For the Law Enforcement Agencies of Miami-Dade County

The Rap Sheet

Katherine Fernandez Rundle — Miami-Dade State Attorney

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Recent Case Law

McKibben v. State, 35 Fla.Law Weekly D2527b (1st DCA, 11/17/10) Two officers went to a trailer park to arrest an individual on a warrant. The subject's residence was a single-wide trailer. As one officer knocked on the door, the other saw a person peek out of a window, someone the officer perceived to be a male. The defendant's roommate, a female, answered the door. The officers advised her they were there to arrest her on a warrant and she asked if she could get some shoes and other personal items from inside. The officers accompanied her back into the trailer. As she was putting on her shoes, she kept looking nervously down the single hall of the trailer. Officers became concerned for their safety based on the female's actions, the small size and configuration of the trailer and the fact that one of the officers believed he had seen a male look out from the trailer. One of the officers did a cursory sweep of the trailer and, in doing so, saw fluorescent lighting coming from a closet partially covered with a plastic curtain and several marijuana plants in the closet. The officer made these observations without moving or touching anything. The officer completed the protective sweep, found no one, called another unit to handle the controlled substance matter and transported the female to jail.

The court found that the **officer's protective sweep** was reasonably prudent in light of the facts and circumstances and upheld it. The officers testified to articulable facts which led them to believe that the small residence harbored an individual posing a danger to them. The sweep was a cursory inspection of the rooms accessed by the hallway where the roommate repeatedly directed her glances, and lasted no longer than was necessary to dispel the reasonable suspicion of danger.

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IMPORTANT!

Next PPCC meeting, **Wednesday, March 16, 2010, 1:00 p.m.**
State Attorney's Office • 1350 NW 12 Avenue • Miami FL 33136
All are invited to attend

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C.N. v. State, 35 Fla.Law Weekly D2699c (2d DCA, 12/8/10) This case deals with charges of **disorderly conduct** and **resisting arrest without violence**. After a dance, a crowd of teenagers spilled out into the streets. Police received complaints of noise, property damage and fighting. They went to the area, arrested a number of persons they called "instigators", and the situation was calming. After having been there for about an hour, an officer noticed this juvenile. She was shouting and using foul language. He was afraid this might start another fight so he instructed her to move along. She did not. The officer advised her that if she didn't leave he was going to arrest her. She didn't move so the officer arrested her for disorderly conduct. After the arrest, she was pulling away from his grasp and tightening her arms so she was additionally charged with resisting without violence.

In order to prove disorderly conduct based on words alone, the State must show that the words either caused a crowd to gather, thereby resulting in safety concerns, or that the words incited a crowd to engage in an immediate breach of the peace, such as fighting. The officer's testimony indicated that no one was fighting in the area he was patrolling. The juvenile's words had not caused the crowd to gather, the crowd had spontaneously come together after a party.

The lack of evidence to support the disorderly conduct charge causes problems with the resisting without charge too. In order to prove resisting without violence, the State must show that the officer was engaged in the lawful performance of a legal duty. In cases involving a detention, the State is required to show that the officer had a reasonable suspicion that the detainee was committing a crime. The court held that since the acts of C.N. did not constitute the crime of disorderly conduct, therefore the officer did not have the requisite reasonable suspicion and the arrest for resisting without must also fall.

Brown v. State, 35 Fla. Law Weekly D2692a (4th DCA, 12/8/10) The issue in this case deals with whether the police acted properly in **stop**ping, seizing and **search**ing this defendant. The victim heard a sound at the door of his residence, looked out of the peephole and saw an unfamiliar man. Seconds later, he saw the same man jump over the fence in his backyard and called 911. The victim did not see what the man was doing because he was on the phone, but he heard banging noises on his sliding glass door. When he looked outside, he saw the man leaving the back yard just as the police were arriving. A police unit was arriving at the same time and went to the rear area where the victim directed them. There they found one person, the defendant, fitting the physical description provided by the victim. They took him to the victim's unit, where the victim identified him as the person who had tried to enter his condo. Police saw pry marks near the locking mechanism of the victim's rear sliding glass door. They arrested the defendant, searched him and found a "rigged" screwdriver hidden on his person.

