person call. The caller (who apparently gave her name and address) told the responding officer she "*had seen a shirtless, bushy-haired, light-skinned, African–American, male teenager walking suspiciously in the trailer park, which had primarily older residents. The woman had seen the teenager walking between the trailer park office and one of the trailers. She did not report seeing any activity other than a teenager walking late at night. At no time during the events described in this opinion did anyone report any burglary, theft, or other crime in the trailer park. The deputy called in a second deputy with a dog, but the dog could not follow a scent*." Thirty minutes later, the officer saw the defendant, a "tall, tan white teenager", shirtless and whose clothing generally matched the

Continued on next page

Continued from previous page

earlier description running from a house to a taxi. The taxi was stopped and the defendant was asked, without *Miranda* warnings, what he was doing and why he was in the neighborhood. There is no indication as to what the defendant responded, but he was removed from the taxi. A frisk revealed a Marijuana pipe, and at that point a different officer on the scene concluded the defendant had not dispelled their alarm and arrested him for loitering and prowling. A further search of a backpack revealed trafficking amounts of hydrocodone, and other evidence to charge three counts of burglary to a conveyance.

In throwing out the stop and initial arrest of the defendant, and the resultant felony charges, the Second DCA held the facts were insufficient for the officer to make an arrest for loitering and prowling, nor to even effect a *Terry* stop on the defendant. The Appellate Court opinion goes into a lengthy and thoughtful exposition on the history and analysis of the loitering and prowling statute. In the interest of brevity, the Court's reasoning will be highlighted as follows:

The arresting officer must read the defendant his *Miranda* rights before questioning him about his actions which created the alarm and concern: "*The Miranda warning is needed because the defendant is in custody for the misdemeanor of loitering or prowling and that offense usually overlaps with a reasonable suspicion of another offense, typically a felony or attempted felony. Thus, a person stopped for prowling because he is hiding in the bushes late at night under alarming circumstances may make a statement while dispelling alarm that is relevant to convict him of a recent burglary. Likewise, in dispelling alarm that he is not a threat to person or property, a defendant may need to explain that he was hiding in the bushes to engage in prohibited use of drugs."*

The essence of the crime of loitering and prowling is conduct which creates the alarm, not conduct which resembles attempting to commit another crime: *"(An) examination of the statute clearly demonstrates that prowling is not accurately described as a preliminary attempt to commit another crime…(T)he issue is whether an ordinary law enforcement officer would have alarm for the safety of person or property upon viewing the conduct."*

The emphasis is upon the mind of the arresting officer: "*In the express language of the statute, the harm to be prevented by this offense is not the possible harm to person or property; it is the alarm to the observer. … The legal justification for this offense is a desire to minimize the number of occasions when law enforcement officers suffer this type of alarm. … Accordingly, immediately prior to the arrest, the officer is not actually determining whether the circumstances look like a possible crime in the making. The officer is determining whether he or she is viewing conduct that is reasonably causing the officer alarm or imminent concern that harm to person or property will likely occur in the very near future unless the officer intercedes."*

An arrest for loitering and prowling cannot be based upon conduct which does not occur in the officer's presence. **IMPORTANT NOTE**: this is 100% incorrect, and is not the law in the Third District Court of Appeal in Miami, see State v. Cortez, 705 So.2d 676 (Fla. App. 3d 1998), which was affirmed by the Florida Supreme Court, in 731 So2d 1267. It is necessary to call to testify a civilian witness who witnessed the defendant's conduct in order to establish and prove the loitering and prowling charge in court, although in this present case such testimony may have been insufficient to do so. For further explanation or if you have any questions about this issue, please contact this writer at 305 547 0220.

All opinions of the Third District Court of Appeal (3d DCA) and the Supreme Court are binding in our Circuit. All other DCA opinions are binding in this District only if there are no contrary opinions in the 3d DCA.

All PPCC Subcommittees, Chairs and members are listed below. Please contact any of the Co-Chairs or members if you have an issue to be addressed.

CASE INTAKE SUBCOMMITTEE
CO-CHAIRS:
Marie Jo Toussaint, ASA, SAO (305) 547-0255;
e-mail: MarieJoToussaint@MiamiSAO.com
Ivonne V. Duran, Police Legal Bureau
Miami-Dade P.D. (305) 471-2561
e-mail: ivduran@mdpd.com
Committee Members:
Det. Paul Manzella, SIBPD
Det. Octavia Bridges, UMPD
Lt. Efren Lopez, M-DPD

COMMUNICATIONS SUBCOMMITTEE
CO-CHAIRS:
Lt. J. C. Rodriguez, M-DPD, (305) 548-5774;
e-mail: jcrodriguez@mdpd.com

