Tenth Circuit

Legal Advisor

Jerry Hill, State Attorney

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Using eyewitnesses, photopaks and sworn statements in building your criminal case is a critical and effective part of successful prosecution.

Mike Cusick, Felony Intake director, provides a step-by-step outline on how to best include these factors in your reports in April Legal Advisor.

State Attorney Jerry Hill's message this month deals with SAO's new intake system. The main thrust -- cooperation generates success.

INVESTIGATIVE PROCEDURES

By Mike Cusick

Effective use of the eyewitness

Eyewitness identification is an important part of a case unless the identification of the defendant as the perpetrator is based upon a confession, fingerprints or some other physical evidence.

As a result, it it important for the investigating officer to use proper procedures in obtaining an identification.

A photopak is often used to determine the identification of the perpetrator.

The first issue courts look at when a photopak identification is challenged is whether the law enforcement officer used an unnecessarily suggestive procedure in obtaining an out-of-court identification.

The following guidelines will hellp to avoid any argument that the line-up is suggestive:

1. Never tell the witness that the suspect will be in the photopak -- tell the witness that you have some photos that you want the witness to look at.

2. Use a minimum of six photographs in the photopak.

3. Use photographs that not only look similar to your suspect, but also similar to the original description given by your witness.

For instance, if the witness described the perpetrator as having black, curly hair, it would be important to try to use pictures of indiviuals with black curly hair.

4. Never use more than one photograph of any individual, including the suspect, in the same photopak.

5. If you use color photographs, make sure that all of the photographs are in color. Do not mix color and black and white

photographs in the same photopak.

6. Conduct the photopak identification as soon as possible after the crime.

7. Maintain a copy of the photopak in evidence or as part of your investigative file.

8. Pin the witness down as to the certainty of the identification.

9. Put only one suspect in each photopak.

When the identification is challenged, the issue will be whether there was a substantial likelihood of misidentification.

The following factors will be considered by the court in deciding whether the identification by witness was reliable:

1. What opportunity did the witness have to see the suspect during the crime?

2. What degree of attention did the witness pay to the suspect at the time of the crime?

3. How accurate was the original decription given by the witness in comparison to the actual physical characteristics of the suspect?

4. How certain was the witness of the identification made by the witness?

5. How much time elapsed between the time of the crime and the time of identification?

It is essential to specify in your report whether or not the witness was positive as to the identification.

Sworn statements

There still remains some confusion as to when a taped statement must be taken from a witness as opposed to a typed statement.

Taped sworn statements must be taken from all eyewitnesses.

The only exception to this eyewitness rule concerns bank tellers and store clerks in forgery and uttering a forged instrument cases.

A special affidavit can be used for those cases.

If your department does not have copies of that affidavit, please contact me.

If the witness is not an eyewitness, a typed affidavit can be used.

FROM THE COURTS

Edited by Chip Thullbery

Bookmaking Statute constitutional

The defendant was charged with felony bookmaking under section 849.25 Florida Statutes (1987).

He filed a motion to dismiss, arguing that section 849.25 was unconstitutional.

The trial court granted the motion to dismiss, and the Fourth District affirmed.

The State appealed to the Supreme Court which reversed, holding that section 849.25 is constitutional.

State v. Cogswell, 13 FLW 193 (Fla. Mar.10, 1988).

What makes a traffic accident manslaughter

The defendant was charged with vehicular manslaughter.

At his trial the evidence showed that at approximately 5:30 A.M. while driving to work he approached a stop sign.

Instead of slowing down, he

(See "Manslaughter" next page)

"Manslaughter"

turned his lights down to the parking lights and looked for lights of oncoming traffic.

Seeing none, he accelerated into the intersection where he hit a truck, killing the driver.

The defendant himself testified that he often ran the stop sign and made a conscious decision to do so on the morning in question.

He was convicted as charged and appealed.

The First District affirmed, holding that there was sufficient evidence to support a conviction for manslaughter by culpable negligence.

Kornugay v. State, 13 FLW 542 (Fla. 1st DCA, Mar. 1, 1988).

Request for DUI blood test approved

The defendant was charged with DUI and filed a motion to suppress the results of a blood test.

The facts on which the motion was based were that the defendant was involved in a one car accident in which she was not hurt.

However, paramedics came to the scene.

When a Highway Patrol trooper arrived, he asked the defendant if she would take a blood test.

She agreed and gave the trooper written consent.

The trial court denied the motion to suppress.

On appeal, the defendant argued that the blood test should have been suppressed because there was no authority for the administration of a blood test under the facts of this case.

The Fourth District rejected this

(See "blood test" next page)

"blood test"
argument and affirmed, holding that because the defendant voluntarily consented to the test, it was admissible.

Chu v. State, 13 FLW 663 (Fla. 4th DCA, Mar. 9, 1988).

Warrantless arrest at defendant's home upheld

The defendant filed a motion to suppress statements made by him at the time of his arrest.

The evidence upon which the motion was based was that after the officers had obtained statements from the victim and a witness, they went to the defendant's residence to arrest him.

They were greeted at the door by his wife.

They asked her to get her husband, which they did.

He then came out of the house and was placed under arrest.

At that time he made the statements which were the subject of his motion.

The trial court granted the motion to suppress, and the State appealed.

The Second District reversed, holding that the officers could arrest the defendant without a warrant since he had voluntarily come out of his home.

State v. Dominguez, 13 FLW 674 (Fla. 2d DCA, Mar. 9, 1988).

