LEGAL EAGLE
A Newsletter for the Criminal Justice Community
April 2016

Taser and Baker Act

In this issue:

- Custody for Miranda
- Write the Ticket!
- Drugs in a Car
- Vehicle CCF
- Video Voyeurism

LEGAL EAGLE

Published by:

Office of the State Attorney

West Palm Beach, FL

33401

B. Krischer, Editor

Ronald Armstrong suffered from bipolar disorder and paranoid schizophrenia. He had been off his prescribed medication for five days and was poking holes through the skin on his leg "to let the air out." His sister convinced him to accompany her to the Hospital. He willingly went to the Hospital and checked in, but "during the course of the evaluation he apparently became frightened and eloped from the emergency department." Based on that flight and the report about his odd behavior over the previous week, the examining doctor judged Armstrong a *danger to himself* and issued involuntary commitment papers to compel his return. Armstrong's doctor could have, but did not, designate him a danger to others, checking only the box that reads "mentally ill and dangerous to self" on the commitment form.

Armstrong was found out on the street, police engaged him in conversation while they waited for word that the commitment order had been signed. Armstrong continued his bizarre behavior eating grass etc. Once word that the involuntary commitment order was signed the officers advanced on Armstrong, who reacted by sitting down and wrapping himself around a four-by-four post that was supporting a stop sign. The officers tried to pry Armstrong's arms and legs off of the post, but he was wrapped too tightly and would not budge. After a warning was given an officer applied a Taser in drive stun mode five separate times over a period of approximately two minutes. Rather than have its desired effect, the Tasing actually increased Armstrong's resistance.

Two other security officers from the hospital then jumped in to assist the three police officers. That group of five successfully removed Armstrong and laid him face down on the ground. He was hog-tied in that position due to his violent thrashing about. His sister then noted he didn't seem to be breathing. He was released, rolled over, and later died at the hospital. Just six and one-half minutes elapsed between dispatch advising officers that Armstrong's commitment papers were final and the call for EMS.

The family sued the police officers and Taser for Armstrong's wrongful death and violation of his constitutional rights. The court found the use of force unreasonable, but granted the officers qualified immunity because the state of the case law at the time did not give the officers "fair warning" that their actions violated Armstrong's Fourth Amendment rights.

Officers should consult with their agency advisors to confirm the interpretation provided in this publication and to what extent it will affect their actions. **Past issues of the Legal Eagle are available at //SA15.org under "Resources."**

Issue:

Was the use of a Taser on a non-criminal, non-violent, non-compliant, mental health patient reasonable use of force? **No.**

Reasonable Use of Force:

A claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of a person is "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, (S.Ct.1989). There are three factors the Courts look to in this analysis. First, they look to "the severity of the crime at issue"; second, they examine the extent to which "the suspect poses an immediate threat to the safety of the officers or others"; and third, they consider "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." "To properly consider the reasonableness of the force employed we must 'view it in full context, with an eye toward the proportionality of the force in light of all the circumstances.' "

Here, Armstrong had not committed a crime, nor was there probable cause to effect a criminal arrest. However, because of the involuntary commitment order it was reasonable for the officers to consider him "mentally ill." "The use of force that may be justified by" the government's interest in seizing a mentally ill person, therefore, "differs both in degree and in kind from the use of force that would be justified against a person who has committed a crime or who poses a threat to the community."

The Court of Appeals noted: "Mental illness, of course, describes a broad spectrum of conditions and does not dictate the same police response in all situations. But 'in some circumstances at least,' it means that 'increasing the use of force may ... exacerbate the situation.' Accordingly, '*the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis*.' And even when this ideal course is not feasible, *officers who encounter an unarmed and minimally threatening individual who is 'exhibiting conspicuous signs that he is mentally unstable' must 'de-escalate the situation and adjust the application of force downward.*' See, *Martin v. City of Broadview Heights,* (6th Cir.2013)."

