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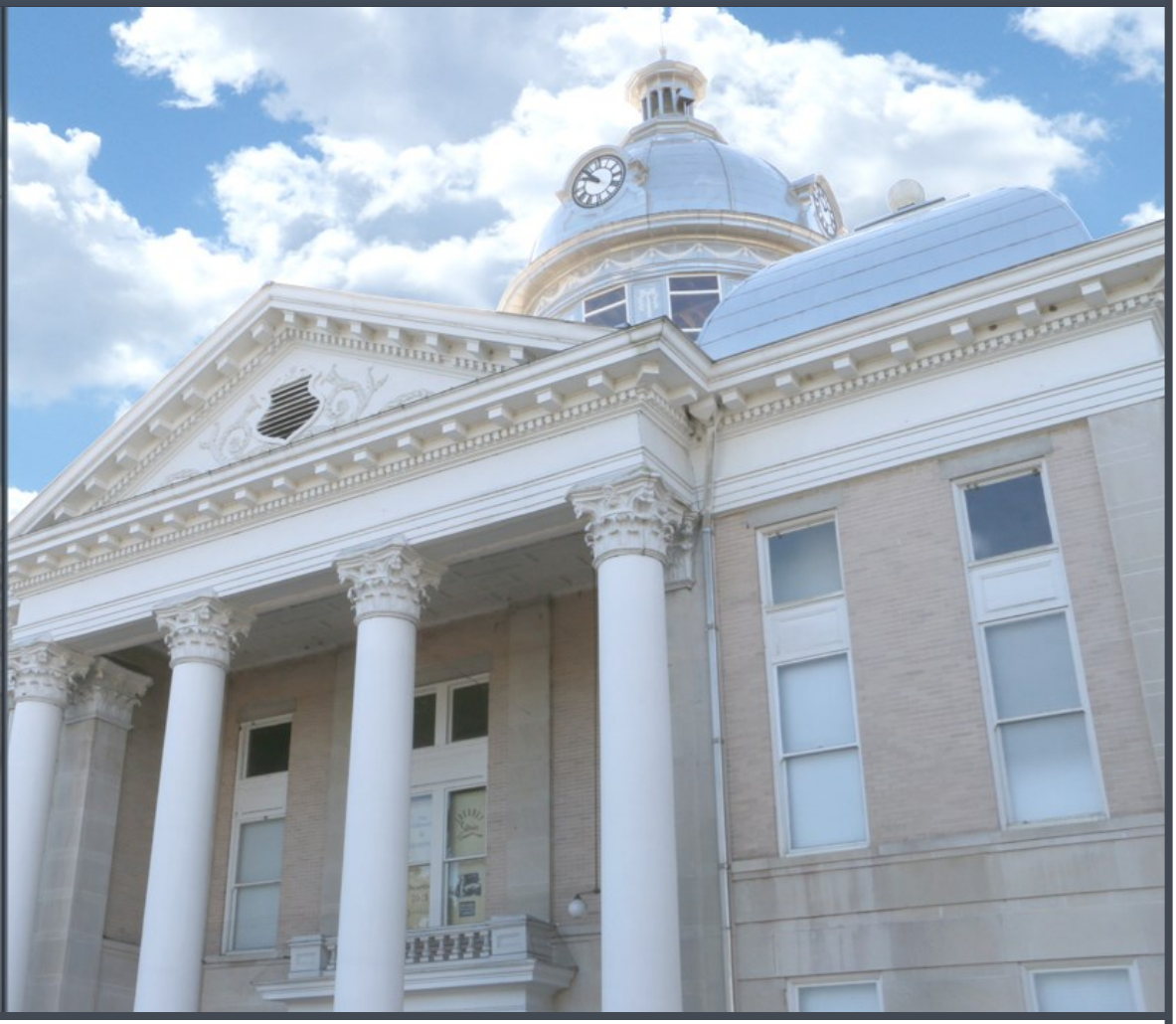