When a traffic violation justifies a stop

The defendant was charged with trafficking in cannabis and filed a motion to suppress.

The evidence at the hearing on the motion showed that early one

(See "Justifies" next page)

"Justifies"

morning, the defendant, who was driving a truck and trailer with a bent tag, met a boat at a ramp in Dearfield Beach.

The boat had no registration numbers and when it was placed on the trailer, it was not secure.

Further, the back of the truck was loaded with rocks and bags of fertilizer in order to allow the truck to pull a heavy load up the ramp.

Subsequently, officers who had observed this stopped the truck for a tag violation.

As a result, they discovered over one thousand pounds of marijuana.

The trial court denied the motion to suppress, and the defendant was convicted.

On appeal, the Supreme Court affirmed, holding that the officers had a founded suspicion of criminal activity which justified the stop of the truck.

However, the Court ruled that had there not been a founded suspicion, the stop could not have been justified as a traffic stop for the bent tag.

The Court held that in order for a stop based on a traffic violation to be valid, the State must show that under the facts and circumstances of the case, a reasonable officer would have stopped the vehicle absent an additional invalid purpose.

Kehoe v. State, 13 FLW 182 (Fla., Mar. 10, 1988).

Giving false information justifies Resisting charge

The defendant was charged with resisting an officer without violence.

Evidence at his trial indicated that when he was stopped for a traffic violation while riding a bicycle, he gave a false name and social security number.

(See "Resisting" next page)

"Resisting"

Because of this, the officer placed him under arrest.

He was convicted, and on appeal, he argued that his arrest was illegal because giving false identification cannot be a basis for a resisting an officer charge.

The First District rejected his argument and affirmed, holding that when the giving of false identification impairs an officer's investigation, a defendant is guilty of resisting an officer without violence under section 843.02 Florida Statutes (1987).

Barkley v. State, 13 FLW 634 (Fla. 1st DCA, Mar. 10, 1988).

Two cases disprove temporary detentions

The defendant filed a motion to dismiss.

The evidence at the hearing on the motion showed that an officre observed her in an area known for street-level sales of cocaine, sitting on a porch with two known drug dealers.

She walked toward her vehicle, back to the porch and then back to her vehicle where she got into the back seat.

The vehicle started to leave as the officer approached. However, he stopped it and found cocaine and weapons.

The trial court denied the motion to suppress, but on appeal, the Second District reversed, holding that the officer did not have a founded suspicion on which to base his stop.

Martin v. State, 13 FLW 604 (Fla. 2d DCA, Mar. 2, 1988).

In a similar case, the evidence presented at the hearing on a motion to suppress showed that a deputy observed the defendant's car in a predominantly black area known for cocaine sales.

The defendant, a white male,

(See "Temporary" next page)

"Temporary"
was the only person in the car, and a black male was leaning against the driver's door.

After the deputy passed the car, the black male walked quickly away into the woods.

The deputy stopped the defendant's car and eventually found cocaine rock.

The trial court granted the motion to suppress, and the Fourth District affirmed, holding that there was not a founded suspicion of criminal activity on which the officer could base his stop of the car.

State v. Hoover, 13 FLW 561 (Fla. 4th DCA, Mar. 2, 1988).

Defendant is entrapped

The defendant was charged with trafficking in cocaine and filed a motion to dismiss, alleging entrapment.

The facts on which the motion was based were that the defendant was a loan shark who had lent money to a certain individual.

The individual contacted police and became an undercover agent for them.

Acting as an agent, he offerred the defendant cocaine in place of the cash which he owed him.

The defendant refused on two occasions to accept the cocaine, but when contacted a third time he reluctantly agreed to accept the cocaine as payment.

The trial court denied the motion, ruling that the defendant had not been entrapped as a matter of law because the police action had interrupted a specific ongoing criminal activity.

The defendant was convicted as charged and appealed.

(See "Entrapped" next page)

"Entrapped"

The Fourth District reversed, holding that the defendant had been entrapped since he had been induced to commit a narcotic violation and there had been no evidence that he was involved in continuing criminal activity concerning narcotics.

Rounsley v. State, 13 FLW 553 (Fla. 4th DCA, Mar. 2, 1988).

State Attorney's Message

By Jerry Hill

Juries and judges indicate your case quality is better

Nine months ago we began operating under a new Intake procedure in Polk County. More recently we extended it to Hardee and Highlands Counties. I am very pleased with the results we have seen. Cases are moving more smoothly through the system and the products we are p[resenting to judges and juries are greatly improved.

Most of the credit for this success does not go to my office -- it goes to each of you. I am keenly aware that we are requiring more of law enforcement and you have responded admirably. I want you to know that I really appreciate your efforts.

As you know, our Intake attorneys are required to tell you of their filing decisions in each case. If you disagree with their decisions I encourage you to get in touch with them. Moreover, My door is always open to you if you feel that you have not received a satisfactory explanation. Effective prosecution is a team effort and you are a critical part of the team. Consequently, while we do not always agree as to the proper outcome of a case, it is important that we keep an open dialogue in order to ensure that whatever decision we reach is made with all the facts on the table.

Keep up the good work.

Tenth Circuit

LEGAL ADVISOR

Editorial Staff

Jerry Hill............................Publisher
Chip Thullbery......Managing Editor
Mike Cusick..Legal Content Editor
Carl Weaver....Layout and Makeup

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Drawer SA, P.O. Box 9000, Bartow FL 33831-9000 (813) 534-4800