TENTH CIRCUIT

Legal Advisor

Jerry Hill, State Attorney

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AS WE COME TO THE CLOSE OF THE YEAR 2000, I WANT TO TAKE A MOMENT TO THANK EACH OF YOU FOR THE WORK WHICH YOU DO. TRULY THE TENTH CIRCUIT IS A FAR BETTER PLACE TO LIVE BECAUSE OF YOUR SACRIFICE AND DEDICATION. MAY YOU HAVE A JOYOUS HOLIDAY SEASON AND A WONDERFUL NEW YEAR!

AN UPDATE REGARDING SEARCH WARRANT AFFIDAVITS

By John Aguero

Law enforcement officers applying for search warrants need to be sure they supply all material information in their affidavits--whether that information is helpful or not. On November 16, 2000, the Florida Supreme Court issued its opinion in the case of *Thorp v. State*, 25 FLW S1056. This case is highly instructive on the subject of what should be included in a search warrant affidavit. The Court decided that a search warrant failed because the probable cause affidavit for the warrant contained misleading statements and omissions. Gary Thorp had been convicted of first degree murder and sentenced to death for the murder of Sharon Chase. The primary evidence against him was DNA evidence. The search warrant in question was for Mr. Thorp's blood.

Law enforcement included facts in the affidavit that indicated the defendant was seen with blood on him the night of the homicide. However, it failed to mention that the medical examiner had concluded the victim had not bled profusely. The court found this omission misleading. Also, the police hypnotized a witness and used part of that witness' description of the defendant in the affidavit, but they left out the information that the witness had been hypnotized. The court also found this to be misleading. The law in this area requires an appellate court to look at the omissions and make a determination whether probable cause would have been established if the omitted material had been included. Likewise, if information is included in the affidavit that is itself misleading, the reviewing court will look to see if probable cause was established, without the misleading information.

The important lesson to be learned from this case is that, even if facts are not helpful to establishing probable cause, if the facts are material and are known to law enforcement, the judge must be told. Failure to fully inform the judge of all material facts in a straightforward fashion will jeopardize any evidence recovered as a result of the search warrant.

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

A FORK WAS NOT A DEADLY WEAPON

In this Polk County case, the defendant, a juvenile, was charged with aggravated battery. At his trial, the evidence established that he stabbed the victim in the back with a fork. The fork caused scratches, swelling, and puncture marks, but the victim did not seek medical treatment. The defendant was convicted as charged. On appeal, the Second District reversed and reduced the conviction to battery, holding that the state neither proved that the victim had suffered great bodily harm nor that the fork was a deadly weapon. *C.A.C. v. State*, 25 FLW D2672 (Fla. 2d DCA Nov. 15, 2000).

SMELL OF CANNABIS GAVE PROBABLE CAUSE TO SEARCH CAR BUT NOT TRUNK

The defendant was charged with possession of marijuana and filed a motion to suppress evidence. The facts on which the motion was based were that an officer stopped the defendant for an extinguished headlight. When he approached the defendant's vehicle he smelled an odor of marijuana coming both from inside the vehicle and from the defendant's clothing. As a result, he searched the defendant and found marijuana on his person. He also searched the trunk of the vehicle and found marijuana in a briefcase. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Second District reversed, holding that while the officer had probable cause to search the defendant and the interior of the car because of the smell of marijuana, he did not have probable cause to search the trunk. *Betz v. State*, 25 FLW D2677 (Fla. 2d DCA Nov. 17, 2000).

AN INS DETAINEE IS NOT A PRISONER FOR ESCAPE STATUTE

The defendant was charged with escape. At his trial, the evidence established that he was being held in a county jail solely under a detainer from the Immigration and Naturalization Service when he escaped from the jail. He was convicted as charged. On appeal, the First District reversed, holding that a person being held on an INS detainer is not a prisoner within the meaning of the escape statute. *Villegas-Alen v. State*, 25 FLW D2636 (Fla. 1st DCA Nov. 9, 2000).

PRIOR CONVICTIONS FOR PURPOSES OF FELONY DWLSR

The defendant was charged with felony DWLSR and filed a motion to dismiss, asserting that the state could not establish a *prima facie* case because it could not use his prior DWLSR convictions since they had occurred at a time when the DWLSR statute did not require knowledge of a suspension. The trial court denied the motion, and the defendant pled no contest. On appeal, the First District reversed, holding that only convictions obtained under the current statute requiring knowledge of a suspension can be used as a basis for a felony DWLSR charge. *Huss v. State*, 25 FLW D2638 (Fla. 1st DCA Nov. 9, 2000).

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