For the Law Enforcement Agencies of Miami-Dade County

The Rap Sheet

Katherine Fernandez Rundle — Miami-Dade State Attorney

1 July 2011

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

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Summary of PPCC Meeting
June 15, 2011

Agencies represented: SAO, Sunny Isles Beach PD, M-DPD, M-DPD Crime Lab, Coral Gables PD, University of Miami PD

Agenda Items:

New Laws re: Synthetic Cannabis and Cocaine:

New laws effective July 1, 2011 add certain compounds of synthetic cannabis and synthetic cocaine to the list of controlled substances. For the synthetic cannabis, possession of less than 3 grams is a misdemeanor; more than that is a third degree felony. (Unfortunately, I was reading an article in the paper just this week which referenced a new type of synthetic cannabis already on the market (as *Fairly Legal* and *Barely Legal*) that is not covered under the new law because they changed the compound slightly.)

Fleeing and Eluding a Law Enforcement Officer:

In response to an inquiry I received, we discussed the recent United State Supreme Court case of *Sykes v. US,* which held that the crime of Fleeing and Eluding a Law Enforcement Officer is a violent felony for purposes of punishment enhancement under the federal Armed Career Criminal Act. This likely will not affect Florida's sentencing enhancement provisions as we have our own descriptions and listings of qualifying offenses. The question was posed to me in the context of whether this would have any effect on law enforcement agencies' guidelines on pursuits, as many limit pursuits to situations involving violent felonies. While agencies are obviously free to review their pursuit policies at any time, this opinion seems to categorize fleeing as a violent felony for a very limited purpose.

Issues from the Floor:

Jewelry Stores Buying and Melting Gold:

Pat Kiel raised the issue of jewelry stores which buy gold (and sometimes melt it down on the same day) and are seemingly subject to none of the restrictions such as those imposed on pawnbrokers and precious metals dealers. Pawnshop Subcommittee Co-Chairman ASA Nneka Uzodinma indicated she would look into the topic and report back at a future PPCC meeting.

The next PPCC meeting will be held on Wednesday, **September 21, 2011** at 1:00 p.m.
when we will have our annual Legislative Update
All are welcome to attend.

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

Recent Case Law

McKelvin v. State, 36 Fla.Law Weekly D347a (4th DCA, 2/16/11) There are two types of undocumented informants in Florida case law - the **anonymous informant** and the **citizen informant**. The citizen informant is held to be more reliable than an anonymous informant; his identity and contact information are known to the police. In this case, a citizen approached police and provided them with some very specific information about a certain black male in a specific vehicle and a particular location who was engaged in narcotics activity. Detectives went to the specified location and sure enough, the described individual drove up in the specified vehicle. Without having observed any suspicious or illegal activity, the detectives stopped the vehicle. The trial court held that because the police were personally approached by the informant and because the information provided was so specific, that the police had sufficient reasonable suspicion to stop the defendant.

The Fourth DCA, however, reversed the trial court's decision, holding that the informant in this case was no more reliable than an anonymous informant, as he (or she) had not provided any contact or identifying information to the police but indicated that he (or she) wished to remain anonymous. Although the state urged the court to consider the informant a citizen informant due to the face-to-face encounter, the court declined to do so stating that there was no independent police corroboration of illegal or suspicious activity before the defendant was stopped.

Ibarra v. State, 36 Fla.Law Weekly D423a (2d DCA, 2/25/11) The defendant's conviction in this case was reversed and the case sent back for a new trial due to a **discovery violation**. The state sought to impeach the defendant's testimony by questioning him about a statement he made to a detective. The statement had not previously been provided to the defense in discovery. It is very important that police advise the state of *all* **statements made by defendants**, in order to avoid a similar result.

Fernandez v. State, 36 Fla.Law Weekly D615a (3d DCA, 3/23/11) This case revolves around a **detention** and a **weapons patdown**. Two people were robbed at gunpoint in Miami Gardens. A BOLO was issued describing the armed assailant as a black male wearing black shorts and a white T-shirt, driving a blue Toyota with the tag hanging down. Twenty minutes later and not too far away, another man is robbed. He describes the robber as wearing black shorts, a white T-shirt and black Jordan shoes.

One officer was pursuing a vehicle matching the BOLO, but the driver of the vehicle fled before he could make a stop. Another officer saw the first officer near the car and saw a man matching the BOLO walking along the road. The second officer went to approach this man and he ran. A third officer, who was responding to the second robbery, saw the defendant matching the BOLO description standing by a pay phone, breathing heavily and sweating "profusely". He approached him. Because of safety concerns he cuffed the defendant and patted him down for weapons. Instead he found a large amount of cash and two gold chains. About 30 minutes later, the 3 victims arrived at the scene of the stop and they identified the defendant as the robber and they identified his vehicle. A firearm was found in a nearby dumpster and one of the victims identified it as the weapon used in the robbery.

The defendant did not dispute the basis for the stop and temporary detention, as it was based on well-founded suspicion. He did argue, however, against the handcuffing, the patdown and holding him until the victims arrived, alleging that these exceeded the scope of the permissible stop. But the court didn't buy it. The Third DCA held that the police were well-justified in patting down a man who fit the description of a person who had just committed 3 armed robberies. In addition, he had already run from other officers, so the handcuffing was justified due to the flight risk. And the court found that the detention was brief, only limited to the time it took to bring the 3 victims to the defendant's location. His convictions were affirmed.

