TENTH CIRCUIT

# Legal Advisor

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*Volume 14, Number 9* *September, 2000*

## LIMITATIONS ON FINGERPRINT EVIDENCE

**BY JACK RILEY**

Fingerprint evidence is probably the most powerful proof available in criminal prosecutions. DNA evidence may be conclusive, but it is more difficult to present and harder for juries to comprehend. It is common knowledge that even identical twins have different fingerprints. While a fingerprint may be very probative, it is important to remember that it is often just one piece of circumstantial evidence. If a fingerprint is the sole evidence of guilt, we must establish that it could only have been left at the time of the offense by the person committing the crime..

Cases involving possession of contraband are often built on fingerprint evidence. Courts around the state have been fairly uniform in requiring more than fingerprints on drug packaging to support a conviction. In *Tanksley v. State*, 332 So.2d 76 (Fla. 2d DCA 1976), police responded to a tavern in response to a tip concerning drug activity. They found Tanksley and others near a concrete block. Beneath the block they found a bag containing an envelope with foil packets of heroin inside. Tanksley's prints were found inside the envelope. The Court held that there was insufficient evidence to prove possession. It was possible that the defendant had discarded the envelope and that some other person used it to package the drugs.

The Second District held more recently in *Chavez v. State*, 702 So.2d 1307 (1997), that the number of prints located on the contraband is not material. Chavez had been seen at a drug house on occasion. A vehicle was stopped as it left the scene and several packages of methamphetamine were seized. The packaging was in several layers, one layer being aluminum foil. Sixteen fingerprints and four palm prints on the foil matched Chavez. The Court held that this was insufficient to establish that Chavez had any involvement in the drug activity. Chavez had been to the home on prior occasions and could have handled the foil before it was used to package the contraband. The First District issued a similar ruling in *McClain V. State*, 559 So.2d 425, where McClain's prints were found on the third of five layers of drug packaging. The drugs were found under McClain's seat in a rental car. In each of these cases, the State was unable to prove that the prints could only have been left when the crime was committed.

Fingerprints found on property belonging to the victim are extremely useful in burglary and theft prosecutions, but as with drugs, the prints alone may not be enough. In *Williams v. State*, 740 So.2d 27 (Fla. 1st DCA 1999), a witness observed a male subject fleeing an office building. A VCR was among the items taken in the burglary. Within 90 minutes, the victim's VCR was recovered from the side of a well-traveled road. The defendant's fingerprint was found on the VCR. At trial, the defendant said he saw the VCR by the road and examined it. He stated that it appeared damaged, so he left it there. The Court held that this was a reasonable hypothesis of innocence and reversed the conviction. In *Shores v. State*, 25 FLW D91 (4th DCA 2000), the defendant's print was found on a commercially packaged box of ammunition in the victim's home. The victim had purchased the ammunition locally, two months before the burglary. The Court held that the print alone was insufficient since the defendant could have handled the ammo at the store before it was purchased by the victim. Had the ammunition been purchased in a distant city, the result would probably have been different. It is important to note that in this case the defendant did not have to testify. The Court came up with a reasonable hypothesis of innocence on its own.

When relying on circumstantial evidence to establish guilt, the evidence must be such that it is inconsistent with ANY reasonable hypothesis of innocence. It is most important to remember that the defendant has the right to remain silent and does not have to prove anything. This means that if there is a hypothetically reasonable explanation of the facts that indicates innocence, we lose. Investigators need to be cognizant of this when building a case.

In a drug case, the investigator needs to tie the defendant to the contraband independent of the prints. Was the defendant in possession of a lot of cash, a ledger, or paraphernalia? Did the defendant appear to be under the influence of drugs? In a burglary case, were the defendant's prints found anywhere else in the structure? Were the defendant's prints also found at another crime scene? Did the defendant pawn anything similar to the stolen property? In all cases, the best means of eliminating the innocent explanation is through the questioning of the suspect. Many suspects will ask for an attorney, but some will offer a false alibi or an absurd explanation of the facts that we can disprove in court. When building any case it is important to bear in mind that there is no such thing as too much evidence.