As noted above, the mental health doctor in preparing the Baker Act petition indicated that Armstrong was a *danger to himself*. When "a mentally disturbed individual not wanted for any crime ... is being taken into custody to prevent injury to himself, directly causing that individual grievous injury does not serve the officers' objective in any respect." *Drummond ex rel. Drummond v. City of Anaheim,* (9th Cir.2003). As such the Court of Appeals here ruled, "The first *Graham* factor thus weighs against imposition of force. The government's interest in seizing Armstrong was to prevent a mentally ill man from harming himself. The justification for the seizure, therefore, *does not vindicate any degree of force that risks substantial harm to the subject*."

The Court of Appeals continued its analysis of the use of force. "The second and third *Graham* factors, whether Armstrong threatened the safety of others and resisted seizure, do justify some—limited—use of force, though. [Officers] had observed Armstrong wandering into traffic with little regard for avoiding the passing cars, and the seizure took place only a few feet from an active roadway. Armstrong, moreover, fled from the Hospital earlier that day, although he did not go far. Under such circumstances, [Officers] concerns that Armstrong may try to flee into the street to avoid being returned to the Hospital, thereby endangering himself and individuals in passing cars, were objectively reasonable. A degree of force was, consequently, justified."

The Court of Appeals recognized that Armstrong was actively resisting his seizure by grabbing on to the post and refusing to let it go. The court made note, however, that the officers spent a **mere 30 seconds** attempting to physically pull him off prior to the application of the Taser. Noncompliance with lawful orders justifies some use of force, but the level of justified force varies based on the risks posed by the resistance. Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance. And, here, the factual circumstances demonstrate little risk—Armstrong was stationary, non-violent, and surrounded by people willing to help return him to the Hospital. That Armstrong was not allowing his arms to be pulled from the post and was refusing to comply with shouted orders to let go, while cause for some concern, do not import much *danger or urgency* into a situation that was, in effect, a static impasse."

More damning was the court's

finding that the force employed was not "proportional" to the threat facing the officers. "When we turn 'an eye toward *the proportionality* of the force in light of all these circumstances,' it becomes evident that the level of force [Officers] chose to use was not objectively reasonable. [Officers] were confronted with a situation involving few exigencies where the *Graham* factors justify only a limited degree of force. *Immediately Tasing a non-criminal, mentally ill individual, who seconds before had been conversational, was not a proportional response*."

Court's Ruling:

The Court of Appeals found the use of the Taser on a mental health patient that, at the time the Taser was employed, was not a threat to the officers or others an unlawful use of force. "Deploying a Taser is a serious use of force. The weapon is designed to 'cause ... excruciating pain.' Painful, injurious, serious inflictions of force, like the use of a Taser, do not become reasonable simply because officers have authorization to arrest a subject who is unrestrained and though resistant, presents no serious safety threat."

"Our precedent, then, leads to the conclusion that a police officer may *only* use serious injurious force, like a Taser, when an objectively reasonable officer would conclude that the circumstances present a risk of immediate danger that could be mitigated by the use of force. At bottom, 'physical resistance' is not synonymous with 'risk of immediate danger.'"

"That Armstrong had already left the Hospital and was acting strangely while the officers waited for the commitment order to be finalized do not change this calculus. If merely acting strangely in such a circumstance served as a green light to Taser deployment, it would then be the rule rather than the exception when law enforcement officials encounter the mentally ill. That cannot be. By the time [Officers] chose to inflict force, any threat had sunk to its nadir—Armstrong had immobilized himself, ceased chewing on inedible substances, and ceased burning himself. Use of force designed to 'cause ... excruciating pain' in these circumstances is an unreasonably disproportionate response."

"We certainly do not suggest that [Officers] had a constitutional duty to stand idly by and hope that Armstrong would change his mind and return to the Hospital on his own accord. But the facts of this case make clear that our ruling does not hamper police officers' ability to do their jobs: Tasing Armstrong did not force him to succumb to [Officers'] seizure-he actually increased his resistance in response. When [Officers] stopped Tasing and enlisted the Hospital's security guards to help pull Armstrong off of the post, however, the group removed Armstrong and placed him in restraints. Had [Officers] limited themselves to permissible uses of force when seizing Armstrong, they would have had every tool needed to control and resolve the situation at their disposal. Viewing the record in the light most favorable to [Armstrong], [Officers] used excessive force, in violation of the Fourth Amendment."

