Tenth Circuit

Legal Advisor

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Deposition prior to trial is as critical to winning a case as is any element of the investigation. Lanc Havice of SAO Felony Division highlights the importance of preparing for deposition in May Legal Advisor.

Also, Intake Division Director Mike Cusick deals with charging interference with custody in this issue.

BE PREPARED FOR DEPOSITION

By Lanc Havice

It is important that you, as a law enforcement officer, are prepared for your deposition.

Not only is the defense attorney investigating the case, he is also trying to "lock in" your testimony.

A deposition may be used at trial for the purposes of contradicting or impeaching your testimony.

If you have misstated the facts or have omitt6ed certain facts at the deposition, it will be too late at trial to straighten out errors in your testimony.

We -- the prosecutor and the officer -- are "stuck" with your testimony given at the deposition.

Before you are deposed on a case, you should take time to review your reports and other relevant items, e.g., the videotape and/or audiotape in a drug transaction.

In a nutshell -- you should prepare for a deposition in the same manner as you prepare for a trial.

Investigative Procedures

By Mike Cusick

Charging interference with custody

The best advice to law enforcement in handling custody disputes is to defer to the civil courts. Very few of the disputes you encounter will call for criminal charges. Our attorneys will not become involved in such disputes, unless there clearly is a criminal charge. You should follow whatever procedures your department has adopted for handling custody disputes.

If your department does not have a policy, it may bea good idea to create one.

Many of the cases we see involve Section 787.03(2), Florida Statutes, which mainly concerns parental kidnapping situations. It was created to deal with disputes where the court has not issued a custody order. It applies to both natural (married and unmarried) and adoptive parents (while it also mentions other custodians, most, if not all of the cases we see involve parents).

In order to have a violation of this statute, the parent must take, detain, conceal or entice away a child. As a practical matter, we have not prosecuted cases where a child was merely detained. The reason for this is that we must also prove that the concealment, taking, detaining or enticing away was done with a malicious intent.

If the child is merely detained, proof of that malicious intent is almost impossible to establish. We are likely to prosecute cases where one parent is concealing the child for a long period of time or where the parent is taking or enticing away the child away from the jurisdiction.

If the parent is concealing the child, we can argue that the element of malicious intent is proven because the parent is depriving the child of contact with the other parent. The same is true if the parent is removing the child from the state.

You should remember that there are several defenses to the offense. It is a defense if: (1) The parent is trying to protect the child from danger, (2) The child instigated the removal and was not enticed, (3) The parent has a reasonable belief that she is about to become a victim of domestic violence.

If there is credible evidence to support any of these defenses, then a criminal charge will probably not be filed.

In the past, case law supported an interference charge where the natural father of a child born

out of wedlock took the child from the natural mother. The courts lately, however, are taking the position that the natural mother does not have superior custody rights to the child.

Therefore, unless we have concealing or removing from jurisdiction and malicious intent, we will not prosecute a natural father merely because he has taken custody of the child.

If a custody order exists, prosecution will normally be considered under Section 787.04. It is important to note from the outset that where a court order exists, we must be able to prove that the suspect had knowledge of the court order.

This will normally be established by proving that the suspect had been served with a copy of the order. Service on the suspect's attorney will not be sufficient to prove knowledge on the part of the suspect.

Even when we can show knowledge of the court order, quite often there is a problem in that the order is not specific as to the times and dates of custody.

There are general references to one or the other parent having visitation or custody during holidays or school vacations. The more vague the order is, the less likely we can prove criminal intent.

Since the complaining parent has civil remedies for violation of the court order, it is advisable for them to pursue sanctions for a violation of the court order in civil court. Only when you have a clear outright violation of the statute, should criminal charges be considered.

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FROM THE COURTS

Edited by Chip Thullbery

Theft of several items in one container is one theft

The defendant was charged with burglary of a conveyance, grand theft of property, and grand theft of a firearm.

The evidence at his trial showed that he snatched a purse containing money and a firearm from an unattended vehicle at a gas station.

He was convicted as charged, but on appeal, the Supreme Court reversed one of the grand theft convictions, holding that the theft of the purse and its contents only constituted one crime.

Johnson v. State, 17 FLW S259 (Fla. April 30, 1992).

Hitting someone who has not invited a fight is not sudden combat

The defendant was charged with manslaughter. At his trial, the evidence showed that he unexpectedly turned and struck the deceased in the face with his fist while the two were walking towards the kitchen in the house of a third person, causing the deceased to fall and hit his head on the floor.

The defendant was convicted as charged.

On appeal, he argued that the evidence established as a matter of law that the death was an excusable homicide upon a sudden combat.

The Third District rejected this argument and affirmed, holding that there was no sudden combat because the defendant and the deceased had not squared off for a physical fight or exchanged threats

(See "Hitting" next page)

"Hitting" or angry words.	Valencia v. State, 7 FLW D976 (Fla. 3rd DCA April 14, 1992).

Officer had reason to stop but not to frisk

In this Polk County case, the defendant was charged with possession of cocaine and carrying a concealed firearm, and he filed a motion to suppress.

The evidence on the motion showed that two officers observed the defendant flagging down a passing pickup truck in a high crime area.

The defendant spoke to the driver of the pickup, keeping one hand in his pocket.

The officers believed his gestures were consistent with street-level cocaine sales and instructed him to place his hands on the truck bed.

One of the officers frisked him, finding the weapon and cocaine.

The officers testified that the defendant was frisked because they knew that cocaine dealers carry weapons.

However, they conceded that they had seen no suspicious bulges in the defendant's clothing and that they were not in fear for their lives.

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

On appeal, the Second District reversed, holding that there were no facts upon which the officers could base a reasonable belief that the defendant was armed so as to justify a patdown search for weapons.

Hamilton v. State, 17 FLW D1067 (Fla. 2nd DCA April 22, 1992).

A defendant having an attorney in another case doesn't necesarily mean he can't be questioned

The defendant was charged with first degree murder and filed a motion to suppress statements he made to the police.

The evidence upon which the motion was based showed that he was arrested in Kentucky on federal charges unrelated to this case.

After waiving his Miranda rights, he was questioned by F.B.I. agents. They ceased questioning him after he stated that he wanted to get to the jail to call his father.

Subsequently he was brought before a federal magistrate and a federal public defender was appointed to represent him. At some later time he was questioned by police officers from Dade County.

At the start of this interview he was informed of his Miranda rights and waived them. He then made statements which were the subject of his motion. The trial court denied his motion to suppress, and he was convicted as charged.

On appeal, the Supreme Court affirmed, holding that the Miami officers could legally question the defendant because he never asserted his Fifth Amendment right to have counsel present during questioning.

Gore v. State, 17 FLW S247 (Fla. April 16, 1992).

Defendant's actions gave officer probable cause

The defendant was charged with possession of drugs and filed a motion to suppress.

The testimony showed that one morning an officer was passing a

(See "actions" next page)

"actions" corner known for drug transactions.

He saw the defendant, a black man, leaning into a passenger vehicle occupied by a white man and saw an exchange of hands between them.

The officer stopped his car, and as soon as he did the individual driving the car left the area in a hurry.

When the defendant turned, the officer recognized him because he had seized a quantity of cocaine from the defendant only two weeks previously.

As the defendant turned, he made a very quick motion with his hand to place a plastic baggie into his pocket. Based on all of these circumstances the officer stopped the defendant and searched him, finding cocaine.

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

On appeal, the Fourth District affirmed, holding that the officer had probable cause to believe the defendant possessed cocaine.

Elliott v. State, 17 FLW D1044 (Fla. 4th DCA April 22, 1992).

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