Tenth Circuit

Legal Advisor

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The goal of our Felony Intake Division is to quickly review the cases filed by you. There are both internal time constraints and time constraints placed on us by the judicial system which require that the cases by filed or declined in a timely fashion. The majority of the officers and agencies are meeting these time constraints. In Mike Cusick's article this month, he outlines changes in the Felony Intake procedures which are being made to insure that the investigations are completed promptly. We need your cooperation in successfully prosecuting the cases prepared by you.

KEEP UP THE GOOD WORK.

FROM THE COURTS

MOVEMENT OF ROBBERY VICTIMS WITHIN HOUSE WAS KIDNAPPING...

The defendant was charged with among other things, armed kidnapping and robbery with a firearm. At his trial, the evidence showed that he gained access to the victim's home by claiming to be a police officer. Once inside the home, he produced a gun and demanded money. He gathered the victims from different rooms in the house and brought them into the living room holding them hostage at gun point while he searched for jewelry and cash. He was convicted of bothe the robbery and the kidnapping. On appeal, he argued that the evidence did not support the conviction for kidnapping. The Third District rejected this argument and affirmed, holding that the victims' movement and confinement lessened the risk of detection and thus was no slight or inconsequential and was not inherent in the nature of the other crimes with which the defendant was charged. *Rodriquez v. State*, 15 FLW D348 (Fla. 3rd. DCA Feb. 6, 1990).

RIDING IN A CAR KNOWN TO BE STOLEN IS NOT AUTO THEFT...

The defendant was charged as a juvenile with theft of an automobile. At his trial, the evidence showed that he accepted a ride from a friend who was driving a stolen car. Subsequently officers noticed the vehicle and stopped it. In a post arrest statement, the defendant indicated that when he entered the car he suspected it was stolen. He was adjudicated delinquent for theft, but on appeal, the Third District reversed, holding that the evidence was insufficient to support the theft charge because there was no indication that the defendant ever had control of the vehicle. *G. C. v. State,* 15 FLW D288 (Fla. 3rd DCA Jan. 30, 1990).

LAB TEST STILL NEEDED TO PROVE SUBSTANCE IS COCAINE...

The defendant, a juvenile, was charged with possession of cocaine. At the adjudicatory hearing, the sole evidence identifying the substance was the officer's testimony that based on his experience it appeared to be cocaine and that it field tested positive for cocaine. The defendant was ajudicated delinquent but on appeal, the Third District reversed, holding that the evidence that the substance was cocaine was insufficient. *L. R. v. State*, 15 FLW D427 (Fla. 3rd DCA Feb. 13, 1990).

INVESTIGATIVE PROCEDURES

CHANGES IN REFILING DECLINED OR NO BILLED CASES...

On all arrest cases an Information is to be filed by the State Attorney's Office within twenty-one days of the defendant's arrest. Failure to do so results in the defendant's release from custody. In addition, on all arrest cases, the court system sets the defendant's arraignment for the fourth Monday after his arrest. As a result of these time constraints, the Felony Intake Division requires that the investigation be completed and turned in to the State Attorney's Office within ten days of the defendant's arrest or as soon as possible.

Most officers attempt to meet this deadline. In some cases, there are justifiable delays in filing the case because witnesses will not cooperate or because of other problems with evidence. There are a minority of officers that seem to ignore the follow-up requests for the investigation to be completed. This is frustrating to the assigned attorney because he is trying to meet the time constraints placed on him by the courts.

On non-arrest cases, we attempt to make a filing decision within thirty days after we receive the case. A non-arrest case is not supposed to be turned in to the State Attorney's Office until the investigation is complete. That means that all of the witnesses have been interviewed, the evidence has been obtained and an attempt has been made to question the defendant. It is impossible to meet the thirty day deadline when, after a review of the case, there are witnesses who have not been interviewed or no attempt was made to interview the defendant. The result is that the attorney has to send a request to the filing agent asking him to complete the investigation. A deferral date is given to the officer allowing for additional time to complete the investigation. When that date has passed, additional requests are made for the information. Sometimes a response is never received. In the end, some files get stale and either are declined or else when the material finally comes in, the attorney must reread the entire file because of its age.

In the past, when a case was no billed or declined, if the investigation eventually came in, the case would be filed. There was no real evaluation of how the delay had effected our ability to prosecute the case. Now, we will review those cases to determine which ones will be filed.

INFORMANT'S TIP GIVES PROBABLE CAUSE TO ARREST...