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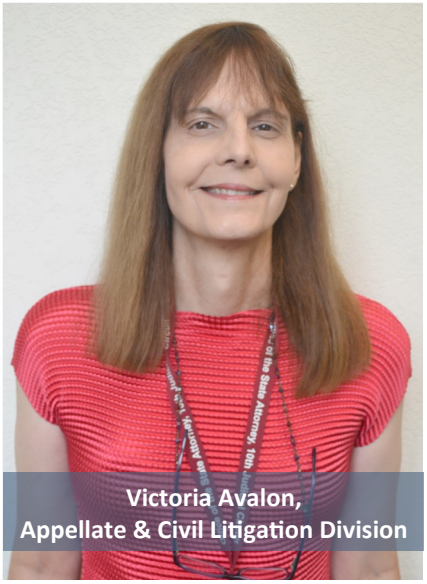
Loitering or Prowling in Light of McClamma v State

Victoria Avalon, Appellate & Civil Litigation Division

One of the most misunderstood statutes you have in your arsenal is § 856.021 Fla. Stat., our so-called "loitering or prowling" statute. We have previously had an article on this statute. A recent case has come out interpreting this statute from the Second District Court of Appeals which has jurisdiction over our circuit. This article will explain how that decision will affect when the statute can be used.



Victoria Avalon,
Appellate & Civil Litigation Division

This statute is one of those hard to parse statutes, like our disorderly conduct statute, § 877.03 Fla. Stat., that can get you in trouble when it is used improperly. What this article is intended to do is give you some insight into how our district court construes this statute, and in the process, help you distinguish a true crime under § 856.021 from someone who is simply going about his business and looking suspicious to you.

Let's start with the statute itself. This is how it reads:

§ 856.021. Loitering or prowling; penalty.

1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.

2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the person or other circumstance makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.

3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Subsection (1) tells us what we have to do at trial to prove a "loitering or prowling." The suspect has to be doing whatever it is he is doing at someplace or sometime that the law-abiding are not known to do, and under circumstances that give you a "reasonable alarm" or "immediate concern" for safety either of someone, or something. So, the keys are:

* Immediate concern. Whatever he's doing, it has to register in your mind that something evil is imminent, something going to happen in the near future.

* The place, or time, or both have to be inconsistent with what a normally law-abiding person would do.

The problem with these key elements is that they can be very subjective. To you and me, a person standing on a street corner in an expensive neighborhood, at 2:00 in the morning, sporting a red bandanna hanging out of his pocket and a lot of tattoos, looks suspicious. We instinctively want to stop him and question him closely about who he is and what he is up to. The people in that neighborhood don't hang out on street corners at 2 a.m., and they don't wear clothing consistent with gang apparel and tattoos. Or do they? How many doctors or lawyers drive Harley-Davidsons on the weekend and dress like an extra in *Sons of Anarchy* when they do? Looks can be deceiving, so we have to be more careful. That's the reason for subsection (2), which requires you to give a person you stop for loitering or prowling a chance to explain himself, and if his explanation is reasonable, for you not to arrest him. You do have to administer the typical rights warning to your suspect first, however. Our appellate judges in the Second District Court of Appeal have given us some good recent guidance on what is, and what is not, "loitering or prowling" under the statute. This is not, and let's examine why that is.

My favorite case for this discussion is actually one the State lost on appeal. It is *McClamma v. State*, 138 So. 3d 578 (Fla. 2d DCA 2014). The majority opinion was written by Second District Judge Chris Altenbernd, who as an appellate jurist probably commands the most respect among other judges and members of the legal community in the Tenth Circuit. *McClamma* is a Master's-level course on § 856.021, and if you read case law, it is a good read. In it, Judge Altenbernd breaks the statute down to its essentials. Here are the facts.

