OFFICE OF THE STATE ATTORNEY, TENTH JUDICIAL CIRCUIT

Legal Advisor

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GATHERING EVIDENCE AT A DUI ARREST

By Hope Pattey, Misdemeanor Director

Making a solid DUI arrest begins with the first observation that the officer makes. This is normally going to be a vehicle traveling down the roadway which draws the officer's attention either by a driving pattern of some sort or a traffic violation. It is important in the prosecution of a DUI that the documentation of the stop begins with the officer's first observations of the suspect and/or vehicle. The basis for a stop or initial contact is the primary reason that a Motion to Suppress is filed in these cases and, if the report is clearly documented, it may prevent the defense bar from filing many of these motions.

The next step is generally contact with the defendant. Again, clear indications in a report of what you observe about the defendant are key in these cases, i.e., odor of alcohol; flushed face; bloodshot eyes; fumbling for documents, etc. In addition, make note, if applicable, regarding open containers and/or closed containers within the vehicle, for example, a cooler in the back seat. And, of course, if an arrest is made, a photo of what you see goes much further than simply writing it down in your report.

Be sure to explain to the defendant why you stopped him or why you are making contact with him. By initiating this conversation, the defendant may offer some explanations for the driving pattern or odor that you smell which can be used at a later time, either at a hearing or trial. Remember *Miranda* is not required at a traffic stop. Be sure

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to completely document any and all statements that a defendant makes during this time. When asking the defendant to step out of the vehicle to perform field sobriety exercises, again take note of how the defendant walks. Does he use the door to steady himself or lean against it for support?. Many, if not all, of the DUI reports have a specific area to document field sobriety exercises, but be sure to also write in your narrative how the defendant performs as well. Sometimes it is difficult to discern what you are getting at from a diagram.

At this point you have gathered your probable cause to place this defendant under arrest for the offense of DUI. If you are the officer who will be transporting the defendant to the station or jail, don't forget to document things that happen during that ride. There are many times that a defendant will make spontaneous statements about how much he drank or what he will do for you if you would only take him home. Again, these statements are helpful at a hearing or trial. Some of you take this opportunity to request that the defendant submit to a breath sample. Remember, if the defendant agrees, you do not have to read implied consent. The only time you must read implied consent is if the defendant refuses the test. If the defendant does refuse, it is helpful to the prosecution to have the printout card from the instrument indicating a refusal to show to a jury. So, if at all possible, go ahead and set your defendant down in front of the instrument, wait the twenty minutes for the observation period, and if they still refuse, go ahead and do a printout card from the instrument. This is the point in your investigation when *Miranda* should be read and the post arrest questions asked. Get as many clear and concise answers to these questions as possible. It is amazing how many times when asked these people will tell you what they drank, when, where, how much, etc.

Finally, please remember to always document each and every officer who is on scene regardless of how minor the officer's participation may have been. Also, if one officer makes the stop and a DUI officer takes over for the arrest, be sure the first officer writes his or her own report to document the basis for the stop.

Hope Pattey is an Assistant State Attorney. In addition to her case load, Hope serves as the Misdemeanor Division Director.

Unique Situations

There are some DUI cases which will require a different response from the officer than the standard case set out above. Please remember in an accident case, it is imperative that the officer complete the crash investigation and then clearly tell the defendant that the criminal investigation is starting. Read *Miranda* at that time. If the Defendant is not read *Miranda* at this point, then all statements made by the defendant during the criminal investigation are subject to suppression. This is important because many times in these cases we do not have an eyewitness to put the defendant behind the wheel. Having a post *Miranda* admission to operating the vehicle becomes necessary to prove the case.

We are also seeing more and more DUI cases that are a result of persons driving under the influence of some sort of drug. Many of these cases are prescription medication cases that are very hard to prosecute. Therefore, the more evidence garnered from the defendant, the stronger the case becomes when presented to a jury. When speaking with the defendant about what prescriptions the defendant takes be sure to also ask the following: When was the last dose taken? How much is the dosage? How frequently is it taken?

GATHERING EVIDENCE AT A DUI ARREST

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If at all possible, always get a DRE involved in these cases. They have the advanced training to conduct a more thorough evaluation of the defendants in these cases. In addition, complete the breath test as in any other case. With a .000 blow, always request a urine sample so that it can be analyzed for the presence of drugs.

Finally, in cases wherein a defendant refuses to submit to a breath test, there is a new evidence gathering technique that is slowly being utilized across the state. It is the use of a search warrant to obtain a blood draw. This has been done and tested in the18th Circuit. It is also being used in other areas of the state. Here in Polk County, we are in the process of developing a working protocol that will be used first by the Lakeland Police Department DUI Unit. There will be certain requirements that must be met before a blood draw search warrant will be approved by either our attorney or a judge. As we progress with this new technique in our Circuit, we will keep the other law enforcement agencies apprised and get all agencies up to speed on how to handle these situations.

