LEGAL EAGLE

A Newsletter for the Criminal Justice Community November 2011

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Arrest Outside Jurisdiction

Officer Michael Coss was off-duty, outside his jurisdiction, when he encountered Michael Price's car on his way home. Officer Coss was wearing his police uniform and was driving an unmarked patrol car. Price's erratic driving got his attention. The vehicle sped up to approximately eighty miles an hour when it got on the interstate, but it then began to slow down, speed up, and slow down again. He was drifting between lanes and then changed lanes in front of a semi-truck, causing the driver of the truck to take evasive action and blow his horn. A few moments later, Price's vehicle swerved off to the right of the fog line and came within a foot of striking a bridge.

Officer Coss asked his dispatch to determine if a highway patrol officer or Sheriff's deputy was available to stop Price's car, but no one from either agency was available. Officer Coss then decided to stop Price's car because he was concerned that Price was driving under the influence and he would cause an accident, hurting himself or someone else. Officer Coss stopped Price's car utilizing his vehicle's patrol lights. He then asked Price to keep his hands on the steering wheel until deputies from the sheriff's office arrived and took over the investigation.

Price was ultimately arrested and charged with possession of a firearm by a convicted felon, possession of ammunition by a convicted felon, and driving under the influence of alcohol. He argued in support of his motion to suppress all the evidence that the officer was outside his jurisdiction and effected the arrest by asserting the color of his authority as a law enforcement officer. The trial court agreed. The 2nd D.C.A. disagreed and reversed the order of suppression.

Issue:

Was Officer Coss' arrest of Price in violation of the 4th Amendment as an arrest made outside his jurisdiction "under color of his office?" **No**.

Arrest Authority:

"Generally, an officer of a county or municipality has no official power to arrest an offender outside the boundaries of the officer's county or municipality." *Huebner v. State*, (4DCA 1999). It is also clear that a police officer in fresh pursuit of a felon or misdemeanant or violator of traffic laws has the right of arrest outside his jurisdiction. See, F.S. 901.25; *Cheatem v. State* (4DCA 1982).

"In addition to any official power to arrest, police officers also have a common law right as citizens to make so-called citizen's arrests. We do not mean to imply that police officers acting outside their jurisdictions are treated as private persons for the purposes of the exclusionary rule. Rather, we mean that the Legislature, by vesting police officers with official powers, did not intend to divest the officers of their common law right as citizens to make arrests." *State v. Phoenix*, (4DCA 1982).

Thus, as a general rule the arrest for a DUI committed in the officer's presence, while off-duty, outside of his jurisdiction, not in fresh pursuit, would be sustained as a citizen's arrest for that criminal behavior.

Under the Color of Office:

"To prevent law enforcement officials from misusing the powers of their office in making a citizen's arrest, the courts of this state have held that law enforcement officials may not make a citizen's arrest *under the color of their office*. The 'under color of office' doctrine applies only to prevent law enforcement officials from using the powers of their office to observe unlawful activity or gain access to evidence not available to a private citizen."

Neither Officer Coss' identification of himself as an off-duty law enforcement officer nor the use of his vehicle's patrol lights constituted acting under color of office. In, *Phoenix v. State* (Fla.1984), the Florida Supreme Court agreed with the 4th D.C.A. and held that law enforcement officers had authority to conduct citizen's arrests outside their jurisdiction where, even though they identified themselves as police officers when they made the arrests, they had not asserted their official positions for any other purpose and thus the under-color-of-office doctrine did not apply.

Court's Ruling:

The 2nd D.C.A. found that although Officer Coss was outside of his jurisdiction at the time he effected the arrest, and despite using the trappings of his status as a police officer, the arrest was lawful as a citizen's arrest. "When officers outside their jurisdiction have sufficient grounds to make a valid citizen's arrest, the law should not require them to discard the indicia of their position before chasing and arresting a fleeing felon." *Phoenix v. State* (Fla.1984).