While the defense argued that the circumstances of this case were similar to other cases where the courts have held there was insufficient evidence of founded suspicion to justify a stop, the court disagreed. In those cases, the defendants were simply found "in the area" of suspected burglaries and the courts held that those defendants were stopped based on a mere hunch. Here, the court found *much* more to justify the stop (the circumstances set out in the paragraph above) and ruled that this case relied on additional circumstances missing from the cases cited to by the defense.

Myles v. State, 35 Fla. Law Weekly D2819a (3d DCA, 12/15/10) This decision by our District Court deals with **DNA** and **cold hits**. Evidence which would contain DNA was collected from a sexual battery victim. The case remained unsolved for 3 years, but the unidentified DNA had been stored in the State Index Data Bank for unresolved crimes. This defendant was stopped in response to a complaint regarding a "dispute with a female". The officers who stopped him felt that he resembled the sketch of the "North Dade Rapist" so they called Miami-Dade PD swab detail detectives to the scene of the stop. The detectives explained to the defendant that they wanted to take a voluntary DNA swab from him in order to "eliminate him" as a suspect in a series of sexual assaults. The defendant agreed, took the swabs himself, and signed a consent form agreeing to the taking of the swabs. As a result, the defendant was eliminated as the "North Dade Rapist" but a routine check by FDLE did come back with a hit to the sexual battery three years earlier. Based on this cold hit, the defendant was arrested. After his arrest, they took additional swabs from the defendant and he signed another consent form.

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The defendant, in moving to suppress the DNA evidence, argued that he only consented to the first swabs because he felt he had no choice. He testified that there were 10 police officers at the scene and that he had been a previous victim of police brutality so was submitting to the police presence, not freely and voluntarily consenting to the swabs. Police testified that there were only 5 officers at the scene of the stop including two plain clothes detectives. A detective testified that he read the consent form to the defendant and that he signed it freely and voluntarily and was not coerced or threatened. The trial court found, by a preponderance of the evidence, that the defendant read the consent form, understood it and signed it voluntarily.

As to the second set of swabs, the defense argued that a cold DNA hit did not constitute probable cause to arrest a defendant. The DCA ruled that a DNA cold hit is analogous to identification by a fingerprint match, and does constitute probable cause for arrest.

Gentles v. State, 35 Fla. Law Weekly D2900a (4th DCA, 12/22/10) This case deals with the issue of whether a **consensual encounter** was **transformed into a seizure** by an officer's actions. The facts are clear. The officer, on patrol at 4:15 a.m., saw a car parked in a mall parking lot. He found the defendant asleep behind the wheel and the engine running on the car. The officer approached the car in order to see if the defendant was injured, sick or needed assistance. Once the officer awakened the defendant, the first thing he asked him to do was turn off the engine, which the defendant did. The officer testified that he made the request for his and the defendant's safety. The officer asked the defendant for ID and asked if he was okay. The defendant handed over his ID and explained how he had come to fall asleep behind the wheel in the parking lot. The defendant answered the officer's questions freely and was "compliant the whole time". There was no indication of any criminal activity. When the officer was checking the defendant's ID, he learned that the defendant was an HTO and that he was on probation for felony DWLS. He arrested the defendant.

The defendant argued that when the officer told him to turn off the engine he was, in effect, seized, and that the officer did not have sufficient reasonable suspicion for the stop/seizure. The trial court did not buy that argument and denied the defendant's motion to suppress. The 4th DCA, however, found that it *did* constitute a seizure and that everything that followed, including the check of the defendant's ID where the officer learned that the defendant was an HTO, must be suppressed.

In analyzing prior case law with regard to what constitutes a seizure, the court listed some instances from previous cases where police actions have converted a consensual encounter into a stop. Those actions were:

1. Using a police car to block the path of a car,
2. Shining a flashlight or spotlight on a defendant's car,
3. Displaying a weapon or physically touching a person,
4. Ordering a driver in a stopped vehicle to roll down his window, or
5. Directing a defendant to remove his hands from his pocket.

While the court was unable to cite to a case with the precise same facts as this one, based upon these precedents they decided that ordering a citizen to shut off the car engine alone (without additional factors) constitutes a seizure.

The court went on to discuss (and discard) possible bases for a temporary detention, such as an officer's concern for his own safety and an officer's "community caretaking" duties. They found that neither of those situations existed here. The case was reversed and remanded.

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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