TENTH CIRCUIT

Legal Advisor

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PLACING INDIVIDUALS INTO "PROTECTIVE CUSTODY"

BY WADE WARREN

From time to time, we see cases where an officer places a defendant into "protective custody." Sometimes the report does not outline the grounds for the officer's action. There seems to be some confusion regarding exactly when an officer can hold someone in the absence of probable cause that a crime has been committed. Oftentimes the officer is incorrectly applying the provisions for civil commitment allowed under the Baker and Marchman Acts. The intent of this article is to help clarify issues involving these acts.

Chapter 394 is the Baker Act which is concerned with mental health. F.S. 394.463 provides that if an officer believes that a person suffers from a mental illness and because of his or her mental illness the person refuses voluntary examination after the purpose for it is explained, *or* if the person is unable to determine for himself or herself whether examination is necessary, *and* if the person is likely to suffer from neglect or refuse to care for himself or herself (and the harm cannot be avoided through the help of family, friends, or other services), *or* if there is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, then the person can be taken into custody and delivered to the nearest receiving facility for examination. The officer shall execute a written report detailing the circumstances under which the person was taken into custody, and the report shall be made a part of the patient's clinical record. The individual can be held for up to 72 hours for observation, after which the person must be released if involuntary placement is not sought.

If a person is taken into custody for the commission of a misdemeanor and it appears that the person meets the statutory guidelines for involuntary examination or placement under the Baker Act, the person is to be taken to the nearest receiving facility. In the event that the arrest is for the commission of a felony the arrested person is to be processed in the same manner as any other criminal suspect. The law enforcement agency shall immediately notify the nearest public receiving facility, which shall be responsible for promptly arranging for the examination and treatment of the person. However, a receiving facility is not required to admit a person charged with a crime if the facility determines that it is unable to provide adequate security, but the facility is required to provide mental health examination and treatment to the person where he or she is held.

Understand that merely being mentally ill does not require a person to be taken in for involuntary examination. You must document *how* he or she is likely to suffer from neglect, or *why* there is a substantial likelihood of serious bodily harm. This will probably require taking statements from concerned family or neighbors.

Chapter 397 is the Marchman Act which is concerned with substance abuse. F. S. 397.677 allows a law enforcement officer to place a person into protective custody when the criteria of F.S. 397.675 has been met. This criteria is that the person is substance abuse impaired ***and*** has lost the ability of self-control with respect to substance use, ***and either*** has inflicted or is likely to inflict harm on himself or on another, ***or*** is in need of substance abuse services and due to the substance abuse impairment is incapable of making a rational decision in regard to those services.

Once this criteria is met the officer may offer to take the person home, to a hospital, or a licensed detoxification or addictions receiving facility. If the person refuses to consent to assistance, and the officer has determined that such a facility is the most appropriate place, ***and*** after giving due consideration to the expressed wishes of the person, the officer may take the person to the aforementioned facility, or (if the person is an adult) to a municipal or county jail or other appropriate detention facility. This detention is not an arrest and no record can be made showing the person has been detained or charged with any crime. The officer in charge of a detention facility must notify the nearest appropriate service provider within the first 8 hours after detention and an attending physician must then assess the person within a 72-hour observation period to determine the need for further services. The nearest relative of the person must also be notified unless the person is an adult who requests that no notification be made.

Please note that merely being substance abuse impaired is not enough to meet the criteria for placing someone in protective custody. The person must have lost the ability for self control with respect to the substance use. Therefore, a person who goes on the occasional drunk and gets belligerent would not meet the criteria. This is directed at the hopeless addict who cannot control his drinking or drug use. The officer must address this ongoing substance abuse issue to comply with the Marchman Act. Please also remember that the officer must attempt first to get the person to voluntarily consent to assistance before *reasonable* force may be used to detain the person. Then, once detained, the person must be placed with an appropriate service provider. It is not enough to merely let them dry out for a while and then release them. If they met the initial criteria for protective custody, they have an ongoing problem that does not vanish with momentary sobriety. They must be placed for assessment.

The typical problem in these situations develops when the individual physically resists the officer's efforts to detain him. Suddenly what would be a civil commitment has become a criminal matter. If we are going to file criminal charges for that resistance, we must be assured that the officer was engaged in a legal duty at the time. If a person is put into protective custody who does not meet the legal criteria of F. S. 394.463 or 397.675, the officer *may not* be engaged in a *legal* duty at that time. This can result in the charges being dismissed. It may also expose the officer to liability if the court determines he or she did not act in good faith. Obviously this is not something that we would like to see occur.

The detaining officers must provide the crucial information to show that protective custody is authorized under one of the acts. If we have the proper documentation for these criteria, we should be able to meet the constitutional requirements for a reasonable seizure of the person, protecting both their rights and the officers and public as well.

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

STATE MAY CONVICT FOR BOTH DUI MANSLAUGHTER AND LEAVING THE SCENE OF AN ACCIDENT

The defendant was charged with and convicted of DUI manslaughter and leaving the scene of an accident involving death based on an incident in which while intoxicated she hit and killed a pedestrian and then left the scene. On appeal, the Second District affirmed, holding that convictions for DUI manslaughter and leaving the scene of an accident involving death arising out of a single incident do not violate double jeopardy. *Lawrence v. State*, 26 FLW D2952 (Fla. 2d DCA Dec. 14, 2001).

VOLUNTARY INTOXICATION IS NO DEFENSE

The defendant was charged with felony battery. At his trial he requested an instruction on voluntary intoxication. The trial court refused the request and instead, pursuant to section 775. 051, Florida Statutes, instructed the jury that voluntary intoxication is not a defense to any crime. The defendant was convicted as charged. On appeal, he argued that section 775.051 is unconstitutional. The Fourth District rejected this argument and affirmed, holding that section 775.051 does not violate due process. *Lewis v. State*, 27 FLW D41 (Fla. 4th DCA Dec. 14, 2001).

INJUNCTION FOR PROTECTION CAN SERVE AS TRESPASS NOTICE

The defendant was charged with, among other things, trespass. At his trial, the evidence established that the victim had obtained an injunction for protection against the defendant which prohibited contact of any kind. Despite the injunction, he went to the victim's home and talked to her in her yard. He was convicted as charged. On appeal, the Third District affirmed, holding that the injunction served as notice against entering or remaining on the victim's property. *Jordan v. State*, 27 FLW D56 (Fla. 3d DCA Dec. 26, 2001).

DEFENDANT'S DENIAL SUPPORTED INTRODUCTION OF CONTRABAND CONVICTION.

The defendant was charged with introduction of contraband into a county detention facility and filed a motion to dismiss, asserting that the state could not establish a *prima facie* case because it could not show that he voluntarily introduced the contraband into the facility. The facts on which the motion was based were that after the defendant was placed under arrest for some crime, the arresting officer asked him if he had any contraband in his possession. He replied that he did not. Thereafter he was taken to jail where marijuana was discovered in his shoe during the booking process. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that taking the contraband into the facility after having been given the opportunity to disclose it amounted to a voluntary introduction. *Manna v. State*, 27 FLW D109 (Fla. 4th DCA Jan. 2, 2002).

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