

Legal Advisor

Volume 18, Issue 7

July 2004



Jerry Hill

State Attorney

Important Bartow Phone #s:

- Switchboard 534-4800
- Misdemeanor Intake 534-4928
- Misdemeanor 534-4926
- Victim Assistance 534-4989
- Felony Intake 534-4987
- Felony 534-4964
- Investigations 534-4804
- Violation of Probation 534-4803
- Child Abuse/Neglect 534-4857
- Homicide Division 534-4959
- On Call Pager 819-1526
- Worthless Checks 534-4874
- Juvenile Division 534-4905
- Fax 534-4945
- Witness Management:**
- Misdemeanor/Traffic 534-4021
- Felony 534-4020

NEW LAWS 2004

By Wayne Durden

This is a summary of the new laws and changes to existing laws enacted by the legislature earlier this year that have an impact on the enforcement of criminal laws..

Effective May 11, 2004, F. S. 465.015(3)(c)(1), was amended to create a first misdemeanor to hold oneself out as a licensed pharmacist. Chapter 04-25, Laws of Florida.

Effective May 13, 2004, F. S. 790.335, was created to prohibit the knowing and willful creation or maintenance of any list, record or registry of privately owned firearms, and providing a new third degree felony for violation; and, F. S. 790.333, was created to protect sport shooting and training ranges from civil liability claims for accumulation of projectiles. Chapter 04-59 and Chapter 04-56, Laws of Florida.

Effective May 20, 2004, F. S. 316.217(4), was amended to allow law enforcement vessels to be operated without the display of lighted lamps if (a) operation without the display of lighted lamps is necessary to the performance of an officer's duties, (b) the law enforcement agency has a written policy authorizing and providing guidelines for vessel operation without the display of lighted lamps, (c) the law enforcement vessel is operated in compliance with agency policy, and (d) the operation without the display of lighted lamps may be safely accomplished. F. S. 327.461, was also created to allow state and local law enforcement agencies to enforce federal restrictions on operating boats or swimming in a "safety zone, security zone, regulated navigation area or naval vessel protection zone", if a mutual aid agreement is in place, and providing misdemeanor or felony penalties for violations. Chapter 04-74, Laws of Florida. ...continued on page 2...

Inside this Issue

New Laws 2004 ...continued from page 1...	2
Employee Birthdays	2
New Laws 2004 ...continued from page 2...	3
LEO News	3
New Laws 2004 ...continued from page 3...	4
LEO Reminders	4
From the Courts	5
LEO Reminders	5
TOP COPS	6
Witness Management	6
New Laws 2004 ...continued from page 4...	6

AUGUST 2004

NEW LAWS 2004

Aug 3

Neil Whiteman, Misdemeanor

Aug 4

Jack Riley, Felony Intake

Aug 8

Sabina Helms, Hardee

Marilyn Cooper, Highlands

Aug 10

Judy Allen, Misdemeanor

Aug 13

Denise Delgado, Highlands

Beverly Gaffney, Witness Management

Aug 14

Ana Cruz, CSE

Aug 15

Cass Castillo, Homicide

Aug 16

Nicole Alex, Felony 2

Aug 19

Terri Cassano, Administration

Lorena Diaz, Administration

Aug 20

Kim King, VOPS

Aug 21

Amanda Harden, Misdemeanor

Aug 23

Lou Bassett

Pete Sternlicht

Aug 26

Janet Greenlee, CSE

Terri Rawasia, Domestic Violence

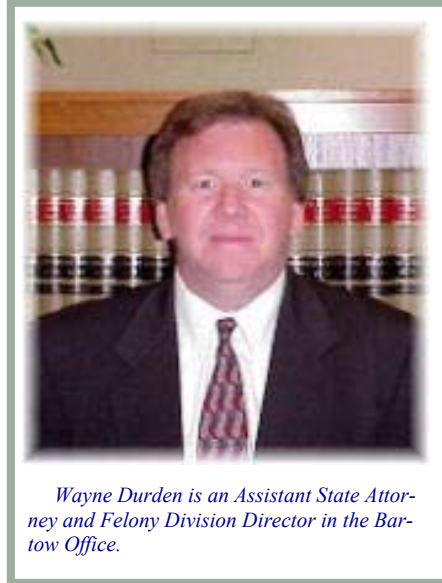
Rhett Searcy, Highlands

Aug 28

Stephen Willis, Float

Jennifer Flynn, Lakeland SAO

Happy Birthday!