"The mere fact that an officer acts like a police officer in making an arrest outside of his geographical jurisdiction does not mean that he is improperly acting under the color of his office. Here, the activity observed by Officer Coss, Price's driving, could be observed by any private citizen driving on the interstate. Therefore, the 'under color of office' doctrine does not apply."

"In the present case, Officer Coss could properly make a citizen's stop of Price's car using the patrol car's lights and he could properly detain Price while wearing his police uniform, as neither of these actions violated the 'color of office' doctrine. Accordingly, we reverse."

Lessons Learned:

While the arrest was upheld as a valid citizen's arrest, it is important to remember that qualified immunity from false arrest claims is only available when an officer has acted in his official capacity. Hence, an officer making a citizen's arrest has no qualified immunity, and should the S.A.O. refuse to file the case, or it is dismissed by the court, or an acquittal after trial, the officer is subject to civil suit and damages.

Attempting to justify the arrest as lawful police conduct relying on the "community caretaking" exception is misplaced. The case law is very clear that, "the community caretaking doctrine addresses those law enforcement functions that are 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.' Instead, searches and seizures under the community caretaking doctrine focus on 'concern for the safety of the general public.' Overall, under the community caretaking doctrine, law enforcement 'may make warrantless searches and seizures [arrest] in circumstances in which they reasonably believe that their action is required to deal with a life-threatening emergency.'"

Thus, community caretaking function is the antithesis of crime detection. It is less 'preserve' and more 'protect.' That said, there is a 4th DCA case involving a BUI where the court upheld the police action utilizing the community caretaking doctrine. But once again, there was a true emergency and possible loss of life at stake. "Here, under the community caretaking doctrine, the depu-

ties were justified in stopping Castella's boat in order to obtain any information they could about the accident, its location, and its aftermath in order both to rescue the injured and to protect the general public from dangers resulting from the damaged vessel, such as the potential for explosion, debris, and impediment to travel on the Intracoastal." Castella v. State, 959 So.2d 1285 (4DCA 2007).

Even if the LEO outside his jurisdiction had the time to call for local backup, the responding officer would have to make his own observations of the erratic driving to support an arrest "committed in his presence" to obviate the need for the citizen's arrest. The fellow officer rule would not be applicable when the reporting officer is off-duty, outside of his jurisdiction, not in fresh pursuit, hence a citizen and not a LEO.

Lastly, the Countywide Mutual Aid Agreement is not applicable. Section II: Provisions for Voluntary Cooperation, which provides that subscribing agencies can provide voluntary assistance "to include but not limited to, investigating…DUI violations..." is for non-emergency *requests* for assistance. It is not a blanket authorization for municipal officers to drive around the county making DUI arrests. Thus, The Mutual Aid Agreement will not justify a routine DUI arrest by a LEO off-duty, outside his jurisdiction, not in fresh pursuit. Any arrest so made will be viewed by the courts as a citizen arrest.

State v. Price
2nd D.C.A. (Oct. 21, 2011)

Civil rights groups urge Supreme Court to rule against GPS tracking

In advance of the Supreme Court hearing on the use of GPS tracking by law enforcement agencies, several civil liberties groups are urging the court to rule in favor of privacy rights.

In the *United States v. Jones*, the Supreme Court is set to rule on whether the use of warrantless GPS tracking by law enforcement officials is a violation of the Fourth Amendment's protections against unreasonable search and seizure.

Several groups including the American Civil Liberties Union, the Council on American-Islamic Relations, the Electronic Privacy Center, and the Gun Owners of America have all filed amicus curiae briefs in support of Jones in the case.

Using an expired warrant that only applied to the District of Columbia, law enforcement officials placed a GPS tracker on Antoine Jones's car while it was parked in a public lot in Maryland. Using the information obtained from the GPS device, police were able to convict Jones of being involved in a cocaine-distribution operation. Civil liberties groups argue that the placement of the GPS device on Jones's car violated his fourth amendment rights and ruling in favor of the government in this case could result in broad government overreach and threaten other constitutional protections.

