

The Rap Sheet

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Miami-Dade State Attorney



1 January 2011

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Against Law Enforcement
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listed on the back page**

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Summary of PPCC Meeting

December 15, 2010

Agencies represented: SAO, Hialeah PD, Sunny Isles Beach PD, M-DPD, M-DPD Crime Lab, Surfside PD, Coral Gables PD, Aventura PD, Miami Springs PD

Agenda Items:

Organized Retail Theft:

I recently met with Officer Sean Bergert with Aventura on the subject of Organized Retail Theft. He has become somewhat of an expert in this area and I asked those present if they would be interested in a presentation on the topic. There were a few responses but there wasn't a big crowd at the meeting, so I'm asking for some wider input. If you would be interested in learning more in this area by way of a presentation at a future PPCC meeting, please let Kristi Bettendorf know. Mike Cole offered to participate as well as this is an area with which he is also well-versed.

Florida's Knock and Announce Statute (§901.19):

We discussed the recent Florida Supreme Court case on this topic, State v. Cable, 35 Fla.Law Weekly S705b (12/9/10). This case involved officers' entry into a hotel room occupied by Cable after they knocked, but failed to announce their purpose in requesting entry. The Florida Supreme Court recognized that in areas of the fourth amendment that the states must follow the United States Supreme Court and can provide no greater protection than their interpretations. However, they interpreted Florida's Knock and Announce statute as providing a basis for a higher standard in Florida, and held that the exclusionary rule is applicable in situations where police have failed to satisfy all of the requirements of §901.19. This case reversed the stance previously taken by the Third DCA, following the holding in the United States Supreme Court case of Hudson v. Michigan, that the exclusionary rule did not apply to statutory knock-and-announce violations.

Issues from the Floor:

Short Notices on eNotify:

Alan Klein from the Miami-Dade Crime Lab asked about short notices sent via eNotify. As an example, a notice sent to him after he has left work on a Friday requiring his attendance the following Monday will automatically escalate before the next day he is scheduled to work. My limited understanding of eNotify is that it was set up as the police agencies requested and that, therefore, there is nothing the State Attorney's Office can do to change the pattern of escalation that is built into the system. Kristi will look into the specific case example provided, and get further feedback from those more familiar with the sending of eNotices.

The next PPCC meeting will be held on Wednesday, January 19, 2011 at 1:00 p.m. All are welcome to attend.

IMPORTANT!

Next PPCC meeting, **Wednesday, January 19, 2010, 1:00 p.m.**
State Attorney's Office • 1350 NW 12 Avenue • Miami FL 33136
All are invited to attend

2010 Case Law Involving Consent Searches

Hill v. State, 35 Fla.Law Weekly, D1455c (3d DCA, 6/30/10) In the early morning hours, police received a call about a black male in the company of a white female selling narcotics, giving a clothing description and a location. An officer responded and observed a male and female generally fitting the description provided by the anonymous caller. There were no observations made which would indicate that a crime was occurring or was about to occur. Another officer responded and shone his spotlight on the 2 people. Soon after, another 2 uniform officers arrived. One officer asked the defendant for ID and as he took his ID and stepped aside to call in a warrants check, another officer asked the defendant for his consent to search his person. None of the officers had displayed any weapons, nor had the defendant been ordered to sit down or stay in a particular place. The officer requesting the consent testified that the defendant was free to decline the search and leave. The defendant testified that even though he didn't believe the officer had a right to search him, he proceeded to empty his pockets. While he was doing so, a clear plastic bag containing cocaine was revealed.

The defendant filed a motion to suppress the cocaine alleging that it was an illegal stop without reasonable suspicion of criminal activity, arguing that under the totality of the circumstances – the defendant being “boxed in” by 4 officers approaching him from 4 different directions, the spotlight being shined on him, the officer keeping his ID as he ran the warrants check, the other officer asking for his consent – no reasonable person would have felt free to leave. The state argued that this was a consensual encounter and the defendant's emptying of his pockets was not acquiescence to police authority but free and voluntary.

Certain factors have been held to trigger 4th Amendment concerns in deciding whether circumstances represent a consensual encounter or an investigatory stop. Restraining freedom of movement, ordering a suspect to do certain things (e.g., take your hands out of your pockets), the threatening presence of several officers, all of these have been noted as factors contributing to a ‘totality of circumstances’ which will be held to be an investigatory stop rather than a consensual encounter. In addition, the Florida Supreme Court has ruled (in Golphin v. State, 945 So.2d 1174 (2006)) that the retention of someone's ID during the course of further interrogation or search certainly factors into whether a seizure has occurred. The court held that a seizure had occurred under these circumstances, and since there was no articulable suspicion that the defendant was engaged in criminal activity, ordered the evidence suppressed.

E.J. v. State, 35 Fla.Law Weekly D1728a (4th DCA, 8/4/10) E.J. was the passenger in a car stopped for traffic. The driver was subsequently arrested for DUI. The deputy found out that E.J. was only 14, so was going to have the car towed. She asked E.J. to exit the car so she could inventory it. As E.J. was getting out of the car the deputy asked her if she had anything on her person that the deputy should be concerned about and E.J. said no. As soon as she exited the car, E.J. turned around, put her hands on the roof of the car and spread her legs, just as she had seen the driver do. The officer never asked E.J. for consent to perform a search, but upon seeing this, patted her down, felt a large bulge, and asked E.J. what it was, to which she responded “weed”. The deputy seized it and arrested E.J.

