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INSIDE

When is Inevitable Discovery Not So Inevitable?

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From the Courts

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When is Inevitable Discovery Not So Inevitable?

Victoria Avalon, Appellate & Civil Litigation Division

Our law requires that you have a search warrant, or a recognized exception to the warrant requirement, to do a search. If you do not have a warrant when you conduct a search, the law presumes that search to be illegal, and on a defense motion to suppress, the prosecutor must show by a preponderance of the evidence that the warrantless search fits under one of the exceptions to the requirement that you obtain a judicially approved warrant before searching anyone or anything. The usual exceptions you may be familiar with are consent, or searches of vehicles for evidence connected to a crime for which you arrested someone, or inventories conducted pursuant to your department's policy, or when responding to an emergency situation that you didn't create. In this article, I will look at a common exception to the warrant requirement that we often have used to justify a warrantless search, and analyze for you a recent case that changed the landscape in Florida regarding how that exception is applied. That exception is called "inevitable discovery," and to use it you now must be in the active process of seeking a search warrant.

Victoria Avalon,
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The "inevitable discovery" doctrine holds that if you are doing a warrantless search and find evidence, and the search is otherwise wrongfully done, but you would have discovered the evidence anyway following your normal police procedures, the fact that you seized the evidence illegally is harmless as a matter of law. You'd have found it anyway. A good example of this concept at work, that some of you may have experienced, is where you have probable cause to get a warrant but you are pushed for time for whatever reason, so to save time you get consent instead and find contraband; later, a judge rules that the defendant's consent was involuntarily obtained. To combat that, we might have argued that you had probable cause to get a warrant anyway and would have if the defendant had said no, so no harm, no foul. And the higher courts often approved of that logic.

The law evolves, and a recent case, Rodriguez v. State, 40 Fla. L. Weekly S 691 (Fla. Dec. 10, 2015), represents a fundamental shift in Florida's application of the inevitable discovery doctrine that has the potential to affect each of you. The Florida Supreme Court now holds that for us to use inevitable discovery to defend a warrantless search, you must actively be seeking a warrant when you find whatever evidence that you found without one. Here's what happened in this case from Miami. Bail bondsmen were trying to locate a bail jumper. One of the addresses the bail jumper gave was a home that ended up being the crime scene here. The bondsmen went there, made contact with Rodriguez, the resident, and asked for permission to search for the bail jumper. Rodriguez agreed, and the bondsmen found a grow operation. They called local police, an officer responded, Rodriguez invited him in, and promptly got arrested for his grow operation. On first inspection, one might think that

we would have both consent and inevitable discovery here. The former, from Rodriguez's consent to enter; the latter, from the fact that the bondsman's observations alone supported probable cause for a search warrant that would have been issued had the officers secured the property and asked a judge to issue one. But that is not the case.

This case got to the state supreme court on appeal from a Third District Court of Appeal ruling affirming the search on inevitable discovery grounds. As to the consent issue, the trial judge had held that the consent was coerced. The reason why is not clearly explained in the supreme court's opinion, and it's barely addressed in the 3d DCA's affirmance. Nevertheless, on appeal to the 3d DCA that holding was not seriously challenged, so I assume that the facts as to coercion of consent were clear. Thus, consent could not support a warrantless search, and the case therefore turned on inevitable discovery. The 3d DCA therefore spent a lot of effort looking at the history of the exception and comparing the often-conflicting federal and Florida case law on the subject. At that point, the Florida Supreme Court had never held that for inevitable discovery to apply, law enforcement had to be in the process of actively applying for a search warrant, and the 3d DCA approved the search on those grounds. This, largely because the lead detective testified that if consent had been refused, then he would have applied for a warrant. And he certainly had probable cause to do so. That ruling accurately reflected the law prior to Rodriguez. But on review of the district court's decision, the Florida Supreme Court held that for inevitable discovery to apply, law enforcement has to be actively seeking a search warrant.

I believe that high court majority essentially is trying to strengthen the protection afforded to a home. If this had not been a residential building, the opinion might have gone somewhat differently. The takeaway for each of you ought to be that if you don't have a search warrant, but you have the ability to get one, you ought to do that. Judges overwhelmingly prefer that you do, and when you do, it turns the legal tables and puts the burden of proof on the defense to show that the warrant was somehow invalid. My colleague Nicole Orr and her good folks in Felony Intake stand ready to assist you in the process of obtaining a search warrant when you have need of one.

As a postscript, Rodriguez was a 4-3 decision, a close case for the high court. Justice Canady, a Polk County native, led Justice Polston and Justice Quince in a strongly-worded dissent that essentially takes the majority to task for misinterpreting U.S. Supreme Court precedent as to inevitable discovery. It's an interesting read. It is possible that the dissent could form the basis for the Attorney General to try for review in the U.S. Supreme Court, since the revised 1968 Florida Constitution conforms our search and seizure law to the U.S. Supreme Court's precedent. The high Court therefore has the ability to review our state-law search cases.

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FROM THE COURTS...

TRAFFIC STOP -- SEARCH AND SEIZURE – CROSSING DOUBLE YELLOW LINES

The defendant's vehicle was stopped by law enforcement because it had crossed the double yellow lines. The stop led to the defendant eventually being charged with second degree murder. In a motion to suppress, the defendant asserted that briefly swerving two tires over the double yellow lines did not constitute violating a traffic control device. As his authority, the defendant cited the federal driving manual that was incorporated by reference in the Florida Administrative Code. The trial court denied the motion to suppress. On appeal, the First District affirmed the trial court's denial of the motion to suppress, holding that Section 316.0875, Fla. Stat. prohibits both passing and driving to the left of the pavement striping in no passing zones. Therefore, the officer's testimony that he observed the defendant's front and back driver's side tires travel over the solid double yellow lines, so that the vehicle was partially in the oncoming lane of traffic, was competent, substantial evidence that the defendant violated the traffic control device. Lomax v. State, 39 Fla. L. Weekly D1942a (Fla. 1st DCA September 10, 2014).