## **********FROM THE COURTS**********

**DEFENDANT'S ACTIONS CONSTITUTED CHILD ABUSE**

The defendant was charged with child abuse. At his trial, the evidence established that he got into an argument with the mother of his young child. He threatened to kill the child and then went into the bedroom where the child was sleeping. He grabbed a loaded gun, cocked it, and pointed it at the ceiling. The mother rushed into the room and took the child in her arms, but the child did not wake up. The defendant was convicted as charged, and on appeal the Fifth District affirmed, holding that the defendant's actions amounted to an intentional act that could reasonably be expected to result in physical or mental injury to the child and thus met the statutory definition of child abuse. *Clines v. State*, 25 FLW D2088 (Fla. 5th DCA Aug. 31, 2000).

## SUPREME COURT AGAIN NARROWS THE BURGLARY STATUTE

The defendant was charged with burglary and two counts of first degree murder. At his trial, the state contended that he entered the victims' home with consent but that the consent was later withdrawn prior to him murdering the victims. The state sought and received an instruction on felony murder as well as premeditated murder. The defendant was convicted as charged. On appeal, the Supreme Court reversed, holding that the jury should not have received a felony murder instruction based on burglary because the "remaining in" language in the burglary statute only applies if the remaining in is done surreptitiously. *Delgado v. State*, 24 FLW S631 (Fla. Aug. 24, 2000).

## FRESH PURSUIT CAN BEGIN OUTSIDE AN OFFICER'S JURISDICTION

The defendant was charged with armed robbery and filed a motion to suppress evidence. The facts on which the motion was based were that Pompano Beach Police Officers received a BOLO that four black males in a Cadillac who had committed an armed robbery were headed toward I-95. The officers immediately got on I-95 and traveled south. After they had crossed the line into Fort Lauderdale, the defendant and his companions passed them. The officers pursued and stopped them. The stop led to arrests and seizure of evidence. The trial court denied the motion to suppress, and the defendant was convicted as charged. On appeal, the Fourth District in an *en banc* opinion affirmed, holding that the stop which was not in the officers' jurisdiction was legal because it met the criteria for fresh pursuit even though the pursuit began outside the jurisdiction.. *Porter v. State*, 25 FLW D2001 (Fla. 4th DCA Aug. 23, 2000).

## CONCEALING A FIREARM IN OFFICER'S PRESENCE SUPPORTED CONVICTION

The defendant, a juvenile, was charged with, among other things, carrying a concealed firearm. The trial court, after hearing the basis of the charge which was that an officer saw the defendant put a gun in his pocket, dismissed that count. On appeal, the Fourth District reversed, holding that the underlying facts were sufficient to sustain a conviction. *State v. P.P.*, 25 FLW D1818 (Fla. 4th DCA August 2, 2000).

## FREE SPEECH GAVE DEFENDANT THE RIGHT TO DISRUPT A STING OPERATION

The defendant, a juvenile, was charged with resisting an officer without violence. At his trial, the evidence established that an officer operating in an undercover capacity was attempting to purchase drugs from a dealer. Before a transaction could occur, the defendant who was sitting nearby called to the dealer and told him that the officer was a cop. The dealer then moved away, but the defendant was arrested. The court found the defendant guilty, but on appeal, the Fourth District reversed, holding that where no criminal activity has yet taken place, a verbal challenge to police action is protected speech. *J.V. v. State*, 25 FLW D1711 (Fla. 4th DCA July 19, 2000).

# M E M O R A N D U M

**TO:** **All law enforcement agencies in Polk County**

**FROM:** **Jerry Hill, State Attorney**

**RE:** **Timely submission of reports**

In many of our more complex cases, such as homicides and child sex crimes, trials do not occur for months, and sometimes years, after an arrest is made. During the time between arrest and trial, law enforcement typically continues to work on these cases on a regular basis. Interviews are conducted, laboratory testing is completed, additional witnesses come forward, etc.

It is of the utmost importance that we at the State Attorney's Office receive new reports as soon as you get them. We have an obligation to turn over all materials in the possession of law enforcement to defendant's attorneys. Case law makes it clear that once you in law enforcement have information, that information is imputed to us, even if we don't in fact know it.

If we don't receive information from you in a timely fashion and provide it to the defendant, it can result in such adverse consequences as suppression of evidence, or even dismissal of charges. Thank you all for your attention to this very important matter.

**Tenth Circuit**
**LEGAL ADIVSOR**
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The "Legal Advisor" is published by the Office of the State Attorney, Tenth Judicial Circuit, P.O. Box 9000, Drawer S.A., Bartow, FL 33831-9000