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INSIDE

Getting Back to the Basics: Trial Advice 101

From the Courts

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Bartow, FL 33830
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Winter Haven, FL 33881
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Getting Back to the Basics: Trial Advice 101

Written by: Darla Dooley, Assistant State Attorney

I have been an Assistant State Attorney since 2006. During my time as a prosecutor, I have worked in many capacities in the office. I have worked in felony and misdemeanor intake. I enjoyed fielding questions and solving problems. Additionally, I worked in the misdemeanor and felony trial divisions. Some of my tenure was even spent trying cases in the economic crimes division.

Currently, I am one of four assistant state attorneys assigned to handle post conviction relief cases. These are claims made by a defendant that his or her attorney provided ineffective assistance of counsel. Much of my time is reading trial transcripts. A large portion of these transcripts contain the testimony of law enforcement.

Testimony from law enforcement makes up a large portion of the State's evidence. Without it, there is no getting past a Judgment of Acquittal or to beyond a reasonable doubt. To be successful, an officer MUST be consistent, credible and well-versed in the fundamentals of testifying.

1. Confidence is a good thing; overconfidence will turn a jury against you.

In simple terms, don't fight with the defense attorney; juries hate an ego. Even more, jurors adamantly reject witnesses with too much swagger. By the time law enforcement testifies, the jury has already spent hours with the assistant state attorney and the defense attorney. They have been sized up. Alliances have been formed. You, as a witness, are the newcomer. Getting into a verbal sparing match with the defense now puts your testimony on the same ground as the Defendant's. At every voir dire I have done, jurors want to believe cops. You're living superheros. Fighting with the defense attorney will not only make you look foolish, it devalues your credibility and your testimony. Consider this: By the time the Defendant takes the stand, he will most likely be made to shine up like a new penny; not at all like the same defendant you arrested. The jury is not going to see him as the street thug you witness every shift. Fighting with the defense attorney brings the value of your testimony down to the level of a street thug.

2. Don't say what you're not supposed to say.

This has happened to all of us; our mouth rambled before our brain could stop it. Try to save these moments for those awkward social situations and not those in court, on the record, and forever memorialized. I am specifically speaking of two situations: Miranda and facts liminied out.

a. So, when do we talk about Miranda and the defendant making statements? If the Defendant's only statement was that he wanted a lawyer, you can not testify to it. However, if the defendant makes some kind of incriminating statement and the prosecutor wants the jury to hear it, then you must talk about giving the defendant Miranda. Why? Jury Instruction 3.9(e) instructs the jury in their deliberations that if they are to consider the defendant's statements, they must consider whether the defendant had been threatened in order to have made such a statement and whether anyone had promised the defendant anything to obtain the statement. The jury is then instructed that if they believe that the defendant was either threatened or promised, they should disregard the statement. Testifying about giving Miranda and the facts surrounding the giving of the statement are now factually necessary.

Assistant State Attorney, Darla Dooley, is a part of the Appellate & Civil Litigation Division

b. How mistakes happen. I have noticed that many prosecutors ask the questions "Did you investigate?" "Yes." "What did you do?" "What did you do next?" The truth is the next thing you did was that you tried to interrogate him, he invoked, so you continued to investigate and collect evidence. You must skip over the: "I tried to talk to him but he lawyered up" part. Otherwise there will be a mistrial. Go on to the: "I collected the evidence and secured it at property and evidence and requested it be tested." If you have any doubts or questions, ask. If you haven't asked the assistant state attorney, "Is there any reason for me to testify about the defendant's statement?", you need to. If the bailiff has called your name, you may ask the Court for permission to speak to the ASA to clarify a critical point in your possible testimony. Jury Instruction 3.10 instructs that it is entirely proper for a lawyer to talk to the witness about what testimony the witness would give. A simple statement of "Your Honor, if I could please have a moment with the prosecutor for a point of clarification?" will do. As far as other facts, such as criminal histories or other facts ruled inadmissible by the Court, stay mentally alert not to talk about them.

Continue to Next Page

3. Cross Examination: "That didn't hurt at all."

It always makes me smile when I think of this quote. I remember a motion to suppress involving a rookie member of law enforcement and his first-time ever testifying at such a hearing. While it may not have been painful for him, it must have escaped his attention that I was writhing in pain at my table. Here's why: A good defense attorney will ask compound questions. They assume facts that are beneficial to their client that they haven't proved or cannot prove. They combine it with something that will make you agree and "POW" they now have a stronger stance. This is how it looks: "Isn't it true that you pulled over my client driving the red car?" While it may be true you pulled over the defendant while he was driving, he wasn't driving a red car. A tacit agreement that the car was red WILL come back to bite you, I promise. If you don't correct this the first time, the defense attorney will make it appear that you are changing your testimony on the stand. It challenges your credibility and welcomes reasonable doubt where there wasn't before. Second, defense attorneys love to rapidly fire questions. It's a wonderful technique. Building a tempo of rapid fire questions will get you off your game and doesn't give you time to think about your answer. Remember: Rapid fire does not mean rapid answer. Clarify your answer. Confirm those parts that are true and deny those parts that are false. THIS IS VERY IMPORTANT IN DEPOSITIONS AS WELL. Take your time and answer carefully.

4. Be prepared, not pompous.

This goes along with Number One and fighting with the defense attorney. Cockiness is interpreted as arrogance. Arrogance undercuts any appearance of neutrality. A neutral investigator gives the appearance of having no preconceived ideas. Further, juries perceive a neutral investigator as having conducted a proper investigation. Knowing the case backwards and forwards is imperative. Especially at a deposition. Depositions are not only a fact finding missions, they are where the competition sizes you up to decide if they are going to trial or pleading out. If you bumble your way through a deposition, you have set yourself up for failure at trial. Reading deposition transcripts of unprepared or under-prepared persons when they go to trial is not a pretty sight. Lack of preparedness gives the defense unfettered opportunities to slice and dice your credibility and inject reasonable doubt where there wasn't originally.