This went down in Pinellas County in 2011. A Pinellas deputy went to a local trailer park on a "suspicious person" call. The complainant related a description of a bushy-haired, light-skinned, African-American male, young, shirtless, walking around in a park full of older residents. And that is all that the complainant saw. There were no reports of crime happening around that time. But nearby, a group of detectives were on stakeout, because commercial burglaries were happening in a shopping center not far from the park. So the deputy at the trailer park puts out a radio call to them, passing on a heads-up about the complaint he'd just had. Twenty minutes later, the stakeout team sees someone run across the street-someone fitting the description. They try to track him, and get as far as another local neighborhood, and that was it. Thirty minutes after that, in that neighborhood, McClamma ran from a house to a taxicab, catching the eye of a deputy on patrol. He was tall, tan, teenage, and white. He was shirtless and bushy-haired. He looked like the guy from the trailer park, in every way but race. The deputy pulled over the cab, got McClamma out, patted him down for officer safety, and found contraband. And that is where it all went wrong.

One of the things that is striking about how Judge Altenbernd and other learned jurists parse the law is how often they return to similar concepts and themes in different circumstances. If you think about it, this can help you on the street, because it opens a window into judicial thinking that will assist you in applying the law to the situations you find yourself in. Let's review the three levels of police-citizen contact, because they are the heart of Judge Altenbernd's analysis even though he does not discuss them in detail in the opinion itself.

First, you have the **consensual encounter**.

This is the lowest level of police-citizen contact and requires no reasonable suspicion or anything else. You can walk up to anyone and initiate a casual conversation with him. The key to this is that you can't use your authority. If he wants to walk away, he can do that. He doesn't have to talk to you. We don't have that here because the deputy stopped the cab and detained McClamma.

Second, you have the **reasonable suspicion detention**. This is where you have facts sufficient to convince the most skeptical person you can think of that a crime is, was, or will be happening, and your suspect is somehow involved in it. This can't flow from just a hunch, like the guy we described above. You have to be able to connect it to crime, a breach of the peace, a threat to public safety that you can reasonably describe. The term of art we use for this most often is "*Terry* stop," from the 1968 U.S. Supreme Court case *Terry v. Ohio*, 362 U.S. 1. This appears to be what the deputy did when he stopped the cab and got McClamma out, and patted him down looking for weapons.

The third level of police-citizen contact, is, of course, the **probable cause arrest**, where you know a crime has happened, your guy did it, and you can explain how that is, again to the most skeptical person you can think of. We certainly don't have that on these facts.

So we're at Level 2 in *McClamma*. The police stopped a cab and detained the passenger. Did they have a reasonable suspicion that he'd violated the loitering and prowling statute? Judge Altenbernd takes the position that to give you the mental state of immediate concern for your community to justify a stop for loitering or prowling,

> *the defendant must intentionally commit conduct that the defendant knows or with substantial certainty should know would cause an objectively reasonable observer to have reasonable alarm that the defendant's conduct is creating an imminent safety risk for person or property in the vicinity.*

McClamma, 138 So. 3d at 585. In other words, he's got to be doing something that anyone with any sense at all would know is something that's going to get your attention and make you think something criminal is about to happen, right here and right now. If that is the case, then you have reasonable suspicion to stop him, administer his rights warning, and then if he is willing to talk to you, quiz him about what he's doing there. You have to give the rights warning, because if you <u>do</u> interrupt a crime in progress, he's probably about to confess to it and he has the right to remain silent. If you <u>aren't</u> interrupting a crime in progress, then he's got the right to explain himself if he wants to, and ease your concerns if he can.

Judge Altenbernd gives the best illustration I've ever seen of how § 856.021 ought to work in practice. This is it, reproduced in his own words:

> *Hypothetically, assume an elderly woman loves the flowers planted beside her old, wooden home. The local government has a watering ban in place. Although the woman does not want to publicly disobey the law, she wants her flowers to survive. So on a cool evening after dark she puts on her hooded sweater and fills up a large red can to water her flowers. The can is the old gasoline can that [20] her deceased husband once used for the lawnmower. When a police officer drives by and witnesses this person in the dark pouring liquid from a*

gasoline can next to the house, he quite reasonably believes that the person might be attempting arson. He has justifiable and reasonable alarm for the safety of property. He also has grounds for a Terry stop for attempted arson.