Arthur Spitzer, legal director of the ACLU in Washington, D.C., said the Supreme Court should uphold the Fourth Amendment and protect private lives against the invasion of government probing.

"The court should apply those values so that as technology becomes more and more powerful, those values can be preserved, not erased," Spitzer said. "If the Fourth Amendment is to have any continuing meaning, we think the court needs to recognize that just because technology makes something possible, it doesn't mean it should be allowed." Spitzer added that the case will have "strong implications" on whether or not the government needs a warrant to track people using their cell phones.

In contrast, law enforcement officials argue that GPS tracking is nothing new and that it is simply an easier way to conduct existing practices like tailing and surveillance, which have already been approved by the law.

The case is scheduled for argument in early November.

OFFICE OF GENERAL COUNSEL

FLORIDA CASE LAW UPDATE 11-07

Case: **Hamilton v. State, 36 FLW D2242a (Fla. 4th DCA)**

Date: **October 12, 2011**

Subject: **Committing a robbery with a toy gun will generally not support a conviction for the enhanced offense of "Robbery with a Weapon," even though the victim did not know the gun was not real**

FACTS: Hamilton committed a robbery using a toy gun, and was subsequently convicted for Robbery with a Weapon in violation of Section 812.13(2)(b), Florida Statutes, which enhances the offense to a first degree felony. Hamilton appealed, arguing that since he used a toy gun instead of a real firearm, and therefore did not actually endanger the victim, his conviction for the first degree felony was improper.

RULING: The Fourth District Court of Appeal agreed with the appellant, and held that evidence that a perpetrator used a toy gun in the commission of a robbery, by itself, is insufficient to support a conviction for armed robbery with a "weapon." Accordingly, the court held that Hamilton should be convicted only of Robbery under 812.13(2)(c), Florida Statutes, a second degree felony.

DISCUSSION: The enhanced statute under which Hamilton was originally convicted provides that "if in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree." The Standard Jury Instruction (15.1) defines a "weapon" to be "any object that could be used to cause death or inflict serious bodily harm." In this case, the prosecution was unable to introduce any evidence to show that the toy gun could be used to cause death or inflict serious bodily harm. The court acknowledged that the victim did not know that the gun was not real, and was therefore understandably placed in fear. However, "Florida courts apply an objective test and look to the nature and actual use of the instrument and not to the subjective fear of the victim or intent of the perpetrator." (Citing *Williams v. State*, 651 So.2d 1242 (Fla. 2d DCA 1995).)

COMMENTS: The *Hamilton* court was careful to distinguish its decision in this case from the holding in *Gomez v. State*, 496 So.2d 982 (Fla. 2d DCA 1986,) where a conviction for Robbery with a Weapon was upheld when the perpetrator used a toy gun to strike the victim several times during the robbery. In that case, the toy gun could have inflicted serious bodily harm by the way it was actually used, even though it could not fire a projectile. In this case, however, there was no evidence that the toy gun was used in a similar manner.

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Recent Case Law

Resisting Arrest

Dispatch received an anonymous call reporting a large group of juveniles fighting, providing an exact location, but no description of any of the individuals involved. Officer #1 arrived at the reported scene to find four juveniles, but no one was fighting. The officer approached and asked to speak to the juveniles. Two stayed and spoke with him while two others walked away. Officer #2 arrived and was told by officer #1 to stop the two individuals walking away. One boy stopped, but the other, the defendant, ignored his order to stop. Officer #2 once again yelled "stop." This time the defendant, M.M., turned around and responded: "don't raise your f---ing voice at me." At this point, Officer #2 testified that the defendant stood in an "aggressive manner… almost like a fighting stance." Officer #2 testified that the defendant then tried to punch him, so he turned, and returned two punches to the defendant's face. The officer struck the defendant twice more, then apprehended and handcuffed him.