Wayne Durden is an Assistant State Attorney and Felony Division Director in the Bar-tow Office.

Effective May 21, 2004, F. S. 790.065, was amended to keep in place, until October 2, 2009, the requirement that a criminal history check by FDLE must be obtained prior to the sale or delivery of a firearm by a licensed importer, manufacturer or dealer, to a person other than a licensed importer, manufacturer, dealer or collector. Chapter 04-79, Laws of Florida.

Effective June 10, 2004, F. S. 812.135, was amended to provide an enhanced penalty for home invasion robbery in which a firearm or other weapon was used. If the weapon used was a firearm or other deadly weapon the offense is a first degree felony punishable by life. If a non-deadly weapon was used or if no weapon was used the offense is a first degree felony. Chapter 04-290, Laws of Florida.

Effective July 1, 2004, Chapter 948, Probation and Community Control, has been significantly rewritten. The result of this legislation is mainly the re-organization and re-numbering of the Chapter. However, terms and conditions of community control have been amended, and restrictions have been placed on the imposition of special terms of probation and community control to tailor them to an offense and an offender. Chapter 04-373, Laws of Florida.

Effective July 1, 2004, F. S. 832.07, relating to Worthless Checks, was amended to allow a taker of a bad check to send notice to the maker of the bad check by First Class Mail evidenced by an affidavit of service, and to allow the maker fifteen (15)

days to make the check good and pay required fees. (Previously, notice had to be sent by registered or certified mail, and the maker had seven (7) days to make the check good). Chapter 04-273, Laws of Florida.

Effective July 1, 2004, F.S. 1006.07, was amended to allow students to have cell phones or pagers at school but school boards may adopt rules governing their use. Chapter 04-272, Laws of Florida.

Effective July 1, 2004, F. S. 921.143, was amended to prohibit the state from negotiating a plea agreement that bars a law enforcement officer, correctional officer or probation officer who is a victim from making a statement at sentencing, and to prohibit the court from accepting such a plea agreement. (To our knowledge we have never negotiated such a prohibition in the Tenth Circuit). Chapter 04-14, Laws of Florida.

Effective July 1, 2004, F. S. 775.08435, was created to significantly restrict a judge's authority to withhold adjudication of guilt in felony cases, and to allow the state to appeal if a judge does so. This law does not apply to misdemeanor or juvenile cases. Chapter 04-60, Laws of Florida.

Effective July 1, 2004, F. S. 319.23, was amended to require DHSMV to maintain for ten years a laundry list of original documentation relating to the sale and possession of motor vehicles so that such original documentation is available as evidence in auto theft and fraud cases. Chapter 04-29, Laws of Florida.

Effective July 1, 2004, F. S. 316.1935, was amended and:

- ◆ at F. S. 316.1935(1), increases the charge for Fleeing and Eluding from a first degree misdemeanor to a third degree felony where the officer is in an unmarked unit or lights or siren were not activated;
- ◆ creates F. S. 316.1935(3)(b), providing that a person who flees or attempts to elude an officer and drives at high speed, or in any manner which demonstrates a wanton disregard for the safety of persons or property, and

...continued on page 3...

NEW LAWS 2004

causes serious bodily injury or death to another person, including any law enforcement officer involved in pursuing or trying to stop the person's vehicle, commits a first degree felony requiring imposition of at least a three year minimum mandatory term of imprisonment;

- ◆ creates F.S. 316.1935(4)(b), providing that a person who in the course of unlawfully leaving the scene of a crash causes serious bodily injury or death to another person, including any law enforcement officer involved in pursuing or trying to stop the person's vehicle, commits aggravated fleeing or eluding with serious bodily injury or death, a first degree felony requiring imposition of at least a three year minimum mandatory term of imprisonment;
- ◆ creates F. S. 316.1935(7), providing that any motor vehicle involved in a violation of F. S. 316.1935, is contraband, which may be seized and is subject to forfeiture. Chapter 04-388, Laws of Florida.