5. Reports

While an assistant state attorney sizes up a case based on the strength of the report, a defense attorney crafts his defense. A young member of law enforcement boldly boasted about having written a nine page report. Yet when we got into deposition, there was no substance in eight of those pages that assisted this gentleman in being able to testify about the crime scene or how he obtained evidence. I'm not advocating the "less is more" approach. Reports have many purposes. Arguably, one of the most important purposes is to lay out the case. The State, that's you, must disclose names of all witnesses when the Defendant elects to participate in discovery. The law states that I know everything that you know. That means, I am under a legal obligation to disclose all the people you talked to, all law enforcement present on scene, and who you collected evidence from, or who you gave it to. The State has to live very transparently. This is not a cat-and-mouse game. Unless, it is written in your report, the State Attorney's Office staff has no way to know who to disclose. Failure to disclose results is a discovery violation. A discovery violation could result in evidence being excluded. Exclusion is a harsh penalty, but it can be avoided by simply disclosing these elements in your report. For example, a good report will reflect the name of the person at the store who gave you the video (such as manager Fred from Circle K), the exact location of the object you obtained fingerprints from (the bottom right corner of the air conditioner –maybe even a picture of you pointing to show orientation), the name of the neighbor you talked to (Sam Smith at 123 Glory Way), and the name or badge number of every person on scene (even if they only were there for perimeter security). Taking time now to include these details will pay huge dividends in the long run.

I have great respect for the work of law enforcement does. It is stressful, difficult and often under appreciated. It takes time to complete a thorough and complete investigation, but it is critical to building a strong case. Providing effective testimony is the glue that secures a conviction to the case that you built. In the field, you stay mentally alert of your surroundings as great emphasis is placed on your safety. A lawyer's weapon is their words; a different kind of bullet with a different kind of sting. Therefore, your mental alertness is just as necessary in the courthouse as it is in the field. If you have questions about testifying at trial or a deposition, you should never hesitate to contact the assigned assistant state attorney in advance. Good luck and be safe.

FROM THE COURTS...

SEARCH AND SEIZURE

Deputies went to the defendant's home in response to a neighbor's complaint that the defendant was manufacturing methamphetamine. The defendant told the deputies that he was stripping and burning copper wire and scrap metal in a fire pit. One of the deputies asked the defendant if they could look around to verify that the defendant was in fact burning copper wire. The defendant agreed to this request. Among various other items, a deputy located a small pill style plastic case on top of a pile of junk around the fire pit in question. The substance inside the pill case was methamphetamine. On appeal, the Second District held that the deputy had limited consent to search the fire pit area and was only authorized by the defendant to determine if he was burning copper wire. Therefore, the Court held that the evidence should have been suppressed at the trial court. The Court indicated that if the defendant had given general permission to search an area for narcotics, the search would have likely been determined lawful. Oldham v. State, 38 FLW D454a (Fla. 2nd DCA February 27, 2013).

CONSTRUCTIVE POSSESSION – EVIDENCE - SUFFICIENCY

The defendant was charged with possession of cannabis with intent to sell, manufacture, or deliver. After stopping the defendant's vehicle (there were also others present in the defendant's vehicle), officers detected the smell of marijuana emanating from the vehicle and were able to trace it to a closed bag behind the rear seat in the hatchback. Officers found nearly one pound of marijuana in the bag. There was nothing on or in the bag that tied it or the items inside the bag to the defendant. The defendant was convicted at trial. On appeal, the Second District reversed, holding that the state failed to meet its burden of proving that the defendant had the ability to exercise dominion and control over the bag. Because the state was unable to provide evidence that linked the defendant to the marijuana other than her mere proximity to it, the court held the motion for JOA should have been granted. Williams v. State, 38 FLW D582a (Fla. 2nd DCA March 8, 2013).

PROBABLE CAUSE FOR TRAFFIC STOP

The defendant was arrested for DWLSR. The officer's encounter with the defendant began when the defendant was observed parking his vehicle in a grassy area where a no parking sign was located. By the time the officer turned his car around, the defendant had stepped out of his car and was walking away. The officer directed the defendant to return to his vehicle. It was then determined that the defendant was driving while his license was suspended. The trial court granted the defendant's motion to dismiss, finding that it was an illegal stop because the defendant was already walking away from his car and the parking ticket did not require the defendant's presence. On appeal, the Fourth District reversed the lower court, holding that Section 316.1945(a)(c)2, Fla. Stat. permits the officer to issue a ticket to "the driver" or attach the ticket to the vehicle. Therefore, the officer did not need reasonable suspicion of criminal activity because the initial stop was valid. State v. Arevalo, 38 FLW D551b (Fla. 4th DCA March 6, 2013).

Happy Holidays!

http://www.sao10.com

Bartow Phone Numbers:

Switchboard	**534-4800**
Misdemeanor Intake	**534-4927**
Misdemeanor	**534-4926**
Domestic Violence	**534-4861**
Felony Intake	**534-4987**
Felony	**534-4964**
Investigations	**534-4804**
Violation of Probation	**534-4803**
Child Abuse	**534-4857**
Homicide	**534-4959**
On Call Phone	**860-8243**
Worthless Checks	**534-4874**
Juvenile	**534-4905**
Main Fax	**534-4945**
Witness Management	**534-4021**
Fax	**534-4034**

Officers can submit their vacation to Witness Management at the following email address:

witmanagement@sao10.com

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