The State charged M.M. with resisting arrest with violence. The defendant moved to dismiss the charges before and after trial alleging the officer was not engaged in the lawful execution of a legal duty, as required under section 843.01, F.S., because he lacked reasonable suspicion to stop the juveniles. The trial court denied the motion and found the defendant guilty of the lesser included offense of resisting arrest *without violence*. The 4th D.C.A. disagreed.

Issue:

Did Officer #2 have a reasonable suspicion that the defendant had engaged, or was engaging, in illegal activity to justify an investigative stop? **No**.

Resisting Arrest:

Florida law makes it very clear that an individual may not resist even an illegal arrest with violence. But Florida statute does permit a defendant to resist without violence an illegal arrest. Because the Juvenile Court judge found the defendant guilty of the lesser charge of resisting arrest *without violence* the 4th D.C.A. found that the officer's lack of a reasonable belief that M.M. was engaged in illegal activity made M.M.'s resistance without violence not actionable.

The State must prove: (1) the officer was engaged in the lawful execution of a legal duty and (2) the defendant's action constituted obstruction or resistance of that lawful duty to establish the crime of resisting arrest without violence. To conduct an investigatory stop, a law enforcement officer must have a reasonable suspicion that a person has committed, is committing, or is about to commit a crime.

"To determine whether an officer had reasonable suspicion for an investigatory stop, we look at the totality of circumstances. Law enforcement must be able to articulate a well-founded suspicion of criminal activity in light of the officer's training and experience. Mere suspicion is not enough."

"When an anonymous tip prompts a police investigation, it will justify a stop as long as it can be corroborated. This requires the officers to observe 'unlawful acts, unusual conduct, or suspicious behavior' when they arrive on scene." Such was not the case here.

Court's Ruling:

Because the responding officers did not observe any conduct to support a reasonable suspicion that a crime had been, or was being, committed they lacked a lawful basis to stop M.M. "The anonymous caller failed to provide a description of any of the juveniles involved. When Officer #1 arrived on scene, he saw only four juveniles…and no one witnessed any unlawful act, unusual conduct, or suspicious behavior."

"There was simply insufficient corroboration of the anonymous tip to provide reasonable suspicion for Officer #2 to conduct an investigatory stop of the defendant. The State argues the arresting officer had reasonable suspicion to stop the defendant because he was in the vicinity where an anonymous caller reported a fight, and he was in the company of

another juvenile who appeared disheveled. Neither of these factors, however, provided either officer with reasonable suspicion that the defendant was involved in criminal activity."

Lessons Learned:

Once again effective report writing and clear recollection of all the factors that led the officer to believe the four juveniles found at the scene were involved in a breach of the peace was required to justify the investigative stop. Here, the anonymous tip was so lacking in specificity, and the officers observed no suspicious behaviors, that there was little in the way of evidence to support the stop.

M.M. (a child) v. State
4th D.C.A. (October 26, 2011)

Dying Declaration

Leotis Lester, Jr., appealed from his conviction for first degree murder and attempted robbery of Mark Thibault. Thibault suffered a gunshot wound to the left side of his neck, had been intubated, and was in critical condition. The bullet went in though his carotid artery and into the spinal cord, transecting them both. His brain had stopped receiving blood, causing injury and severe damage because of the loss of oxygen. He had a severe spinal cord injury and was a quadriplegic. He needed assistance in breathing. Surgery was necessary for the massive bleeding. Dr. Rodriguez testified that someone with that injury would most probably die in the first three days, or if he survived, it would be in a vegetative state.

Prior to Thibault's death, Boynton Beach Police Department detective Christopher Crawford, who had been monitoring Thibault's condition, met with Thibault in his hospital room to show him a photo lineup. Thibault could not speak, but blinked once for 'no' and twice for 'yes' when asked about each photo. When Detective Crawford showed him Lester's picture and asked him if he was the person who shot him, Thibault blinked twice. He blinked once for all other pictures.