Dawson v. State, 36 Fla.Law Weekly D804a (2d DCA, 4/15/2011) Alternatively, the court held that there was an insufficient basis for a **weapons patdown** under the facts of this case. Officers on an "aggressive control campaign" (this term is not explained in the decision) saw the defendant walking down a road in an area known for criminal activity at 11 p.m. They testified that he was stumbling. They approached him and while speaking to him, the defendant kept putting his hands in his pockets, despite officers direction not to. The defendant was wearing baggy clothing so no bulges could be observed. An officer, in the belief that he "could have contraband or a weapon", conducted a patdown of the defendant. A bag of pills was first found in defendant's back pants pocket, and the officer felt what he thought was a gun in a front pocket. The defendant tried to put his hand in the same pocket and a struggle ensued but ultimately officers recovered a gun from the pocket. The defendant testified differently about the encounter, indicating that he never put his hands in his pockets and he never heard officers advise him not to do so.

The case presents two conflicting interests: the 4th Amendment right to be free from unreasonable searches and seizures and the ongoing concern for officer safety in an increasingly dangerous profession. And while the court found that the facts of this case revealed an alarming result – the gun – they indicated that they "are not permitted to be distracted by the fruit of the search", but must focus on the justification for the search. The court cites to cases from its own district and from the Fourth and Fifth Districts which all hold that a person's reluctance to

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remove their hands from their pockets, without more, does not provide reasonable suspicion warranting a patdown search. To justify a patdown, an officer must identify objective facts indicating that the defendant is armed and dangerous [such as the preceeding case where police were looking for an armed robber]. The court found no such objective facts here and reversed the trial court.

Clark v. State, 36 Fla.Law Weekly D787a (1st DCA, 4/14/2011) This case contains a good discussion of the evidence required to prove **possession of burglary tools**. This defendant was seen by police crouched down behind the air conditioning unit on top of a building. There were some tools and pieces of copper tubing there too. There was no evidence of any actual entry into the building or any attempt to do so.

The elements required to prove the crime of possession of burglary tools are 1.) that the defendant intended to commit a burglary, 2.) that the defendant had in his possession tools that he intended to use in the commission of the burglary and 3.) that the defendant did some overt act toward the commission of the burglary. The defendant argued, and the 1st DCA agreed, that the tools recovered from his possession were intended to be used to cut the copper tubing, not to commit a burglary.

The court cites to the Florida Supreme Court case of *Calliar v. State*, 760 So.2d 885 (1999) which held that the burglary tools statute does not encompass any other item that may be used to commit some other offense once the burglary has been accomplished, even if that "other offense" is the offense that the defendant intended to commit once he had accomplished the burglary. The statute only includes tools used or intended to be used to commit the actual burglary or trespass.

State v. Hankerson, 36 Fla.Law Weekly S182a (4/21/2011) The Florida Supreme Court deals with the issue of how many **suspected drug transactions** must be observed before police have probable cause to make an arrest. While still adhering to the principal that each case must be decided upon its unique facts and circumstances, in this particular case the Supreme Court agreed with the trial court that three observed transactions, even in very quick succession, were sufficient to establish probable cause, in light of other circumstances in the case.

Police were surveilling a particular residence that information from neighborhood informants had led them to believe was a locale used for the sale of narcotics. While they watched, the defendant drove up to the residence, exited his vehicle and went to the front porch of the residence, where several people were. While looking up and down the street, the defendant opened up his hand and three individuals each took something from his hand and quickly gave him paper money. The defendant pocketed the money, returned to his vehicle and left. He was subsequently stopped in his vehicle and the ensuing search revealed $63 in cash in his pocket and some cocaine in a baggie in his shoe. The trial court ruled that there was probable cause for an arrest and upheld the search. The 4th DCA reversed the trial court's decision, holding that while there may have been sufficient reasonable suspicion for the stop, there was not probable cause for the search. The Florida Supreme Court sided with the trial court, characterizing what officers observed as "a series of quick exchanges with three separate individuals, not a single transaction".

The dissent in the case, while of no decisional consequence, contains a very good discussion of the case law in this area. Of note is the 2nd DCA's decision in the *Revels* case, which listed 6 factors that should be evaluated in determining whether probable cause (to arrest) has been shown in these cases involving observed suspected narcotics transactions. They are:

1. The training and experience of the law enforcement officer involved
2. The quality of the surveillance procedures
3. The history of the specific location under surveillance
4. Recent events at the location under surveillance
5. Prior knowledge of the parties involved, and
6. A detailed description of the entire event.

An explanation with the last factor should be very instructive to law enforcement officers. "The case law is replete with instances in which one or two factual details observed by an officer transforms reasonable suspicion into probable cause. Likewise, case law includes examples of premature arrests made before enough circumstances have occurred to establish probable cause. Whenever an officer recalls a detail on the witness stand that is not in his or her arrest report, the officer's credibility becomes a significant issue. Although an officer specializing in drug offenses may be more observant of critical evidence, the many transactions that he or she observes must make it difficult to recall each transaction with detail. Thus, detailed testimony of the event, buttressed by a timely written arrest report containing those details, is often critical at a suppression hearing."

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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