As a reminder, do not forget in DUI arrests, where the defendant either refuses the breath test or there is a .000 blow with a urine pending, to attach a probable cause affidavit to your citation when you file your paperwork. Because of the recent Second DCA opinion in Gould, if this information is not present the first appearance judge will not find probable cause and the defendant will be ROR'd.

Remember, that a successful DUI prosecution begins with the gathering of evidence by you. If you have any questions, please contact me at (863)534-4915.

...FROM THE COURTS...

HOW TO MAKE A CONFESSION INVOLUNTARY.

The defendant was charged with burglary and several counts of attempted robbery, aggravated battery, and aggravated assault. Subsequently, he filed a motion to suppress his confession. The facts on which the motion was based were that during their interrogation of the defendant, officers told him that if he did not tell the truth about the identity of his co-perpetrators and he knew they had guns, he might be charged with murder if they had killed someone. The trial court denied the motion, and the defendant was convicted of some of the crimes with which he had been charged. On appeal, the Fourth District reversed, holding that the confession was involuntary and coerced because of the officers' promise not to charge the defendant with a fictional crime if he told the truth. *Chambers v. State*, 32 FLW D2371 (Fla. 4th DCA Oct. 3, 2007).

ENTRY WITHOUT KNOCKING AND ANNOUNCING NOT JUSTIFIED.

The defendant was charged with several drug related crimes and filed a motion to suppress evidence. The facts on which the motion was based were that when officers served a search warrant at the defendant's home they knocked and waited only twelve seconds before entering. At the time they knew that the defendant was a suspect in a murder investigation where the murder weapon had been an AK-47. The trial court granted the motion, but on appeal the Second District reversed, holding that exigent circumstances justified the entry without the officers waiting a longer period of time after knocking and that the basis for the exigent circumstances need not be contained in the search warrant or the affidavit on which it is based. *State v. Pruitt*, 32 FLW D2612 (Fla. 2d DCA Nov. 2, 2007).

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...FROM THE COURTS...

ODOR OF BURNING MARIJUANA EQUALS PROBABLE CAUSE.

The defendant was charged with possession of marijuana with intent to sell and possession of drug paraphernalia and filed a motion to suppress. The facts on which the motion was based were that after the defendant's car was stopped for a license plate violation, officers standing by the car smelled the odor of burning marijuana coming from within. As a result they searched the defendant and his passenger, finding the marijuana on the defendant. The court granted the motion to suppress, but on appeal, the First District reversed, holding that the smell of burning marijuana emanating from a vehicle gives law enforcement probable cause to search all of the occupants of the vehicle. *State v. Williams*, 32 FLW D2188 (Fla. 1st DCA Sept. 14, 2007).

EFFECT OF REQUEST FOR A PATDOWN.

The defendant, a juvenile, was charged with possession of marijuana and filed a motion to suppress. The facts on which the motion was based were that an officer saw the defendant walking down the street one morning. He pulled over to him and asked to speak to him. The defendant appeared visibly upset and was sweating. When asked, he told the officer he was going to catch a bus. The officer got out of his car, and asked the defendant if he could pat him down. The defendant replied that he did not have a gun but that he did have some marijuana. The officer then arrested the defendant. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Fourth District affirmed, holding that the officer's request for consent to conduct a pat down did not turn the consensual encounter into an investigatory stop. *P.W. v. State*, 32 FLW D2258 (Fla. 4th DCA Sept. 19, 2007).

ARREST OR DETENTION NECESSARY FOR GIVING FALSE INFORMATION CHARGE.

The defendant was charged with violating his probation by committing a new crime, giving false information to a law enforcement officer. At the hearing on the violation, the evidence established that while he was sitting in his car, the defendant was punched in the face by another man. When the police arrived, he indicated that he did not want to press charges. An officer asked him his name, and he gave his middle and last names only. When the officer ran a computer check on the name and could not find it, the defendant admitted that he had not given him his first name. The officers stated that at this time they considered the defendant to be a victim but that he was not free to leave. However, there was no evidence that they told him he was not free to leave. The court found him in violation, but on appeal, the Fifth District reversed, holding that the defendant was not guilty of giving false information because there was no evidence that the defendant had reason to believe he was under arrest or being lawfully detained. *Brevick v. State*, 32 FLW D2394 (Fla. 5th DCA Oct. 5, 2007).