The trial court had concluded that E.J. had consented to the search by her conduct of placing her hands on the roof of the car and spreading her legs. The appellate court stated that the trial court did not make the correct analysis nor consider all of the factors that it should have in determining whether E.J. had freely and voluntarily consented to a search. Whether consent is voluntary is a question of fact and is to be determined based upon the totality of the circumstances. The factors the appellate court felt were important here and were not considered by the trial court were the defendant's young age, the fact that she had never before had any contact with police but was merely mimicking the driver's actions, and whether her actions were a submission to lawful authority. The trial court erroneously viewed the issue as whether the officers reasonably believed that E.J.'s actions constituted a consent to search, instead of whether it had been proved, by a preponderance of the evidence, that the defendant in fact gave consent. Not to be ignored is the fact that the deputy never even *asked* E.J. for her consent to a conduct a search. The motion to suppress was granted and the case reversed.

England v. State, 35 Fla.Law Weekly D2302c (2d DCA, 10/20/10) This defendant was also a passenger in a car which had been validly stopped for a traffic offense. The driver consented to a search of the car. The court held that because the deputy had consent to search the car, he was lawfully permitted to detain all occupants of the car until the search was completed. The search revealed a bag of marijuana on the passenger side floorboard of the car, *not* on the defendant's person. Good news: The court held the search to be lawful and affirmed the denial of the defendant's motion to suppress. Bad news: the court suppressed the defendant's statements – in which he owned up to the marijuana – as his statement was made without benefit of *Miranda* warnings.

State v. Ojeda, 35 Fla. Law Weekly D2377a (3d DCA, 10/27/10) This consolidated appeal involves two separate fact patterns, each with their own elements. In the first case, officers went to the defendant's home at 7:45 a.m. on a Wednesday morning because they had gotten a tip that he was growing marijuana in the house. They checked the defendant's criminal history before going and found that he had

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six prior arrests. Four detectives, a sergeant and two uniformed officers went to the defendant's house. Two detectives went to the front door while the others spread out around the house. The two uniformed officers stood about 30 feet from the front door. The defendant answered the door, appearing to have just awakened. A detective explained why they were there and the defendant invited them into the house. The defendant was advised of his *Miranda* rights, after which he indicated that he was willing to cooperate with their investigation. At this point, there were a total of 5 officers in the house. The defendant signed a consent to search form and led officers to the garage where he pointed out a functioning marijuana lab, indicating that it had been left there by the previous renters(!). The trial court held, and the 3d DCA affirmed, that applying a totality-of-the-circumstances test, the show of police authority would have caused a reasonable person to believe that he was not free to deny consent, but acquiesced to the police presence. The 3d DCA also stated that the officers were not precluded from "taking the time necessary to secure a warrant". [The dissent astutely pointed out, however, that the police were there on an anonymous tip and an anonymous tip alone would never have been sufficient to obtain a search warrant. In fact, the dissenting opinion sets forth a well-reasoned and legally supported argument for the denial of this motion to suppress but, unfortunately, it is the majority opinion, not the dissent, that counts.]

The second case does not involve a consent issue but does involve the same defendant and same lead detective two years later. The detective testified that, while involved in another narcotics investigation, he noticed the defendant's truck parked outside of a house. The detective decided to approach the house and was joined by a uniformed officer. When the defendant opened the door, the odor of marijuana could be smelled coming from the house. The defendant told him that there was no one else in the house, but the detective heard a door close in another part of the house. The detective and officer entered the house and arrested and cuffed the defendant. A "protective sweep" revealed marijuana, hydroponics equipment and other paraphernalia. Another occupant was also found in the house. After all this had occurred, the detective secured a search warrant. The trial court held that the evidence was seized as the fruit of an unlawful warrantless entry into the home to make an arrest. The appellate court stated that no exigent circumstances existed to justify the warrantless entry and search. The dissenting opinion agreed with this finding, stating that "...[a]lthough [the detectives] had probable cause to believe unlawful drug activity was occurring at the location, its presence alone did not strip the occupant of this dwelling of his constitutional guarantees against a warrantless search".

State v. Watana, 35 Fla. Law Weekly D2824e (4th DCA, 12/15/10) This search followed a traffic stop. The officer and the defendant testified at the motion to suppress the search. The officer testified that the defendant was driving very fast and carelessly and that is why he stopped him at about 3 a.m. The officer described the defendant as "extremely nervous", that he kept looking around, "was very distracted", and sweating profusely. This behavior on the part of the defendant made the officer suspicious that "something more had occurred in the car". The officer did not issue the citation but asked the defendant to get out of the car, which he did. The officer asked for permission to search the defendant and the defendant complied. The officer found a small baggie containing cocaine residue in the defendant's pocket.

The defendant testified that the officer had taken his license and registration, then came back to the car and told the defendant to get out. When he did, the officer told the defendant to move to the rear of the car and turn around. When he did this, the officer just started searching him. He said the officer never told him what he was about to do and never asked for consent to search.

It is apparent that the trial court here accepted the defendant's version of events rather than the officer's. In appeals of rulings on motions to suppress, a trial court's ruling comes to the appellate court "clothed with a presumption of correctness, and the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling". That's what the appellate court did here and found that the state had not proven that the consent was freely and voluntarily given, but that it was a mere submission to a claim of lawful authority.

***** Advising of the Right to Refuse a Consent Search *****

What all of these cases are missing is the officers' advising the defendants that they have a right to refuse to give their consent. This simple extra step helps to sustain a valid consent, even when impermissible police action has preceded it. The courts have consistently held that when an officer affirmatively advises a defendant that he has a right to withhold his consent, that it creates a break, of sorts, between the impermissible police activity (e.g., a bad stop) and the consent and will give the state an argument to be made in support of a valid consent. There are no magic words, such as with *Miranda* warnings, that are required here – it can be very simple. "You know, you don't have to let me search" has been found sufficient. Keep this in mind when handling consent situations.

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.

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