For the Law Enforcement Agencies of Miami-Dade County

The Rap Sheet

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Included in the same chapter, but not effective until October 1, 2011, amendments to section **827.071**, **sexual performance by a child**, add the offenses of "controlling" or "intentionally viewing" to the prohibitions against media depicting any sexual conduct by a child. "Intentionally viewing" is defined as deliberately, purposefully and voluntarily viewing. Proof of intentional viewing requires establishing

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

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Some of the New Laws Effective July 1, 2011 or Before:

Chapter 2011-145:

This deals with some changes to **Chapter 790** regarding weapons and **firearms**. An amendment to Subsection **790.053(1)**, dealing with the **open carrying of weapons**, now provides that it is not illegal for a person with a CCF license to "briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense".

Although it would seem to go without saying that a person licensed to carry a **concealed firearm** can lawfully carry the firearm **in a vehicle**, new subsection 790.06(12)(b) now specifically provides this, if it is being carried or stowed in the vehicle "for lawful purposes".

Section 790.28, which stated that the **purchase of rifles and shotguns** in contiguous states was permitted as long as the purchaser abided by the laws of the United States, the contiguous state and Florida, was repealed, as the contiguous-state law that it was based upon no longer exists. Subsection (c) was added to 790.065 which provides for the purchase of rifles and shotguns from dealers in *any* state.

This became effective on June 17, 2011.

Chapter 2011-220:

While subsection **395.1021(2)** previously provided that **emergency room facilities** must arrange for appropriate medical attention, treatment and gathering of forensic medical evidence from **sexual assault victims** required for an investigation and/or prosecution, it now provides for the same services to such a victim whether the victim has already reported the sexual battery to law enforcement or the victim hasn't reported the sexual battery but may possibly report it in the future.

The statute of limitations for **video voyeurism**, section **810.145**, was extended to 1 year after the date the victim of the voyeurism obtains actual knowledge of the recording, or the date the recording is confiscated by law enforcement, whichever occurs first.

Amendments to **794.052**, provide that an **officer *shall* provide or arrange for transportation** to an appropriate facility for the **victim of a sexual battery** and, in 794.052(c), that prior to submitting a final report the investigating officer ***shall* permit the victim to review the report** and provide a statement as to the accuracy of the final report. [When the word "shall" is used in legislation, it is interpreted as "must".]

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IMPORTANT!

Next PPCC meeting, **Wednesday, September 21, 2011, 1:00 p.m.**
State Attorney's Office • 1350 NW 12 Avenue • Miami FL 33136
All are invited to attend

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Testing for **hepatitis** has been added to section **960.03**, which provides for **HIV testing** for persons charged with certain offenses. It also now provides for follow-up HIV testing, if medically appropriate.

Included in the same chapter, but not **effective** until **October 1, 2011**, amendments to section **827.071**, **sexual performance by a child**, add the offenses of "controlling" or "intentionally viewing" to the prohibitions against media depicting any sexual conduct by a child. "Intentionally viewing" is defined as deliberately, purposefully and voluntarily viewing. Proof of intentional viewing requires establishing more than a single image, motion picture, exhibition, show, image, data, computer depiction, representation or other presentation over any period of time. It also includes an exception for material possessed, controlled, or intentionally viewed as part of a law enforcement investigation.

Chapter 2011-146:

The following are now **violations of injunctions** against repeat violence, sexual violence or dating violence, issued pursuant to **784.046**:

- Being within 500 feet of the petitioner's residence, school, place of employment or any other location specified in the injunction frequented regularly by the petitioner and any named family or household member
- Knowing and intentionally coming within 100 feet of the petitioner's motor vehicle, whether the vehicle is occupied or not
- Defacing or destroying the petitioner's personal property, including the petitioner's motor vehicle
- Refusing to surrender firearms or ammunition if ordered to do so by the court

Chapter 2011-141:

This is the **"Pill Mill Bill"**. New section 456.44 is created to deal with the prescribing of controlled substances. **Physicians** who prescribe controlled substances for the treatment of chronic, nonmalignant pain **must register** as such **effective January 1, 2012** and comply with the requirements of this section. There are also additional requirements for pain management clinics.

New subsection **458.327(1)(f)** makes it a **third degree felony** for a physician to dispense a controlled substance listed in schedules II or III in violation of section 465.0276. New subsection 459.013(1)(f) likewise makes it a third degree felony for osteopaths to dispense controlled substances in violation of the same section.

New subsection **465.015(3)** makes it a first degree misdemeanor for pharmacists to fail to **report within 24 hours to law enforcement** when controlled substances have been obtained, or attempted to be obtained, by fraud. The subsection sets forth the minimum information that must be provided to law enforcement with regard to these frauds.

New subsection **499.0051(16)** makes it a third degree felony to submit a false report with regard to distribution (of controlled substances) reporting required by section 499.0121(14). New subsection **499.0051(17)** makes it a third degree felony to engage in the wholesale distribution of prescription drugs and knowingly distribute controlled substances in violation of 499.0121(14).

