Tenth Circuit Legal Advisor

Jerry Hill, State Attorney

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Filing felony charges

By Mike Cusick

GATHERING THE EVIDENCE

For several reasons, there is s substantial difference in the way felony cases and misdemeanor cases are handled within our office.

First of all, the penalties are much more serious for felony charges than they are for misdemeanors.

Secondly, defense attorneys more closely scrutinize felony cases. While depositions are rare in misdemeanor cases, they are common in felony cases.

Legal challenges to the the search and seizure of contraband are much more common in felony cases.

Legal defenses are more likely to be raised in felony cases.

Finally, by court rule, the requirement for filing a felony information is tougher.

The attorney must swear to having received testimony under oath from the material witnesses in the case.

For all these reasons, felony cases are more closely scrutinized before an

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information is filed.

This office requires on felony cases that all police reports and witness statements must be notartized before submission to the Felony Intake Division.

This requirement exists to comply with the court rule mentioned previously.

Law enforcement officers, by statute, have the authority to notarize their fellow officers' reports.

It is important that the swearing officer review the report for accuracy before swearing to it.

It doesn't look good at deposition or trial if an officer has to back away from statements or observations previously made in a sworn report.

If the report deals with the officer's contact with the defendant, it should explain the legal basis for that contact.

Was it a citizen encounter? Was it a Terry stop? Was there probable cause to make an arrest?

In a sentence or two, please explain what the grounds were for the contact.

For instance, if it was a traffic stop, just stating that you conducted a traffic stop is not enough — we need to know the basis for the traffic stop.

We will not file a case involving drugs or other contraband if there is not a legal basis for the search.

We want to have the entire picture of the testimony in a felony case before a filing decision is made.

For that reason, we require that transcripts be provided of the sworn interviews taken by the investigating officer from the eyewitnesses in the case.

We do not want the investigator to limit those interviews to only those witnesses who favor the victim's version of the incident.

We also want to see what the witnesses favoring the defendant have to say. If they are lying, at least we have them locked into their story.

On the other hand, they may be telling the truth — the defendant may not be guilty of any crime, or at least the crime alleged by the victim.

It is important that the investigator take quality interviews of the witnesses.

The elements of the crime should be foremost in the mind of the

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investigators during the interview.

In the past, we have provided copies of the Felony Law Manual to officers. This manual reviews the elements of the common felony offenses and suiggests areas for questioning.

An updated version of the manual will be coming out towards the end of the summer.

While a witness should be permitted to tell his story, it is important that the investigator keep the witness focussed on the relevant issues of the case.

If the witness is describing the conduct or statements of two or more defendants, it is important for the investigator to require the witness to be specific about which defendant said or did what.

Usually the admissions of one co-defendant are not admissible against another.

We need to know what each defendant had to say — do not allow the witness to use "they said" or "they did".

Please remember that merely being present when a crime occurs does not make a person guilty of a crime.

It is not a crime to watch others commit a crime and do nothing about it.

We must be able to prove that the defendant took an active part in the crime or shared in an expected benefit.

Part of our job is to evaluate the credibility of the witnesses.

It is helpful to know what relationship, if any, exists between the witnesses and the defendant or the victim.

If a person appears to be a co-defendant in a case (even if you don't charge him), the rule with regard to co-defendant testimony comes into play.

In general, we do not file cases based upon co-defendant testimony. There are multiple reasons for this rule which have been explained in previous articles.

Suffice to say that you should keep that rule in mind in determining the strength of your case.

Eyewitness identification is often important to a case.

If a live showup is conducted or if a photopak is shown, it is important that the investigator determine whether or not the witness is positive as to the identification.

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Do not allow the witness to use percentages or words like probably. A witness who is 95 percent certain is also 5 percent uncertain.

The standard of proof required in a criminal case is proof beyond a reasonable doubt. A defense attorney has a lot to work with if your witness is 5 percent uncertain.

The argument will be that 5 percent uncertainty equals a reasonable doubt for the jury. If the witness is not certain of her identification, we need to know that.

It is a complete waste of time to prosecute a case where the only identification evidence comes from a witness who can only say that the defendant probably is the person who committed the crime.

Certain witnesses have set, standard testimony that is expected from them in any given case.

Examples of these types of witnesses are store clerks and bank tellers on forged check and credit card cases, and pawn brokers on stolen property cases.