When he questions the old woman after a Miranda warning, if she explains that the can contains water and that she is very sorry for violating the local ordinance, her defense is not a claim that she caused no alarm. Her defense is that she negligently appeared to be creating a risk when she was not in fact creating the risk. Statutorily, so long as the reality of her actions is not what those actions reasonably appear to be, she has a defense to this crime. The officer, of course, conducted a proper and lawful arrest for loitering when he stopped her; the officer simply releases her from a lawful arrest when he or she is convinced by the explanation that dispels alarm.
McClamma, 138 So. 3d at 586.

Basically, if you are seeing what you common-sensically think is a crime involving life, safety, or property, then you probably have reasonable suspicion to stop for loitering or prowling in addition to the crime you're witnessing. If you can stop someone to investigate that, then you're probably good to stop for loitering or prowling in addition to whatever it is you are investigating. In McClamma's case, the deputies that stopped his cab didn't have that. They didn't have a crime at all. All they saw was a shirtless teenager making a dash for a taxicab. That doesn't give rise to an inference that crime is **about to happen**. Hence, the district court held that the crime of loitering or prowling did not apply.

The moral of this story is that when you are seeing the guy with the bandanna on the street corner in our expensive neighborhood, and you feel yourself getting suspicious, ask yourself whether he is doing something that looks like a crime is about to happen, and what that crime is. Standing on the corner doesn't look like anything but standing on a street corner. That isn't "loitering or prowling." You don't have reasonable suspicion to detain him and interfere with his movements simply because he looks out of place. You have other ways to talk to him, however; you can approach him and attempt to initiate a consensual encounter, for example. If you see something that looks like crime, like the elderly woman pouring liquid from a gasoline can around her house, or the guy on the street corner do a quick, furtive, hand to hand transaction with a passing car and hand in a bag of leafy, green substance in exchange for money, that's a horse of a different color. That looks like crime in progress, and you can and should stop that person and investigate. , and found contraband. And that is where it all went wrong

I hope this article sheds some light on this often-confusing statute for you. Stay safe out there!

FROM THE COURTS...

SEARCH AND SEIZURE – INVESTIGATORY STOP BASED UPON INCONSISTENCY BETWEEN COLOR OF VEHICLE AND COLOR INDICATED ON REGISTRATION

The Florida Supreme Court settled a conflict between two DCA's regarding whether an inconsistency between the color of a vehicle and the color indicated on the registration is sufficient to establish reasonable suspicion for an investigatory stop. In this case, a deputy observed the defendant driving a bright green Chevrolet. The deputy then ran the defendant's license plate in the DHSMV and learned that the vehicle was registered as being blue. Based on the color inconsistency, the deputy pulled the car over to conduct a traffic stop. Upon speaking with the occupants, the deputy learned that the vehicle had recently been painted. During the stop, the deputy smelled the odor or marijuana in the vehicle. Upon a search of the vehicle, marijuana and crack cocaine were found. The defendant filed a motion to suppress the evidence based upon the argument that the deputy did not have reasonable suspicion to stop the vehicle. The supreme court ruled that the evidence should have been suppressed because the sole basis for the investigatory stop was an observation of one completely noncriminal factor, rather than several incidents of innocent activity combining under a totality of the circumstances. Although there are times when discrepancy in vehicle color can be a factor to establish reasonable suspicion, in this case, the color discrepancy was not "inherently suspicious" or "unusual" enough to provide the officer with reasonable suspicion. State v. Teamer, 39 Fla. L. Weekly S478a (Fla. July 3, 2014).

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