Committee Members:
Lt. Gladys Amato, MPD
Major Michael Mills, SMPD
Capt. Wendy Mayes-Sears, M-DCR
Major Kathy Katerman, NMBPD
Regla Dominguez, MBPD
Oliver Spicer, Jr., M-DPD
Ray Araujo, ASA, SAO

CRIMES AGAINST LEOs SUBCOMMITTEE
CO-CHAIRS:
José Arrojo, ASA, SAO (305) 547-0309;
e-mail: JoseArrojo@MiamiSAO.com
Chief Steven Steinberg, Aventura PD (305) 466-8996;
e-mail: SSteinberg@AventuraPolice.com

Committee Members:
Lt. Lazaro Artime, Hialeah PD
Abbe Rifkin, ASA, SAO
Det. Robert Garland, M-DPD
Lt. Willie Hill, Pinecrest PD
Susan Leah Dechovitz, ASA, SAO
Ofcr. Nelson Delgado, VGPD
Audrey Frank-Aponte, ASA, SAO
Lt. Jerome Berrian Jr., MBPD
Regla Dominguez, MBPD
Sgt. Jose Diez, MPD
Ofc. Alexander Martinez, Corrections
Sgt. Carlos Arguelles, M-DPD
Sgt. Michael Weissberg, SMPD
Captain Luis Bazo, M-DPD

JUVENILE SUBCOMMITTEE
CO-CHAIRS:
Todd Bass, ASA, SAO (305) 637-1300
e-mail: Todd Bass@MiamiSAO.com
Sgt. Melissa DeJong, CGPD (305) 460-5632
e-mail: MDeJong@CoralGables.com

Committee Members:
Chief Ian Moffett, MDSPD
Ellen Skidmore, SAO
Sgt. Mark Schoenfeld, MBPD

PAWNSHOP SUBCOMMITTEE
CO-CHAIRS:
Jason Pizzo, ASA, SAO (305) 547-0404
e-mail: JasonPizzo@MiamiSAO.com

Committee Members:
Det. Melissa DeJong, CGPD
Pat Kiel

DOMESTIC CRIMES SUBCOMMITTEE
CO-CHAIRS:
Leah Klein, ASA, SAO (305) 547-0132;
e-mail: LeahKlein@MiamiSAO.com
Capt. Janna Bolinger-Heller, M-DPD, (305) 418-7218
e-mail:jbh@mdpd.com

Committee Members:
Carrie Soubal, SAO
Sarah Poux, MBPD

RAP SHEET SUBCOMMITTEE
CO-CHAIRS:
Marie Jo Toussaint, ASA, SAO (305) 547-0220
e-mail: MarieJoToussaint@MiamiSAO.com
Committee Members:
Ed Griffith, SAO

ROLL CALL/RIDE-ALONG SUBCOMMITTEE
CO-CHAIRS:

Committee Members:
Audrey Frank-Aponte, ASA, SAO
Brenda Mezick, ASA, SAO

TRAINING SUBCOMMITTEE
CO-CHAIRS:
Susan Dechovitz, ASA, SAO; 547-0309
e-mail: SusanDechovitz@MiamiSAO.com
Tom Headley, ASA, SAO; 547- 547-0186
e-mail: TomHeadley@MiamiSAO.com

Committee Members:
Chief Ian Moffett, MDSPD
Det. David Adlet, EPPD
Chief Van Toth, Hialeah Gardens PD
Oliver Spicer, Jr., M-DPD
Sgt. Lynnise Jones-Curry, M-DPD
Barry Mankes
Capt. Luis Bazo, M-DPD
Ofcr. Alexander Martinez, Corrections
Sgt. Michael Weissberg, SMPD

OPERATIONS SUBCOMMITTEE
CO-CHAIRS:
Major Kathy Katerman, NMBPD, (305) 948-2929,
kathy.katerman@nmbpd.org
Dreama Oliver, SAO, Administrator, Felony Operations,
(305) 547-0307, dreamaoliver@miamiSAO.com

Committee Members:
Jay Pollen, MPD

LIAISON SUBCOMMITTEE
CO-CHAIRS:
Kathleen Hoague, ASA, SAO, (305) 547-0522;
e-mail: KathleenHoague@MiamiSAO.com
Maria Diaz, SAO, (305) 547-0331;
e-mail: MariaDiaz@MiamiSAO.com
Lt. J. C. Rodriguez, M-DPD, (305) 548-5774;
e-mail: jcrodriguez@mdpd.com

Current and back issues of the *Rap Sheet* are posted on the State Attorney's Office web site:
http://www.MiamiSAO.com
Subscribe online by sending an e-mail to: **RapSheet @MiamiSAO.com**