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TENTH JUDICIAL CIRCUIT

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Lakeland, FL, 33801
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Fax: (863)-802-6233

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Winter Haven, FL 33881
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The Wonderful, Wacky World of Driving While License Suspended or Revoked

Written by: Pete Mislovic: Assistant State Attorney

The Lakeland Ledger printed an article on September 6, 2011, detailing the massive number of Floridians driving while their licenses have been suspended or revoked. This article estimated that 2.2 million Floridians had his/her license (or privilege to drive, see below) suspended or revoked. While the article did not address the issues, the unanswered questions are how many of these people have insurance, or have failed to demonstrate they are capable of operating a motor vehicle safely.

Assistant State Attorney, Pete Mislovic has been with our office for 22 years.

A common reason for suspension is failure to pay a traffic ticket, or two, or ten. Then the Department of Highway Safety and Motor Vehicles (hereinafter DHSMV) sends a notice to that person that his license is suspended. However, a license can be suspended for any number of other reasons. One Polk County judge compiled a list of crimes which call for a license suspension, and there is not enough space in this newsletter to list them all. Such crimes for which a license can be suspended are petty theft, solicitation when a motor vehicle is involved, and possession of controlled substances. It can be suspended for failure to appear for a worthless check charge, and failure to pay child support, failure to maintain insurance, failure to pay fines and court costs owed to the Clerk of Court. There are numerous felony charges that call for license suspension, such a fleeing to elude or operating a chop shop.

Of these 2.2 million Floridians with suspended driver's licenses, it seems that most of them show up in a Polk County Court for Traffic Arraignments. This article will hopefully make prosecution of these cases easier for law enforcement and prosecutors.

The foregoing is important since the **reason** for the suspension can impact how the crime or civil infraction) is prosecuted.. One response by our legislature to this epidemic was to add the element of knowledge in order to charge a criminal driving on suspended license (DWLSR) case. Also, some presumptions of knowledge were eliminated. If the State cannot prove knowledge, then the charge is a civil infraction. The correct statute number is Section 322.34(1) for Unknowingly driving while license is suspended, and it is a moving infraction (not criminal). The legislature also provided that for suspensions that are financial in nature, knowledge is not presumed. To make it a criminal charge we must show actual knowledge. So when a person fails to pay a ticket, and DHSMV sends notice of suspension the DWLSR charge is not a crime unless the State can show the person actually received the notice of suspension or otherwise knew his license was suspended. Such "financial reasons" for suspension include failure to pay child support, failure to maintain insurance, failure to pay civil penalties, (i.e. other non-criminal traffic citations), and for some reason, non-attendance at school by juveniles.

In these cases, talking with the defendant often provides proof of knowledge. Defendants will blame their wife or girlfriend for failing to pay a ticket. These facts or other statements by a defendant should be included in a written report that is sent to the court with the original citation.

This is important when an arrest is made, as the report will provide a judge with sufficient probable cause to hold an arrested defendant. This additional report also prevents this office from trying to track you down to write a supplement to give the first appearance judge probable cause.

When the offense is criminal, the correct statute number is Section **322.34(2),** and should be used in almost every criminal DWLSR case. A first offense is a second degree misdemeanor. If there is a prior **conviction**, (not just a prior suspension), for DWLSR, then it is a first degree misdemeanor. A third or subsequent conviction can be a felony, but see the discussion of habitual traffic offenders below.

The number of suspensions on a driving record ns not as important as the convictions. Also, the reason for the suspension can provide knowledge supporting a criminal prosecution. Any **court-ordered suspension** should support a criminal DWLSR charge. For instance, when a person is convicted of a drug charge the sentencing court orders the suspension while the defendant stands before him and provides knowledge of the suspension. Also, if a person has a prior conviction for DWLSR, knowledge is presumed, **even if** the prior conviction is for a civil infraction of unknowingly driving while license is suspended. Again, **Section 322.34(2)** should be used.

A review of DAVID on your in-vehicle computer should show the reason for the suspension, i.e. conviction for DUI, or drugs, or failure to pay a traffic ticket. If you cannot show actual knowledge, this reason for the suspension is more important than the number of suspensions. Again, financial responsibility suspensions are hard to prove without an admission by the defendant.

At one time, prosecuting Habitual Traffic Offenders (HTO) was simple: if DHSMV classified a driver as a habitual traffic offender, the DWLSR charge was a felony. When the Department of Corrections noticed an alarming increase in the number of "non-violent driving prisoners" the legislature decided to "fix" this situation. This "fix" was the creation of SECTION 322.34(10), dealing with HTO cases.

The result of this fix is that **most** HTO cases are now misdemeanors, since you cannot charge a felony HTO if **ANY** of the underlying convictions were the result of a financial suspension. So, if one of the prior DWLSR convictions was for failure to pay a traffic ticket, that person cannot be charged with a felony HTO. The other way to charge a person with a felony HTO is if the person has a prior conviction for a violent felony. If you can make these conclusions at the scene of a traffic stop, charge the felony. Otherwise, this office must research the prior DWLSR convictions to make sure they were not based on a financial suspension. This is why you receive the CFE from Felony Intake that reads ...."As of July, 2008, approximately 84% of DWLSR cases that were felonies are now misdemeanors"..... Be prepared to receive this CFE if you charge a felony HTO.