However, because the case law in various jurisdictions was inconsistent, the officers did not have "fair warning" that their actions constituted a violation of Armstrong's Fourth Amendment rights. Thus, the officers were granted qualified immunity for their actions. But, now that there is a ruling stating that the use of a Taser in drive stun as the initial application of force against an individual with mental health issues is unreasonable force, officers similarly situated may not be granted qualified immunity.

Lessons Learned:

The Court of Appeals went to great lengths to make their case. The following language must be taken to heart when employing Tasers in the field. "These observations about the severe pain inflicted by Tasers apply when police officers utilize best practices. The Taser use at issue in this case, however, contravenes current industry and manufacturer recommendations. Since at least 2011, the Police Executive Research Forum ('PERF') and the Department of Justice's Office of Community Oriented Policing Services ('COPS') have cautioned that using drive stun mode 'to achieve pain compliance may have limited effectiveness and, when used repeatedly, may even exacerbate the situation.' "

Lastly, in case with similar facts the trial court after denying the officer qualified immunity made the following observation, "The situation the police officers faced in this case called for conflict resolution and de-escalation, not confrontation and Tasers." See, *Aldaba v. Marshall County*, U.S. Court of Appeals - 10th Cir. (2015).

Estate of Armstrong v.
Village of Pinehurst
U.S. Court of Appeals, Fourth Cir.
(Jan. 11, 2016)

FDLE

FLORIDA CASE LAW UPDATE 16-04

Case: Thompson v. State, 41 Fla. L. Weekly D578a (Fla. 2nd DCA)

Date: March 4, 2016

Subject: Improper to Suppress Incriminating Statements Made during Police Station Interview When Suspect was not in Custody

FACTS: After Thompson's infant child died of injuries from blunt force trauma to the abdomen under unknown circumstances, police interviewed Thompson five times: once at the hospital, once at her grandmother's home, and three times at the police station. During each interview the detective advised Thompson that she was free to end the interview. Thompson was not detained or restrained during the interviews and she left on her own after the police station interviews. During the fifth and final interview, Thompson admitted to striking the infant in the abdomen. The detective then read Thompson her *Miranda* warnings and asked her to repeat the incriminating statements. Ms. Thompson's mother, who was present for the interview, announced that Thompson would be seeking counsel and shortly thereafter they left the police station. Thompson was later arrested and charged with felony murder and aggravated child abuse. Thompson moved to suppress the incriminating statements she made during the fifth interview on the grounds that she was not timely advised of her *Miranda* warnings. The trial court agreed with Thompson's motion and suppressed the statements.

RULING: On appeal the Second District Court of Appeal reversed the trial court's ruling to suppress the incriminating statements. The appellate court found that Thompson's statements were not made during a custodial interrogation and she was therefore not entitled to be advised of *Miranda* warnings.

DISCUSSION: For purposes of *Miranda*, when courts consider whether a custodial interrogation took place, they evaluate "how a reasonable person in the suspect's position would have perceived the situation." See Davis v. State, 698 So. 2d 1182 (Fla. 1997). The Second District recited the four factors that courts consider when evaluating whether suspects can consider themselves in custody and therefore entitled to *Miranda* warnings: (1) the manner in which the police summoned the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect was confronted with evidence of his/her guilt; and (4) whether the suspect was informed that he/she is free to leave. See Ramirez v. State, 739 So. 2d 568 (Fla. 1999). First, the court found that as to the manner of the interviews, Thompson voluntarily spoke and the detective did not coerce, cajole, entice or summon her to engage in the interviews. Second, the court found as to the purpose, place and manner of the last interview, although it took place at the police station, Thompson was not restrained, she was free to leave, her mother was allowed to be present, and she was able to leave after she made the incriminating statements. Additionally, the tone and content of the conversation suggested nothing coercive or confining about that interview. Third, the court found as to the extent to which Thompson was confronted with evidence of her guilt, the detective only confronted her with facts she already knew. When the detective asked Thompson about the infant's broken ribs, she spontaneously confessed to hitting the child in the abdomen. Fourth, the court found as to whether Thompson was informed that she was free to leave, it was clear from the record that Thompson was not in handcuffs, that she walked freely around the interview room, and she confirmed that she wanted to come down to talk to the police. Moreover, she was consistently advised that she could leave at any time and even after Thompson made the incriminating statements the detective advised that she would not be arrested that day.