Effective July 1, 2004, F. S. 322.27, was amended to provide that law enforcement agencies must provide information to DHSMV within 24 hours after any traffic fatality or when a law enforcement agency initiates action to obtain a blood test pursuant F. S. 316.1933. Chapter 04-275, Laws of Florida.

Effective July 1, 2004, F. S. 316.2397, was amended to require wreckers to use amber lights while making roadside recoveries, and provide that they may use amber lights while towing. Violation is a non-criminal, non-moving infraction. Also, F. S. 316.126(1)(b), was amended to require other drivers to ““move over”” during roadside recoveries by wreckers. Violation is a non-criminal moving infraction. Chapter 04-20, Laws of Florida.

Effective July 1, 2004, a new law, as yet unnumbered, was created to criminalize the unlawful use of a recording device in a motion picture theater, if the theater has posted a warning sign. The theater may detain a person for law enforcement. A first violation is a first degree misde-

meanor. Subsequent violations are third degree felonies. Chapter 04-369, Laws of Florida.

Effective July 1, 2004, F. S. 812.022, was amended to provide that a pawn broker can avoid the inference that he/she should have known property pawned was stolen if he/she contacts the rental company named or the local law enforcement agency, if the name of a person or entity other than the person pawning the property is conspicuously displayed on the property pawned. The law contains a number of exceptions. Chapter 04-341, Laws of Florida.

Effective July 1, 2004, Chapter 409 and Chapter 812, Florida Statutes, were amended to provide several new crimes related to Medicaid Fraud. Chapter 04-344, Laws of Florida.

Effective July 1, 2004, F. S. 465.0161, was created to provide that an unlicensed internet pharmacy that distributes a medicinal drug to any person in Florida commits a second degree felony. Chapter 04-387, Laws of Florida.

Effective July 1, 2004, F. S. 877.27(1)(a), was created to provide that making an unlicensed radio transmission or interfering with a licensed radio transmission is a third degree felony. Chapter 04-58, Laws of Florida.

Effective July 1, 2004, F. S. 810.145, has been created to establish the crime of Video Voyeurism. This new law prohibits the use of any electronic device, which would include cell phones, to secretly view, record, transmit or distribute images of another person in a state of undress for purpose of entertainment, sexual arousal, profit or abuse when the other person has a reasonable expectation of privacy. A first violation of this new law is a first degree misdemeanor. Subsequent violations are third degree felonies. The law contains exceptions for law enforcement agencies conducting surveillance, and for security systems, including those operated by merchants, when notice of such device and the device itself is conspicuously placed. F. S. 932.701, has been amended to include qualifying images within the definition of ““contraband”” and to require law enforce-

...continued on page 4...

LEO

NEWS...

Lake Wales Police Dept.

Mark LeVine, Lake Wales police chief, retired effective July 31st. LeVine, 54, worked for the department for 23 years including the last five-and-a-half as chief of police. LeVine said he plans to "kick back for a month or two to see what happens." Congratulations on your retirement and thank you for your years of service to the citizens of Polk County.

Congratulations to Capt. Herbert Gillis who was named interim chief of police while a search is made for a permanent replacement for the City of Lake Wales.

RE: LEAVE / VACATION NOTICES

When faxing or mailing your leave notices, please make sure we can properly identify who you are. Make sure you include your full name, the name of your agency and your I.D. number on your leave notice. You may mail your leave notices to our office or you can also fax it to Witness Management at (863) 534-4034. By e-mail you can send it to one of the following:

bgaffney@sao10.com

shall@sao10.com

As you may already know, Hurricane Charley has left Hardee County without power. The Hardee County SAO will be **CLOSED** until further notice. If you have any questions about a Hardee County case, please call the Highlands County SAO or the Bartow SAO.

The Bartow, Lakeland, Winter Haven and Highlands County SAO Offices are open for business.

