Tenth Circuit

Legal Advisor

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Vol. 7, No. 1 January 1993

This month we feature a letter from Florida's Attorney General discussing a defendant's expanding right to counsel and its impact on police interrogation.

Investigative Procedures

By Mike Cusick

Florida Supreme Court expands defendants' right to counsel

The following is a letter to the State Attorney's Office, Tenth Judicial Circuit, and other law enforcement and governmental agencies from Attorney General Robert A. Butterworth.

The Florida Supreme Court has released a decision, Phillips v. State, No. 78,780 (Fla. November 25, 1992) which is of critical importance and should be brought to the attention of all law enforcement personnel who apprehend or question suspects or who prosecute criminal cases where a confession or statement has been obtained.

The Phillips decision follows the dicta in Traylor v. State, 596 So. 2d 957 (Fla. 1992) and, in a passing reference by footnote, recedes for the first time from prior case law holding that criminal prosecutions, and concommitant attachments of counsel under the Florida and United States Constitutions, commence with the filing of an indictment or information.

Now, such rights attach at first appearance or upon being placed in custodial restraint.

This office will petition for rehearing in Phillips but it is clear that the ability of the state to question suspects and obtain confessions following custodial restraint and first appearance has been substantially restricted.

Because Traylor and Phillips represent a major change in constitutional law, it is critical that all law enforcement understand the practical impact of these decisions.

First appearance was created for the purposes of protecting the right to pretrial release and to ensure that the state not hold arrested persons in custody without initiating criminal prosecutions.

Gerstein v. Pugh, 420 U.S. 103 (1975).

The practical effect of Phillips and Traylor is to transform first appearance and the pro forma request for the assistance of counsel by treating them as a formal initiation of criminal prosecution by the state, a request for trial counsel and, concomitantly, the invocation of the right to remain silent.

Heretofore, as was done in Phillips, law enforcement could initiate contact with an arrested suspect and, provided the Miranda rights were waived, question the suspect, obtain voluntary statements, and use those statements at trial.

After Traylor and Phillips, once a suspect is taken into custodial restraint and requests counsel at the mandatory first appearance, law enforcement may not initiate contact with the suspect for the purpose of investigatory questioning regarding that particular case.

A waiver of Miranda rights and a voluntary confession, as in Phillips, is meaningless.

The suspect may be questioned only if: (1) he initiates the contact and questioning or (2) the police contact counsel and the waiver of the right to remain silent occur in the presence of counsel.

Two other points should be noted. First, the Phillips invocation of the right to counsel and the right to remain silent are offense specific, i.e., they only apply to the offense(s) for which arrested.

Second, Phillips also speaks of formal initiation of criminal prosecution, and concommitant attachment of the right to trial counsel, as occurring"as soon as feasible after custodial restraint."

This suggests an even earlier point than first appearance, which itself must occur within 24 hours of arrest.

What "as soon as feasible after custodial restraint" means, or if it

means anything, is not clear and remains open to further judicial interpretation. We would urge caution to any agency when presented with facts which could bring the rule in Phillips into play.

Because of the importance of the decision, this office urges state attorneys to inform all law enforcement agencies of its contents and import. If we can be of any assistance on this matter, do not hesitate to contact me.

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The "Tenth Circuit Legal Adivisor is published by the Office of the State Attorney Drawer SA, P.O. Box 9000, Bartow FL 33831-9000 (941) 534-4800

FROM THE COURTS

Edited by Chip Thullbery

A consent to search has its limits

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

The evidence on the motion demonstrated that officers went to the defendant's apartment where they asked for his consent to search it for narcotics.

He gave his consent and then officers requested that a narcotics detection dog be sent to the apartment. About fifteen minutes later an oficer arrived with the dog.

The dog was taken through the apartment and alerted to a sink.

The sink was taken apart and the officers broke into the wall behind the sink where they discovered cocaine.

The trial court denied the motion to suppress, and the defendant pled no contest reserving his right to appeal.

On appeal, the Third District reversed, holding that in bringing in a dog and breaking into the defendant's wall, the officers exceeded the scope of the defendant's consent.

Dominguez, v. State, 17 FLW D2664 (Fla. 3rd DCA Dec. 1, 1992).

Once a roadside stop is properly made, officer may always ask to see drivers' license and registration

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

The evidence on the motion showed that an officer stopped the

(See "stop" next page)

"stop"

defendant's vehicle because the temporary tag on the vehicle was not sufficiently visible for the officer to determine whether it had expired.

Once the officer stopped the vehicle however, he could see that the temporary tag was valid. Nevertheless, he asked to see the defendant's drivers license and registration.

While the defendant was looking for the registration, a K-9 officer brought a dog to the scene which alerted to the presence of drugs.

A subsequent search of the vehicle revealed cannabis.

The trial court granted the motion to suppress but on appeal, the Fifth District reversed, holding that since the officer properly stopped the vehicle, the request for the drivers license and registration and the use of the dog were appropriate.

State v. Bass, 17 FLW D2699 (Fla. 5th DCA Dec. 4, 1992).

Open house party law is unconstitutional

The defendant was charged under section 856.015, Florida Statutes, with allowing juveniles to possess alcoholic beverages or drugs at an open house party.

The defendant filed a motion to dismiss challenging the constitutionality of the statute.

The trial court granted the motion to dismiss, and on appeal, the Fifth District affirmed, holding that the statute was unconstitutionally vague.

State v. Alves, 17 FLW D2773 (Fla. 5th DCA Dec. 11, 1992).

Land is posted only when No Trespassing sign contains name of owner

The defendants who are juveniles were charged with being delinquent for committing the crime of trespass.

At their hearing, the evidence showed that a property owner found them cutting down a pine tree on his property.

The owner testified that there was a fence around the property as well as no trespassing signs.

He said that the wording on the signs was "POSTED. NO TRESPASSING. VIOLATORS WILL BE PROSECUTED BY LAW."

The juveniles both testified that they thought they were on the property of another person whose land bordered the victim's and who had given them permission to cut firewood.

The trial court found the defendants guilty of trespassing but on appeal, the First District reversed, holding that the evidence was insufficient to show that the land was properly posted because there was no evidence that the no trespassing sign contained the name of the owner of the land as required by section 810.011(5)(a), Florida Statutes (1991).

D.T. v. State, 18 FLW D41 (Fla. 1st DCA Dec. 15, 1992).