The defendant argued at trial that Detective Crawford's testimony as to Thibault's identification of Lester in the photo lineup was inadmissible hearsay because it did not meet the requirements of the dying declaration exception to the hearsay rule. He argues that there was no evidence that Thibault believed his death was imminent or that he had no hope of recovery. The 4th D.C.A. disagreed.

Issue:

Must the victim expressly verbalize that he knows he is about to die for his statement identifying the defendant as his assailant to be admissible in evidence? **No**.

Dying Declaration:

F.S. 90.804 provides for exceptions to the Hearsay Rule. Sub-paragraph (2) provides:

"The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness: (b) Statement under belief of impending death.--In a civil or criminal trial, a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death."

The Florida Supreme Court said in *Malone v. State*, (1916), "Under an indictment for homicide, where the State seeks to introduce a dying declaration of the deceased in evidence, it should be first shown to the satisfaction of the court that at the time the declarations were made deceased, not only considered himself in imminent danger of death, but that he evidently was without hope of recovery. The circumstances under which the statements were made must be shown, in order that the court may determine whether the statements are admissible as dying declarations."

"It is not required that the declarant make 'express utterances ... that he knew he was going to die, or could not live, or would never recover.' Rather, the court should satisfy itself, on the *totality of the circumstances,* 'that the deceased knew and appreciated his condition as being that of an approach to certain and immediate death.' The trial court did this. The sufficiency and propriety of the predicate for a dying declaration is a mixed question of law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous." *Henry v. State* (Fla. 1992).

Court's Ruling:

The 4th D.C.A. utilizing the decision in *Henry* found that the trial testimony sufficiently supported a finding

that the victim knew he would not survive. The court accepted the trial court's finding:

"The Court does, however, after hearing the medical testimony presented, as well as the other evidence, finds that Mr. Thibault did at the time of this utterance and that being the testimony would be the blinking and the-when he was shown various pictures, did in fact, know his death was imminent and inevitable. The Court does find that based on the evidence that he did entertain no hope whatsoever of recovery. The Court does believe that this is a dying declaration and does qualify under the evidence code."

The D.C.A. went on to rule, "Pursuant to section 90.804(2)(b), F.S. and this Court's prior rulings, the deceased must have known and appreciated his condition as being that of an approach to certain and immediate death, although it is not necessary that the declarant 'make express utterances' that he would never recover."

"As indicated from the testimony of the doctors, by the date of the statement given by Thibault, he was completely paralyzed below the neck, could not breathe on his own, had developed pneumonia and a staph infection, and had been told by the doctor of his condition that his condition was deteriorating. He was aware of what was happening to him because the doctor could speak to him and he would respond appropriately with the eye blinks. He was always in the intensive care unit. From these circumstances, we conclude that the trial court's admission of Thibault's identification as a dying declaration was not clearly erroneous."

Lessons Learned:

In the event that a LEO is called to a scene where the victim has suffered a critical injury and is not expected to survive, or rides along with the victim in the ambulance to the emergency room, all comments made by the victim as to the circumstances surrounding his or her current condition, the who, where, and why, should be noted. Additionally, though not critical to the legal analysis, the deputy should be prepared to articulate whether the victim was aware of the seriousness of his or her wounds and the likelihood of their survival. The statement may be in response to questioning, complete spontaneity is not required.

"Only statements which concern the cause of what the declarant believes is to be his or her impending death or the circumstances surrounding the impending death are admissible under section 90.804(2)(b). No other statements are admissible under the exception." Ehrhardt's Florida Evidence, §804.3.

Lester v. State
4th D.C.A. (Sept. 28, 2011)

OCCUPY MOVEMENT

Date:

September 17, 2011 – ongoing (43 days)

Status:

Ongoing

Causes:

Economic inequality, corporate influence over government, inter alia.

Characteristics:

Non violent protest
Civil disobedience
Occupation
Picketing
Demonstrations
Internet activism
General strike

Arrests/Injuries:

Arrests: 820+,[1]
Injuries: 75+[2