COMMENTS: The interviewing detective in this case consistently maintained the integrity of the interviews as being noncustodial by allowing Thompson to come and go freely, having her family present during interviewing and repeatedly advising her that she was not under arrest and could stop talking at any time.

Laura B. Coln,
Regional Legal Advisor
Florida Department of Law Enforcement,
Orlando Regional Operations Center

Recent Case Law

Write the Ticket!

Patrol officer stopped Dravien Jones after observing that he was driving his vehicle without wearing a seatbelt. During the stop, defendant provided the officer with his driver's license and admitted to the officer his seatbelt was broken. The officer testified that he "appeared excessively nervous" during the stop. Based on his observations, the officer sought permission to search defendant's vehicle. He refused to grant such permission.

The officer instructed Jones to exit the vehicle and conducted a dog sniff of the vehicle. The dog alerted during the sniff, which led the officer to search the vehicle and find approximately twenty oxycodone tablets. The officer estimated approximately **three minutes** elapsed between the beginning of the traffic stop and the dog sniff. The officer stated that although Defendant provided him with his driver's license, the officer never did anything with the license. Similarly, the officer *never wrote a citation for a seatbelt violation, nor did he begin writing such a ticket*.

At trial the defendant moved to suppress the drugs as the fruit of an illegal search. The trial court denied his motion. On appeal, the 4th D.C.A. overruled the trial court's ruling and suppressed the drugs thereby dismissing the charges.

Issue:

Was the dog sniff conducted pursuant to the traffic stop, without writing a citation, lawful? **No**.

Fourth Amendment and Dog Sniff:

The Supreme Court recently addressed the acceptable scope of detentions as it relates to dog sniffs in *Rodriguez v. United States*, (S.Ct. 2015) The Court held that "the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's '**mission**'—to address the traffic violation that warranted the stop, and attend to related safety concerns." "Because addressing the infraction is the purpose of the stop, it may 'last no longer than is necessary to effectuate that purpose.' " The officer's "*authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed*." When determining the reasonable time to complete the required tasks, the court must also consider the "whether the police diligently pursue their investigation." Prior Supreme Court cases have held that a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete the mission" of issuing a ticket, and that a seizure is lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop." *Arizona v. Johnson*, (S.Ct.2009). The *Rodriguez* decision, however, eliminated any ambiguity about the reasonableness of the time required for the officer to complete a traffic stop. As the Court made clear, "if an officer can complete traffic-based inquiries expeditiously, then that is the amount of 'time reasonably required to complete [the stop's] mission.' " "The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff 'prolongs', (adds time to) the stop."

Court's Ruling:

Here the D.C.A. found that once the officer decided not to issue a citation for no seat-belt the purpose for the stop was accomplished. Thus, using a drug dog, even one that was already on the scene, was an unnecessary extension of the traffic stop, (even by three minutes), and the resulting drugs discovered the "fruit of the poisonous tree."

"In this case, the officer abandoned his reason for the traffic stop (writing the seatbelt citation) and instead chose to conduct the sniff of Defendant's vehicle. Once the officer decided against writing the citation, the purpose for the stop was complete and the justification for the stop was no longer valid. Because the officer no longer had any valid reason to detain Defendant, the search of Defendant's vehicle was a violation of his Fourth Amendment rights and, as such, the evidence found as a result of the search should have been suppressed."