In this Polk County case, the defendant was charged with possession of cocaine and filed a motion to suppress. The evidence on the motion showed that a reliable informant advised a Lakeland detective that two people in a vehicle in the area of Fifth and Kettles were selling rock cocaine. The informant described the persons and the automobile they were using and he gave the man's street name. Soon thereafter, the police located the vehicle which contained three people, two of whom matched the description given by the informant. The officers performed a pat down search of the occupants. Inside the defendant's jacket they found a pill bottle containing cocaine residue. The trial court granted the motion to suppress, but on appeal, the Second District reversed, holding that based on the proven informant's detailed information which the police were able to verify, they had probable cause to arrest and thus to search. *State v. Brown*, 15 FLW D467 (Fla. 2nd DCA Feb. 9, 1990).

LACK OF STANDARD PROCEDURES INVALIDATES INVENTORY SEARCH...

The defendants were charged with trafficking in cocaine and filed motions to suppress. The evidence on the motions showed that a trooper stopped a speeding car, and this led to the driver being arrested for driving on a suspended license. The trooper impounded the car and conducted an inventory search. During this search, he unzipped a bag in the trunk and found cocaine. The trial court denied the motions to suppress, and the defendants pled no contest reserving their rights to appeal. On appeal, the Fourth District reversed, holding that the search of the bag was invalid because there was nothing in the record to indicate that the Highway Patrol's standard procedures require the opening of closed containers during an inventory search. *Diaz v. State*, 15 FLW D241 (Fla. 4th DCA Jan. 24, 1990).

For all arrests made on or after April 1, 1990 and for all non-arrest cases filed on or after April 1, 1990, the following procedures will be followed for refiling those cases which were no billed or declined.

1. On all declined non-arrest cases and no billed arrest cases, a new case filing checklist, complaint affidavit and case packet will be compiled.

2. An appointment will be scheduled with the attorney who declined or no billed the case to present the case and discuss the merits of refiling it.

3. On arrest cases, arrangements will be made for rearresting the defendant once the capias has been issued (since speedy trial is running).

The purpose of these procedures is to assure that the policy of timely filing all arrest and non-arrest cases is followed.

You should time your arrest so that your investigation is completed shortly afterwards. It does not make sense to make an arrest on a case, only to have the case no billed a couple of weeks later because the investigation is not over.

Part of the problem is created because an officer only needs probable cause to make an arrest, while proof beyond a reasonable doubt is needed to file the case. These are substantially different levels of proof. You should not make a probable cause arrest unless you anticipate getting the rest of the evidence soon afterward.

In some cases, a charge is based on co-defendant testimony. Such cases make up the majority of the cases we no bill or decline. Filing such cases is a waste of everyone's time and the public's money. Sometimes, we see the co-defendant disguised as a witness. If the witness looks like, acts like, or talks like a co-defendant, we will treat him as one. Unfortunately our legal system punishes the defendant who confesses and rewards the one that does not.

In closing, the best advice I can give you is to do a complete and thorough investigation the first time. If you do not have time to do it now, you certainly will not have time to do it a month from now when you have other cases to work on.

COUNTY COURT PROSECUTIONS

D/L SUSPENSION FOR REFUSAL TO SUBMIT TO BLOOD ALCOHOL TESTING...

To suspend a drivers license of a person who refuses to submit to blood alcohol testing, the investigating officer must prepare and submit a SWORN implied consent affidavit that states the officer had (1) reasonable cause to believe the person was driving under the influence and (2) the person had refused to submit to the blood alcohol test(s) after being requested to do so (see form DHSMV-D54). The implied consent affidavit and administrative D/L suspension can be dismissed if the officer fails to attest (swear) to the truth of the affidavit; therefore the officer should actually and formally swear to the contents of the affidavit. This must be done by oath before a notary public or another officer prior to signing the affidavit.

An example of an appropriate oath is:

> Notary Public or Attesting Officer: *Raise your right hand. Do you swear or affirm that the information contained in this affidavit is the truth, the whole truth, and nothing but the truth?*
>
> Officer submitting affidavit: *I do.*

An individual who refuses to cooperate with your driving under the influence investigation deserves to have his driver's license suspended. Don't let him get his license back by failing to swear to the implied consent affidavit. Remember also that the original affidavit must be immediately sent to Tallahassee (within 72 hours) and never submitted to the State Attorney's Office with the additional DUI reports.

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