A new subsection in the **burglary statute, 810.02(3)(f)**, makes it a second degree felony to burglarize a structure or conveyance (normally third degree felonies) when the offense intended to be committed therein is theft of a controlled substance.

A new subsection in the **theft statute, 812.014(2)(c)13**, makes theft of any amount of a controlled substance a third degree felony.

An amendment to **893.07(4)** provides that law enforcement officers are not required to obtain a subpoena, court order, or search warrant in order to obtain access to or copies of any of the records required to be kept under this chapter. New subsection 893.03(5)(b) requires that the discovery of any theft or significant loss of controlled substances must be reported within 24 hours. Failure to report theft or loss of controlled substances listed in 893.03(3), (4) or (5) is a second degree misdemeanor. Failure to report the theft or loss of substances listed in 893.03(2) is a first degree misdemeanor.

New subsections under **893.13(7)** state that it is a third degree felony for either a person to obtain, or a health care practitioner to provide, a controlled substance or a prescription for a controlled substance by misrepresentation, fraud, forgery, deception, subterfuge or concealment of a material fact, with the intent to obtain a controlled substance that is not medically necessary or in an amount not medically necessary. "A material fact" includes whether the person has an existing prescription for a controlled substance issued for the same period of time by another practitioner. These subsections are limited to controlled substances listed in Schedules II, III or IV.

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Recent Case Law

Dillon-Watson v. State, 36 Fla. Law Weekly D1089a (4th DCA, 5/18/11) Police received an **anonymous tip** about a woman selling drugs to a particular individual, in a described vehicle, at a designated location. Uniformed officers responded and found a woman in a vehicle matching the description at the specified location. They did not observe her involved in any illegal activity, only seated in the vehicle with a male and a baby in a car seat in the back. The deputies approached and asked what they were doing and the appellant explained that she and her ex-husband were exchanging their child at this, a "neutral", location. When the deputy told them about the tip, they laughed. The deputy called for backup and said "I'd like to see your IDs and I'll just take a quick look at your vehicles and if everything checks out okay, you guys will be good to go". They both provided IDs which were checked for warrants with negative results. The deputy advised there were no warrants and added "Let me just take a quick look at your vehicles, and then if you guys are good, you'll be in your way". While the deputy could not state how the appellant expressed assent to search her vehicle, he stated that she consented. A search of the vehicle revealed drugs under the appellant's car seat.

The State correctly conceded that a sufficient basis for an investigatory stop could not be based solely on an anonymous tip, without any sort of indication of illegal activity upon contacting the appellant. The State argued, however, that this was a **consensual encounter**, followed by a **consent search**.

The court compared the facts of this case with previous cases where consensual encounters had not been found, and decided that this, too, was not a consensual encounter. They found that based upon the totality of the circumstances they could not conclude that the appellant would have felt free to leave during this encounter. She was the specific focus of a criminal investigation, not some vague allegation. The deputy said, more than once, that they would be "good to go", once he checked out their ID, once they were able to check the vehicle. Conversely, they would not be "good to go" until the deputy was allowed to search the vehicle. The court held that the defendant had been seized and that the consent was not voluntary, but acquiescence to a show of authority.

Mills v. State, 36 Fla. Law Weekly D877a (2d DCA, 4/27/11) Shortly after midnight officers were patrolling what they considered a high crime area in downtown Clearwater. The area had recently been hit with a series of smash-and-grab burglaries. They saw the defendant walk from behind a closed business, he saw the officers circling around and walked back in the direction from which he had come. Officers went behind the business to find the defendant standing in a dark area "up against the building, behind a tree in… some overgrowth". They shined their spotlight on the man and he walked toward them. When asked what he was doing, the defendant said he had walked behind the business because he got nervous when he saw the police car. The officers arrested the defendant for **L & P** and found prescription drugs in a search incident to arrest. The defendant said the drugs were for his blood pressure and heart. He said he was living at the motel next to the business parking lot. He gave a name – but gave the wrong first name. At the time of the stop, there was no information received by police about a crime at this location.

L& P requires proof of 2 elements. First, the defendant must be "loitering or prowling" in a manner not usual for law-abiding citizens, and this conduct must come close to, but fall short of, the actual commission or attempted commission of a substantive crime, suggesting that a breach of the peace is imminent. The court cites to case precedent that a defendant's "response to police pursuit cannot be used retroactively to support an imminent suspicion of criminal activity". Secondly, the factual circumstances must establish that the defendant's behavior is alarming in nature, creating an imminent threat to public safety. Again citing to precedent, the court states that a defendant's explanation of his presence is not an element of the crime of L & P. The court held that the officers did not observe the defendant committing both elements of an L & P. The court describes the defendant as "at most, a vaguely suspicious presence". The defendant attempted to avoid the police and, when the officers pursued him, he concealed himself. But when the officers spoke to him, he came out of his hiding place, identified himself, and provided some explanation for his behavior. While his explanation may have been suspicious, it was not enough to raise alarm of suggest an imminent threat. The defendant's convictions were reversed.

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.

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