LEO

NEW LAWS 2004

REMINDERS

PLEASE REVIEW YOUR MIRANDA RIGHTS

LANGUAGE

In the recent Fourth District Court of Appeal decision of *West v. State*, 29 Fla. L. Weekly D1444, the court held that the failure to advise the defendant of his right to have an attorney present during questioning required the suppression of the confession given by the defendant after he was advised of his Miranda Rights. In *West* the detective had only advised the defendant that he had a right to have an attorney present before questioning. If your cards and forms do not contain both phrases, change them immediately. If this case holds up on appeal, the failure to include the correct language will result in the confession being suppressed. The following language is recommended.

1. You have the right to remain silent
2. Anything you say can and will be used against you in court of law.
3. You have the right to talk to a lawyer and have the lawyer present with you **w h i l e** you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you **b e f o r e** any questioning if you wish.
5. You can decide to exercise these rights and not answer any questions or make any statements.

It is important that the officer determines that the suspect understands these rights before questioning begins. Please remember that the burden is on the prosecution to prove that the defendant freely and knowingly waived his Miranda Rights prior to giving a statement.

ment agencies to destroy such images once they are no longer required as evidence. Chapter 04-39, Laws of Florida.

Effective July 1, 2004, F. S. 921.244, is created to require a judge to prohibit defendants convicted of violations of F. S. 794.011 (Sexual Battery), or F. S. 800.04 (Lewd Acts with Children), from having ANY contact with their victims for the duration of their sentence, including the time they are incarcerated. Once the victim is 18, the prohibition may be lifted if the victim so requests and the court conducts a hearing and determines it to be in the victim's best interest. Violation thereof is a third degree felony. F. S. 784.048, was also amended to provide that a defendant could also be charged with third degree felony aggravated stalking for violating the court's no contact order. The penalty for either violation must run consecutive to the underlying sentence. This law applies ONLY to underlying offenses committed ON OR AFTER July 1, 2004. Chapter 04-256, Laws of Florida.

Effective July 1, 2004, F. S. 393.135, F. S. 394.4593, and F. S. 916.1075, were created to establish new crimes if employees, volunteers or contractors of DCF, engage clients in sexual activity, regardless of consent. Chapter 04-267, Laws of Florida.

Effective July 1, 2004, F. S. 775.15, was amended to extend the statute of limitations for violations of Chapter 794 (Sexual Battery), F. S. 800.04 (Lewd Acts with Children), and F. S. 825.1025 (Lewd Acts with Elderly Persons), allowing prosecution to commence within one year after the defendant has been identified by DNA analysis. This extension applies ONLY to offenses committed after July 1, 2004, or for which the statute of limitations has NOT ALREADY EXPIRED prior to July 1, 2004. Chapter 04-94, Laws of Florida.

Effective July 1, 2004, F. S. 775.21, F. S. 944.0435, F. S. 944.606, and F. S. 944.607, regarding registration of sexual predators and offenders have been amended to clarify and close loopholes in those laws.

- ◆ "conviction" is redefined to include additional dispositions from other states;

- ◆ the law is clarified to require registration each time a predator or offender moves, regardless of whether his/her driver's license is up for renewal at the time;
- ◆ failing to report a change of address within 48 hours of vacating a residence and failing to establish a new residence is a third degree felony;
- ◆ venue for prosecution is expanded; and
- ◆ arrest or service of a summons for failing to register serves as actual notice of the duty to register, so that failure to immediately register thereafter is grounds to re-arrest or re-charge the defendant with a second violation. (Practically, though, if a person is under arrest and in custody he/she may not have the ability to immediately register). Chapter 04 - 371, Laws of Florida.

Effective July 1, 2004, a new law, as yet unnumbered, creates a first degree misdemeanor to harass, threaten or intimidate a member of a neighborhood crime watch program while participating in crime watch activities. Chapter 04-18, Laws of Florida.

Effective October 1, 2004, Chapter 790, Weapons and Firearms, has been amended to create a definition of "ammunition" at F. S. 790.001; to include ammunition among the items for which possession by a felon or delinquent is a second degree felony at F. S. 790.23; and, to include ammunition among the items for which possession by a violent career criminal is a first degree felony at F. S. 790.235. **However, in light of recent case law regarding constructive possession of firearms the State Attorney's Office will file such charges ONLY when ammunition is actually possessed ON THE PERSON of the defendant or delinquent.** Chapter 04-286, Laws of Florida.