Another common charging error is using Section 322.34(10) FOR ANY DWLSR CHARGE. This section should **only be used when DHSMV has suspended a person's license and declared that person to be a Habitual Traffic Offender.** This designation **must** appear on DAVID or a DHSMV printout before using this statute number.

A recent appellate court decision further muddied the waters when dealing with HTO cases. This is Crane v. State (2012 FLW 181453, Fla.App,. 1 Dist.). This case ruled that a person cannot be prosecuted as an habitual traffic offender unless he has or had a Florida driver's license. This results from the HTO statute, Section 322.34(5), makes it a third degree felony for a person to drive **WHILE HIS DRIVER'S LICENSE IS REVOKED AS AN HABITUAL TRAFFIC OFFENDER.** Therefore, if a person has never had a driver's license, he cannot be prosecuted as a felony HTO.

However, that same person might be charged with driving on a suspended license under Section 322.34(2), since this statute makes it a crime to drive while a person's **DRIVER'S LICENSE OR PRIVILEGE TO DRIVE** has been suspended. Why this difference in statutory language exists is known only by those we elect to represent us in Tallahassee, and we as law enforcement have to charge the crimes according to the laws passed by the legislature.

Hopefully this article will answer more questions than it raises when making a decision of charging a defendant with DWLSR.

If you have any questions, feel free to call Mike Cusick in Felony Intake or me, we will be glad to answer them.

FROM THE COURTS...

RECORDING OF CONVERSATION WITH CO-DEFENDANT DID NOT VIOLATE DEFENDANT'S RIGHTS

The defendant was charged with first degree murder and filed a motion to suppress admissions he made during a recorded conversation with his co-defendant. The facts on which the motion was based were that after the co-defendant implicated the defendant in the murder, the defendant was arrested on unrelated drug charges. Police arranged for the defendant and the codefendant to be together in the jail and for the codefendant to wear a wire. During a conversation with the codefendant the defendant made statements in which he implicated himself in the murder. The trial court denied the motion, and the defendant was convicted as charged. On appeal, the Supreme Court affirmed the defendant's conviction, holding that the recording of his conversation with the codefendant did not violate his Sixth Amendment right to counsel. *Scott v. State*, 36 FLW S325 (Fla. June 30, 2011).

EVIDENCE NEEDED TO PROVE AUTHORITY TO ISSUE TRESPASS WARNING

The defendant, a juvenile, was charged with trespass on school property. At his bench trial, a security guard from the school testified that her duties were to monitor student behavior. She stated that she saw the defendant on school property and recognized that he was not a student there. She told him to leave. The next day she again saw him at the school and had him arrested. The trial court found the defendant guilty as charged, but on appeal the Supreme Court reversed, holding that the identity and authority of the person giving the trespass warning are essential elements of the offense and that the state presented insufficient evidence to establish the security guard's authority to tell the defendant to leave school property. *D.J. v. State*, 36 FLW S363 (Fla. July 7, 2011).

BATTERY ON A LEO CAN SERVE AS A PREDICATE CONVICTION FOR FELONY BATTERY

The defendant was charged with felony battery (prior conviction). At his trial, the jury found him guilty of battery and then proceeded to find him guilty of felony battery based on a prior conviction for battery on a law enforcement officer. On appeal, the defendant argued that battery on a law enforcement officer cannot serve as a predicate conviction for felony battery. The Fourth District rejected this argument and affirmed. *Knowles v. State*, 36 FLW D1507 (Fla. 4th DCA July 13, 2011).

EVIDENCE DID NOT PROVE ROBBERY BY SUDDEN SNATCHING

The defendant was charged with robbery by sudden snatching. At his trial, the evidence established that the victim was sitting on a bench at a bus stop with her purse next to her, touching her right hip. At some point she felt the purse moving, and when she looked, she saw the defendant running away with it. The defendant was convicted as charged. On appeal, the First District reversed, holding that the evidence did not establish that the defendant took the purse from the victim's person. *Wess v. State*, 36 FLW D1640 (Fla. 1st DCA July 28, 2011).

http://www.sao10.com

Bartow Phone Numbers:

Switchboard	**534-4800**
Misdemeanor Intake	**534-4927**
Misdemeanor	**534-4926**
Domestic Violence	**534-4861**
Felony Intake	**534-4987**
Felony	**534-4964**
Investigations	**534-4804**
Violation of Probation	**534-4803**
Child Abuse	**534-4857**
Homicide	**534-4959**
On Call Phone	**860-8243**
Worthless Checks	**534-4874**
Juvenile	**534-4905**
Main Fax	**534-4945**
Witness Management	**534-4021**
Fax	**534-4034**

Officers now can submit their vacation to Witness Management at the following email address:

witmanagement@sao10.com

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