"This is not to say that officers can never conduct dog sniffs during routine traffic stops. A sniff is still permitted so long as, in the absence of an articulable suspicion of criminal activity prior to the search, it *does*

not extend the time it takes the detaining officer to complete the tasks which justified the detention. For instance, the Supreme Court found the dog sniff search constitutional: 'While [the officer who had initiated the traffic stop] was in the process of writing a warning ticket, [the second officer who had arrived on the scene] walked his dog around [the defendant's] car.' *Illinois v. Caballes*, (S.Ct.2005)."

"We agree with the trial court that, prior to the canine search at issue, the officer had no 'articulable suspicion of criminal activity' on the part of Defendant. Thus, the officer had no legal authority to detain Defendant outside the limited purpose provided by the traffic violation. *Once the officer abandoned this line of inquiry, the justification for the stop had expired and Defendant was free to leave.* The dog sniff, therefore, prolonged the stop in violation of Defendant's Fourth Amendment rights. The evidence obtained as a direct result of the sniff should have been suppressed. Accordingly, we reverse and remand the case to the trial court to dismiss the charges against Defendant. Reversed."

Lessons Learned:

The D.C.A.'s ruling here may seem harsh, but in reality does not break new ground. In 2003 the Florida Supreme Court decided *State v. Diaz*, (Fla.2003). In that case the officer stopped a vehicle believing the temporary tag in the rear window was lawfully defective. As he approached the vehicle from the rear he noted that there was no defect in the temporary tag. Yet, he still approached the driver and requested to see his license and registration. The Supreme Court ruled that once the purpose of the stop was resolved further detention of the driver was unlawful, even to ask for a driver's license. The Court held that as soon as an officer "determines that the basis for his or her stop is invalid, the officer, without more, no longer has reasonable grounds to further detain a driver or to subject the driver to a subsequent personal examination, including the requirement to provide license and registration."

"…While the officer's reason for the initial stop may arguably have been legitimate, once that bare justification had been totally removed, the officer's actions in further detaining Mr. Diaz equated to nothing less than an indiscriminate, baseless detention..."

As you will note in this case, had the officer gone forward with the purpose of the stop by writing the traffic ticket, the time waiting for the records check would have been sufficient for the dog sniff without unduly extending the duration of the stop.

Jones v. State
4th D.C.A. (March 9, 2016)

Joint Possession of Drugs in a Vehicle

Police observed Johnson Session and another individual in an automobile that, importantly, *was not owned by either occupant*. Defendant, who was sitting in the driver's seat, was rolling a joint while the other occupant sat in the front passenger seat. The car keys were in the ignition. As the police officer approached, he noted that the driver-side door was open and the interior lights were on. The officer observed several baggies containing crack cocaine and one baggie containing morphine in plain view on the car's center console, which was within equal distance to Defendant and the other occupant. Although the baggies were easily within reach of both occupants, no physical evidence, such as fingerprints or DNA, was offered to prove that either occupant touched any of the baggies. Neither occupant made any inculpatory statements. The defendant appealed his conviction arguing the State did not present sufficient evidence to prove his constructive possession of the contraband. The 5th D.C.A. agreed and reversed his conviction.

Issue:

Is mere proximity to contraband drugs in open view on a vehicle's center console, *between two individuals*, sufficient to prove a violation of sec. 893.13(6)(a), F.S.? **No**.

Possession of Controlled Substance:

Chapter 893 F.S. is entitled "Florida Comprehensive Drug Abuse Prevention and Control Act." Section 893.13, "Prohibited acts; penalties," provides in part, "(6)(a) A person may not be in *actual or constructive possession* of a controlled substance unless such controlled substance was lawfully obtained from a practitioner…"

Actual possession obviously requires the contraband to be on the subject's person. Anything else is constructive possession.

Constructive Possession:

Because it was clear that Johnson Session did not have actual or exclusive possession of the contraband drugs found in the vehicle, as there was another person in the car, and neither person admitted that the drugs was theirs, the State was required to prove constructive possession with other evidence beyond the fact that each was in close proximity

to the drugs.

