Tenth Circuit

Legal Advisor

Jerry Hill, State Attorney

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Florida legislators and district court judges have made several significant modifications to the State's laws. Intake Division Director Mike Cusick has gone over these changes and written synopses of the changes, as they affect operations of law enforcement agencies.

Investigative Procedures

by Mike Cusick

1992 legislative roundup

Counterfeit Controlled Substances

Section 831.31, Florida Statutes, has been amended to expand the definition of "counterfeit controlled substance" to cover "any substance which is falsely identified as a controlled substance named or described in section 893.03, F.S."

We previously have charged false controlled substance violations under section 817.563, F.S. As a result in the change in the definition under section 831.31, a defendant could be charged with both possession of a counterfeit controlled substance with intent to sell and sale of a counterfeit controlled substance.

Felony Petit Theft

Section 812.014(2)(d) has been amended to allow a person to be charged with felony petit theft if he has two or more prior theft convictions.

In the past, the court had ruled that the prior convictions had to have been for petit theft. Now any theft convictions may be used as priors.

Crimes against the elderly

Section 784.08(2) enhances the penalties for assault, battery, aggravated assault and aggravated battery by one degree if the victim is over 65 years of age.

Previously we had to prove that the defendant knew the victim was over 65 years of age. The statute was amended to delete that proof requirement. Now we only need to prove that the victim was actually over 65 years of age.

Preserving 911 tapes

Quite often during a criminal episode a victim, witness or defendant will call the "911" emergency line. The tape recording that is made often is helpful to the criminal investigation.

These tapes are only kept for short periods of time. Sometimes the tape has been erased before the case has even arrived at our office.

The contents of the tape as well as the background noise may either corroborate or refute what the victim, witness, or defendant is saying about the incident.

For this reason, the investigating officer needs to obtain a copy of the tape and place it in evidence before the original is erased.

Specify In Your Report Whether the Firearm is Loaded

The Second District Court of Appeals has ruled that a defendant who carries a concealed firearm in a motor vehicle is not guilty of carrying a concealed firearm if the weapon is unloaded.

This opinion is based on the portion of the statute that states the possession is lawful if the gun is "not readily accessible for immediate use" (see section 790.25[5]). The court found that if the gun was unloaded it was not readily accessible.

Based on this ruling, we will not be charging carrying a concealed firearm on motor vehicle cases when the gun is not loaded. It is very important that the investigating officer specify in the report whether or not the gun was loaded. If it is not specified, we cannot presume that the gun was loaded. Depending on time factors, we will either request a supplement from the investigating officer or file a no bill because of insufficient evidence.

FROM THE COURTS

Edited by Chip Thullbery

Victims' movement was not sufficient to constitute kidnapping

The defendant was charged with armed robbery and kidnapping.

The evidence at his trial showed that he entered a convenience store.

After taking money from the cash register and from a customer, he order all the occupants of the store to go to the back of the store and lie on the floor.

Three individuals moved a distance of 30 to 40 feet but did not lie on the floor.

The fourth moved a distance of 10 feet after the defendant threatened to shoot him. The defendant then left the store and the clerk locked the door and called the police.

The defendant was convicted as charged, but on appeal, the Supreme Court reversed the kidnapping convictions, holding that the defendant was not guilty of kidnapping because the movement and confinement of the victims was slight, inconsequential, and merely incidental to the robberies.

Walker v. State, 17 FLW S567 (Fla. Aug. 27, 1992).

Person who ran into house while fleeing police was guilty of burglary

The defendant was charged with sale of cocaine, burglary of a dwelling, and battery on a law enforcement officer. The evidence at his trial showed that he sold cocaine to an undercover officer.

Two police officers then approached him and asked to speak to him. He fled and ran into a house where officers who gave chase found him hiding in a closet.

(See "fleeing" next page)

"Fleeing"

He was convicted as charged.

On appeal, although the Second District reversed the burglary conviction on other grounds, it held that there was sufficient evidence to support the conviction on the theory that the defendant entered the residence with the intent to commit the offense of resisting an officer without violence.

Britton v. State, 17 FLW D2134 (Fla. 2nd DCA Sept. 1, 1992).

No violation of expectation of privacy by looking over fence

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

The evidence on the motion showed that based on an anonymous tip that the defendant was growing marijuana in his back yard, an officer walked through the neighbors' unfenced backyard without permission.

Then, standing on tiptoe, he looked over the defendant's six-foot wooden fence and saw several marijuana plants growing in five-gallon buckets.

Based on this information, he obtained a search warrant and seized the marijuana.

The trial court granted the motion to suppress but on appeal, the Second District reversed, holding that the defendant did not have a constitutionally protected reasonable expectation of privacy in his back yard.

State v. Sarantopoulos, 17 FLW D2006 (Fla. 2nd DCA Aug. 26, 1992).

Court rejects challenge to breathalyzer tests

The defendant was charged with DUI and filed a motion in limine to prevent the State from using the results of a breathalyzer test at trial on the grounds that the Department of Health and Rehabilitative Services had failed to properly promulgate rules for testing breathalyzer machines.

The trial court granted the motion, but on appeal, the Second District reversed, holding that the trial court erred in preventing the State from using the breathalyzer tests results.

State v. Berger, 17 FLW D1995 (Fla. 2nd DCA Aug. 26, 1992).

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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
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