Effective October 1, 2004, F. S. 454.23, was amended to increase the charge for unlawful practice of law from a first degree misdemeanor to a third degree felony. Chapter 04-287, Laws of Florida.

...continued on page 6...

...FROM THE COURTS...

KITCHEN KNIFE CAN BE A CONCEALED WEAPON.

The defendant was charged with possession of a concealed weapon by a convicted felon and filed a motion to dismiss, asserting that the state could not establish a *prima facie* case of guilt. The facts on which the motion was based were that when police stopped the defendant, they noticed a bulge under his shirt. Investigating further they found that the bulge was a

leather pouch hooked to the defendant's belt which contained a kitchen knife with a substantial blade and wooden handle. The trial court granted the motion to dismiss, but on appeal, the Fifth District reversed, holding that a trier of fact could find that the knife was a dirk. *State v. Walthour*, 29 FLW D1360 (Fla. 5th DCA June 4, 2004).

DEFENDANT ABANDONED JACKET WHEN HE RAN AWAY.

In this Polk County case, the defendant was charged with possession of controlled substances and filed a motion to suppress. The facts on which the motion was based were that while officers were conducting surveillance of a closed convenience store where drug sales were known to take place, they saw the defendant engage in a hand to hand transaction with someone in a car. As a result, they approached the defendant and asked to speak to him. Without responding, the defendant fled. However, one of the officers grabbed the defendant's jacket, but the defendant continued

to run and worked his way out of the jacket, leaving it in the officer's hands. The officer searched the jacket and found cocaine and cannabis. The trial court granted the motion to suppress, but on appeal the Second District reversed, holding that the officers had a right to detain the defendant, that once detained the defendant did not have a right to flee, that in leaving behind the jacket the defendant abandoned it, and that since the jacket was abandoned, the police had the right to search it. *State v. Collins*, 29 FLW D1382 (Fla. 2d DCA June 9, 2004).

MIRANDA WARNINGS WERE INADEQUATE.

The defendant was charged with first degree murder and filed a motion to suppress her confession. The facts on which the motion was based were that using the Broward County Sheriff's Office *Miranda* form, a detective informed the defendant that she had a right to talk to a lawyer and to have a lawyer present before questioning and that if she could not afford a lawyer, one would be appointed for her. The

trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District reversed, holding that the *Miranda* warnings were inadequate because they did not inform the defendant that she had a right to counsel during questioning or the right to stop the interrogation at any time. *West v. State*, 29 FLW D1444 (Fla. 4th DCA June 16, 2004).

DOG SNIFF OUTSIDE OF RESIDENCE WAS AN ILLEGAL SEARCH.

The defendant was charged with possession of controlled substances and filed a motion to suppress. The facts on which the motion was based were that the police found the drugs in the defendant's residence during the execution of a search warrant. The probable cause for the issuance of the warrant was based in large part

on the fact that a drug dog alerted at the front door of the residence. The trial court granted the motion, and on appeal the Fourth District affirmed, holding that a drug dog sniff of a residence is an unreasonable and illegal search. *State v. Rabb*, 29 FLW D1503 (Fla. 4th DCA June 23, 2004).

LEO

REMINDERS

DO NOT COMMINGLE CONTROLLED SUBSTANCES

We have previously mentioned that in trafficking cases, drugs found in different containers should not be commingled or combined. Drugs should also not be commingled in ordinary possession cases. Proof problems are created when some controlled substances are found in the actual possession of the defendant while other items are constructively possessed. As an example, suppose that a bag of powder is found in the defendant's pocket and another bag is found in the glove compartment of the car in which the defendant is a passenger. If you combine those two bags of powder prior to it being sent to the lab for testing, we will never be able to prove that the powder from the bag in his pocket was a controlled substance (even if both bags field tested positive). The most that the FDLE chemist can say is that the mixture contained a controlled substance.