In both instances, affidavits exist which replace the need for a taped statement.

These affidavits cover the elements that would normally be expected from that witness. If your department doesn't have copies of these affidavits, we can provide you with one.

If the victim of a burglary or theft is not an eyewitness to the crime, normally a non-eyewitness affidavit can be used to cover the testimony from that witness.

Again, a copy of that affidavit is available if your agency does not have one.

If a non-eyewitness affidavit is not obtained from the victim at the time the crime is reported, often the best time to get that is when the victim comes in to recover and identify the stolen property or motor vehicle.

If the property does not have a serial number, it is important to have the victim explain how the property can be positively identified.

FILING PROCEDURES

After a defendant is arrested and taken to jail on a felony charge, the paperwork eventually makes its way to the Felony Intake Division.

We combine all of the criminal traffic, misdemeanor and felony charges

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arising out of a particular incident and number it as a felony case.

We send out a **Request For Information** (RFI) to the case filing agent.

The Case Filing Agent may be a detective or the arresting officer, depending on the agency involved.

The RFI identifies what items need to be sent in as part of the felony packet.

The offense reports, witnesses and evidence lists are standard for every case.

If there are civilian victims and/or witnesses, their taped statements and/or non-eyewitness affidavits (as explained above) will be needed.

In some cases, medical records, bank records, copies of checks, search warrants or other documentation will be needed.

A copy of the RFI should be used as the cover sheet for the felony packet when it is sent down.

Please do not send down the felony packet before receiving the RFI. Please also do not send down the felony packet until it is complete, unless you have talked to the felony intake attorney.

If the RFI is not attached, it makes it much more difficult to identify to which case the reports belong.

If the felony packet is sent down without the witness transcripts, it wastes the attorney's time since a filing decision cannot be made without them.

Once the felony packet is received, the attorney reviews it for filing purposes.

If reports, statements, or other information is missing, the attorney will send out to the Case Filing Agent a **Case Filing Evaluation** (CFE) deferring a filing decision to a specific date.

The attorney tries to give the detective or officer as much time as possible to complete the request.

The attorney, however, is limited by time constraints on the case.

The felony arraignment is usually set for the fourth Thursday after the defendant's arrest.

The attorney is supposed to make a filing decision before this date.

Actually, the decision is supposed to be made within 21 days of the defendant's arrest if the defendant has not been released from the jail. Failure

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to file within that time period entitles the defendant to be released from jail without posting a bond.

When a filing decision is made, a CFE is sent to the Case Filing Agent indicating what has been filed.

If charges are reduced or no billed, an explanation is included on the CFE.

We encourage officers to contact the attorney if there is are questions about the CFE.

If the case is being filed by complaint affidavit instead of arrest affidavit, the completed felony packet is to be sent with the complaint affidavit.

A **Case Filing Checklist** (CFC) should be attached to the top of the packet. All of the departments have been supplied with blank CFCs.

While the transcripts of the taped statements do not have to be included in the complaint affidavit felony packet, the taped statements need to have been taken so that they are ready to be transcribed upon the request of the attorney.

If they are needed, the attorney will send out a CFE requesting the transcripts.

THE DEFENDANT INTERVIEW

Whether the case is a complaint affidavit or arrest affidavit, the one thing we
are always looking for is the interview of the defendant.

Unless the defendant cannot be located, there should always be a section in one of the reports which covers the interview of the defendant.

Even if the defendant invokes his Miranda rights and refuses to give a statement, this should be mentioned in a report.

One of the most frequent reasons that a filing decision is deferred is because the reports are silent as to a defendant interview.

Even if the defendant lies to you in his statement, at least he has given you a statement which may be used against him later.

Quite often, it limits the story he can give later should the case go to trial.

Sometimes it means the difference between the defendant going to trial or pleading guilty.

Pleae give yourself and our attorneys time by including this in your original report.

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Even if you are concerned that the statement was given in violation of Miranda, include it. While the satement may not be admissible in the case-in-chief, it may be admissible to impeach the defendant should he take the witness stand.

QUESTIONS – JUST CALL

We are here to assist you with your felony investigations.

Investigator Ron Feschak is the liason for all law enforcement agencies in Polk County except the Polk County Sheriff's Office. He can be reached at 534-4884.

