

TENTH CIRCUIT

Legal Advisor

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NEW FDLE RULES FOR COLLECTION AND STORAGE OF LEGAL BLOOD DRAWS

BY FRANK TALBOT

Some time ago, a Florida Supreme Court ruling found that FDLE rules regarding the collection and storage of blood were inadequate. The Court also ruled that because of the inadequate FDLE rules the State is not entitled to the presumption of impairment jury instruction which states that a reading of .08 and over presumed impairment, a reading of between .05 and .08 brought no presumption, and a reading under .05 resulted in a presumption of no impairment. FDLE has recently enacted new rules for collection and storage of blood. These new rules, for the most part, merely put in writing what law enforcement officers have, hopefully, been doing for years in blood draws.

The following is a summary of the new FDLE rules. You must follow these new rules to ensure that the blood results are admissible at trial. I have also included my suggestions as to how to conduct a blood draw in light of the defense attacks that we see at trial.

THE RULES

(1) The puncture site must be cleaned with a non-alcohol swab. Please make sure to read the label on the swab used to clean the puncture site and note that in your report. You may even want to collect the wrapper and put it into evidence. Make sure that the paramedic or nurse drawing the blood uses the non-alcohol swab from your kit and not their own. Some hospital swabs contain alcohol. You may want to have your crime scene tech record the blood draw on video or with a photograph if you have that opportunity.

(2) The tubes used to collect the blood must contain preservative and anticoagulant. The tubes must also be vacuum sealed. The tubes from the blood draw kit should have the preservative and anticoagulant in it already. Please look at the tubes before the blood draw to make sure you see powder in the bottom of the tubes. This is also a good chance to inspect the condition of the tubes. You will not be able to see a vacuum but you can look for signs of trouble. Are the tubes damaged or broken? Do the rubber seals look OK? Are there any holes in the rubber seals? Record your observations in your report. Your trial testimony will be much more powerful if you can say "I inspected the tubes and they looked intact and in excellent condition" rather than "I don't know" or "I didn't check them".

(3) Immediately after the blood is drawn the tubes must be inverted several times to mix the blood with the preservative and anticoagulant. Don't shake the tubes up. Tilt them back and forth at least ten times and record this in your report.

(4) The blood tubes must be labeled with the following: (a) the name of the person from whom the blood was drawn, (b) the date and time the sample was collected , and (c) the initials of the paramedic or nurse who drew blood.

(5) Refrigerate the sample. While there is an exception to this rule, I suggest that you always refrigerate the sample. If you suspect drugs and not alcohol, then the sample should be frozen immediately. Contact Jack Riley in our Felony Intake for further instructions. If we suspect drugs then we have to send the blood sample to a private laboratory for quantitative testing. After the sample is returned ,I would also suggest that the sample be refrigerated if possible. This will allow the defense attorney to test the sample if the attorney so chooses. More importantly, it will prevent the defense attorney from complaining that the sample wasn't preserved.

(6) You must deliver the sample for testing within 30 days of collection. Please do not mail a blood sample. Although the rules do allow for priority mail or overnight delivery, mailing the sample is a bad idea. You don't want to be the witness that has to explain to the jury or the victim's family that you put the State's most important piece of evidence in the mail.

These new FDLE rules can be found in the Florida Administrative Code, Rule 11D-8.012. Following these new rules will help ensure that the blood alcohol content results will be admissible at trial. The detail and care you take in collecting and preserving the blood samples will ensure that attacks on the procedure will fail. Please document what you did in your report so that your testimony at deposition and trial will be meaningful. What you do not do or do not make record of can and will be used against you by the defense attorney.

DUI manslaughter trials are often the most complex cases that we encounter as prosecutors. They typically involve expert testimony in chemistry, biology, toxicology, and accident reconstruction. Your hard work and attention to detail at the crime scene is often the deciding factor at trial.

***KNIGHTS* DECISION ALTERS PROCEDURE FOR PROBATION SEARCHES**

BY MICHAEL CUSICK

Since 1996, the law in Florida has been that evidence obtained by a probation officer in a warrantless probationary search of a probationer's residence could not be used in a new criminal proceeding against the probationer. In *Soca v. State*, 673 So 2d 24 (Fla.1996), the Florida Supreme Court held that evidence obtained in such searches could only be used to violate the defendant's probationary status. In making its ruling, the Court noted that there was no controlling U.S. Supreme Court decision on this issue.

In an opinion dated December 10, 2001 in the case of United States v. Knights, 122 S.Ct. 587 (2001), the

United States Supreme Court upheld the use of evidence in a new substantive case which had been obtained in a warrantless search of a probationer's residence pursuant to a warrantless search clause in the defendant's probation conditions. The court ruled that a warrantless search of a probationer's residence, supported by reasonable suspicion and authorized as a condition of probation, was reasonable within the meaning of the Fourth Amendment.

This ruling significantly changes the law in Florida. Under this ruling, a probation officer who has a reasonable belief that criminal conduct is occurring, may conduct a warrantless search for contraband and may turn over to a law enforcement any contraband obtained in that search. The reasonable suspicion for the search may be based upon information the probation officer has acquired, or it may be based upon facts supplied by a law enforcement officer. In turn, if there is probable cause to connect the defendant to the contraband, the law enforcement officer may use that contraband to charge the defendant with new criminal law violations. If you have any questions concerning this case, please call me at 534-4802.

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

POCKET KNIFE IS A WEAPON ON SCHOOL PROPERTY

The defendant was charged with possession of a weapon on school property, and he filed a motion to dismiss, asserting that the state could not establish a *prima facie* case. The facts on which the motion was based were that the defendant was found to be in possession of a pocket knife with a three and one half inch blade on school property. The trial court granted the motion, but on appeal, the Third District reversed, holding that the definition of a weapon in the statute under which the defendant was charged includes a common pocket knife. *State v. Coleman*, 26 FLW D2850 (Fla. 3d DCA Dec. 5, 2001).

TOSSING AWAY EVIDENCE CAN LEAD TO TAMPERING CHARGE

The defendant was charged with tampering with evidence and filed a motion to dismiss, asserting that the state could not establish a *prima facie* case. The facts on which the motion was based were that during a traffic stop, the defendant instructed a passenger in his car to throw marijuana and a marijuana pipe out of the window of the car. The trial court granted the motion, but on appeal the Fifth District reversed, holding that tossing evidence away in the presence of a law enforcement officer can amount to tampering. *State v. Harper*, 26 FLW D2832 (Fla. 5th DCA Nov. 30, 2001).

FALSE I.N.S. CARD SUPPORTED CHARGE

In these Polk County cases, the defendants were charged with and convicted of possession of false identification cards in violation of section 322.212(1)(c), Florida Statutes, for having in their possession fake or altered Immigration and Naturalization Services (green) cards. On appeal, they argued that section 322.212 does not apply to green cards. The Second District rejected this argument and affirmed. *Fajardo v. State*, 26 FLW D2771 (Fla. 2d DCA Nov. 21, 2001).

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