All of the controlled substance may have been in the powder found in the glove compartment. While it may be likely that both bags contained the controlled substance, our burden of proof is not that it is "more likely than not." Remember that our burden is proof beyond a reasonable doubt. Best practice would dictate separately packing each item of contraband recovered regardless of degree of crime.



TOP COPS

Hardee County

124 South 9th Avenue
Wauchula, FL 33873
Phone: (863) 773-6613
Fax: (863) 773-0115

Highlands County

411 South Eucalyptus
Sebring, FL 33870
Phone: (863) 402-6549
Fax: (863) 402-6563

Polk County

P.O. Box 9000, Drawer SA
Bartow, FL 33831-9000
Phone: (863) 534-4800
Fax: (863) 534-4945

Child Support Enforcement

215 N. Floral Avenue
Bartow, FL 33830
Phone: (863) 519-4749
Fax: (863) 519-4759

Lakeland Branch Office

930 E. Parker Street, Suite 238
Lakeland, FL 33801
Phone: (863) 499-2596
Fax: (863) 499-2650

Winter Haven Branch Office

Gill Jones Plaza
3425 Lake Alfred Rd. 9
Winter Haven, FL 33881
Phone: (863) 401-2477
Fax: (863) 401-2483

Legal Advisor Staff

Jerry Hill, Publisher

jhill@sao10.com

Chip Thullbery, Managing Editor

cthullbery@sao10.com

Michael Cusick, Content Editor

mcusick@sao10.com

Lorena Diaz, Graphic Design

ldiaz@sao10.com

For comments or suggestions, contact us at the above e-mail addresses.

The "Legal Advisor" is published by:

Office of the State Attorney
Tenth Judicial Circuit

I would like to take this opportunity to recognize several individuals for their assistance recently. A lengthy investigation by the State Attorney's Office culminated in the arrests of seven individuals, six within Polk County. Arrests occurred almost simultaneously at three separate locations with the assistance of **PCSO Detectives David Lyon and Bob Reichert, Sgt. Mark Kestner of PCSO, D/S Dan Cone, Bartow Police Detective Mike Prevatt, and BPD Officer Michael Baine.** Their assistance was absolutely invaluable. In addition to assisting with the arrests, the above officers also coordinated the seizure of a 2003 Hummer, assisted previously in the execution of a search warrant at the suspects' business, and provided intelligence information throughout the investigation. I would like to thank all of the officers for their help. Finally, I would like to thank the State Attorney Investigators who assisted in the arrests and the investigation for all their help.

Jeanette Dugas.

Investigator - Economic Crimes

STATE ATTORNEY - WITNESS MANAGEMENT

We are delighted to have Beverly Gaffney (right) and Sandy Hall (left) as Witness Management employees for the State Attorney. Effective July 1, 2004, the Witness Management Department will only handle State Attorney subpoenas.



...CONTINUED FROM PAGE 5...

NEW LAWS 2004

Effective October 1, 2004, F. S. 794.065, has been created to prohibit a person previously convicted of a number of sex crimes in which the victim was under 16 from moving within 1000 feet of a school, day-care center, park or playground. Violation is a first degree misdemeanor if the prior sexual conviction was a second or third degree felony, and third degree felony if the prior sexual conviction was as least a first degree felony. **But, the conviction for the underlying and qualifying offense must itself have been COMMITTED AFTER October 1, 2004.** Chapter 04-55, Laws of Florida.

Effective October 1, 2003, (this law was made retroactive), F. S. 925.11, was amended to allow defendants **who went to trial and were convicted** an extended period of time within which they may peti-

tion for DNA testing, if applicable. Evidence custodians must be careful to preserve evidence which may contain DNA in such cases. Chapter 04-67, Laws of Florida.

Effective October 1, 2004, F.S. 787.05, F.S. 787.06, F. S. 796.035, and F. S. 796.045, are created to establish second or first degree felonies for "human trafficking" and "human sex trafficking" to penalize those who would force others to perform labor or sex acts. F. S. 895.02, is amended to include these new crimes in the list of offenses subject to RICO prosecution. Chapter 04-____, Laws of Florida. (NOT SIGNED BY GOVERNOR AS OF 7/13/04).

If you have questions about or would like copies of any of these new laws please contact Wayne Durden at 534-4824