Det. Royce Adkins is the liason between our office and the Polk County Sheriff's Office. He can be reached at 534-4885.

The general division number is 534-4802 in Bartow.

In Sebring or Wauchula, you can call the main numbers for those offices

If you have questions about a specific case, call and talk to the attorney.

From the Courts

Edited by Chip Thullbery

Off-duty officers were agents of the state

The defendants were charged with possession of a controlled substance and filed a motion to suppress.

The facts on which the motion was based were that off-duty sheriff's deputies were hired by the promoters of an outdoor music festival to provide security and prevent the possession and use of illegal drugs.

The sheriff's office organized the hiring of the deputies and coordinated their activities.

During the festival, the deputies searched the defendants and found drugs on them. The trial court granted the motions to suppress, and on appeal, the Second District affirmed, holding that even though the deputies were hired by the promoters, they were acting as agents of the State.

State v. Iaccarino, 25 FLW D940 (Fla. 2d DCA Apr. 12, 2000).

Resisting after arrest is also criminal

The defendant was charged with, among other things, resisting with violence.

At his trial, the evidence established that after an officer arrested him for a misdemeanor, the officer took the defendant to a hospital emergency room for treatment of a head injury.

While waiting to be seen, the defendant became unruly, sticking himself with medical instruments and threatening to stab anyone who came near him.

The officer was finally able to subdue him with the help of a paramedic.

The defendant was convicted as charged.

On appeal, he argued that he could not be guilty of resisting with violence because he was already under arrest at the time he resisted the officer.

The Second District rejected his argument and affirmed, holding that a struggle following arrest is an attempt to interfere with an officer in the performance of his or her duty.

Vlahovich v. State, 25 FLW D782 (Fla. 2d DCA Mar. 29, 2000).

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Defendant presented valid heat of passion defense

The defendant was charged with second degree murder.

The evidence at his trial established that the victim who was the defendant's brother-in-law was visiting at the defendant's house on Christmas Eve.

At some point, the defendant found his wife crying.

He then went looking for the victim, and his wife followed.

When they found him in the kitchen, the wife confronted the victim and asked him why he had sexually assaulted her.

Realizing what had happened, the defendant immediately picked up a knife and stabbed the victim once in the chest.

As a result, the victim eventually died.

The defendant was convicted as charged.

On appeal, the Third District reversed and reduced the conviction to manslaughter, holding that the evidence established a valid heat of passion defense against second degree murder.

Paz v. State, 25 FLW D824 (Fla. 3d DCA Mar. 29, 2000).

Merely possessing a firearm on school property not enough

The defendant, a juvenile, was charged with possessing a firearm on school property.

At his adjudicatory hearing, the evidence established that he drove to school in a vehicle which contained a loaded .22 caliber hunting rifle that he had forgotten to remove after hunting the night before.

When he got to school, he learned that vehicles were being searched for weapons, and he had friends transfer the rifle hidden in a pair of blue jeans to a car that had already been searched.

The court found the defendant guilty, but on appeal, the Second District reversed, holding that the state failed to establish that the defendant handled the gun in a rude, careless, threatening, or angry manner.

M.C. v. State, 25 FLW D869 (Fla. 2d DCA Apr. 7, 2000).

Facts supported detention of defendant

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

The facts on which the motion was based were that officers received a tip about increased drug activity in a certain area.

Early one morning

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they went to the area where they saw a parked car with five or six people clustered around the driver's door.

When the people spotted the officers, some fled.

The defendant did not, but he backed away and looked nervous.

He positioned himself behind a woman and held his hands behind his back.

Concerned that he might have a weapon, the officers detained him and patted him down.

As a result, they found cocaine.

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

On appeal, the Second District affirmed, holding that the officers had a reasonable suspicion of criminal activity which justified the detention of the defendant.

Copeland v. State, 25 FLW D875 (Fla. 2d DCA Apr. 5, 2000)

Statute criminalizing neglect of disabled adult is constitutional

The defendant was charged with and convicted of neglecting a disabled adult.

On appeal, she argued that section 825.102(3), Florida Statutes, the law under which she was charged, was unconstitutional.

The Supreme Court rejected this argument and affirmed.

Sienniarcki v. State, 25 FLW S323 (Fla. Apr. 27, 2000).

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