When contraband is found in a jointly occupied vehicle, rather than on the actual person of the defendant, the law describes this as constructive possession. To establish constructive possession of a controlled substance or other contraband, the State must show:

1. That the accused had dominion and control over the contraband;
2. He must have knowledge that the contraband was within his presence; and
3. He must have knowledge of the illicit nature of the contraband.

In *State v. Odom*, (2DCA 2003), the court ruled, "As the sole occupant and driver of the vehicle, Odom had exclusive possession of the vehicle creating an inference of his dominion and control over the contraband contained therein particularly since the contraband was found lodged between the driver's seat and the console of the car." But here, because Session had another passenger with him, the State was not entitled to the benefit of an inference of dominion and control. The State is required to produce independent evidence pointing to his dominion and control of the drugs observed on the center console. Adding to the State's difficulties here is the fact that neither the defendant nor the other occupant owned the vehicle in question.

Dominion and Control:

"To convict a defendant for possession of a controlled substance under a constructive possession theory, the State must prove that the defendant had knowledge of the presence of the drug and the ability to exercise dominion and control over the same." *Brown v. State* (4DCA 2009).

"Knowledge of and ability to control the contraband cannot be inferred solely from the defendant's proximity to the contraband in a *jointly-occupied* vehicle; rather, the State must present independent proof of the defendant's knowledge and ability to control the contraband, which may consist of 'evidence of incriminating statements or actions, or other circumstances from which a jury might lawfully infer the Defendant's actual knowledge of the presence of contraband.' "

Court's Ruling:

"Prosecution based upon constructive possession where there is more than one possible possessor present and the contraband is within reach of each, has been the subject of prior reported decisions… Those decisions set forth the two elements that the State must prove: first, the defendant knew the contraband was present, and second, that the defendant had the ability to exercise dominion or control over it. [Defendant] does not argue that there was insufficient evidence to establish his knowledge that contraband was present, but he submits that the State failed to prove the second element.

"Although courts use the phrase 'the ability to exercise dominion or control,' none of them mean it in the most simplistic sense. *If 'ability' to exercise dominion or control was enough, then proving simply that the defendant could reach out and grab the contraband would suffice on the second element of constructive possession; however,* ***that is not the law***. Courts have held that a defendant's 'mere proximity' to the contraband, without more, is insufficient proof of the defendant's ability to exercise dominion or control over it.

"Because the State in the instant case only proved that [Defendant] and the other occupant had equal proximity to the contraband, and nothing more, [fingerprints, DNA, admission], the second element of constructive possession was not established. *See Martoral v. State*, (4DCA 2007), ('Nothing in the evidence before the trial court tied the [contraband] to defendant as opposed to the passenger.'). Therefore, the trial court erred in denying [Defendant's] motion for judgment of acquittal. We reverse."

Lessons Learned:

Establishing that the defendant exercised dominion and control over the contraband is a very difficult element to prove. Most constructive possession cases are reversed because of the State's inability to prove this crucial element.

In simplest terms, the State must prove ownership. Mere proximity to contraband is not sufficient to establish constructive possession. The court will require proof that the defendant had control or joint control of the premises, rather than the reasonable alternative that he was a mere visitor with no apparent authority to treat the drugs, or other contraband, as his own. If the area in which the contraband is found is within the defendant's exclusive possession then his guilty knowledge of the presence of the contraband together with his ability to maintain control over it will be inferred. If not, if there are others in the vehicle with him, then other proof – admissions, fingerprints, or DNA, will be required to convict.

Session v. State
5th D.C.A. (March 18, 2016)

Concealed Firearm in a Vehicle

Andrew Benjamin was a passenger in a vehicle stopped by two officers for speeding and seat belt violations. First Officer approached the driver's side of the vehicle; Second Officer approached the passenger's side. As he approached the vehicle, First Officer saw an empty holster in the driver's lap. When questioned, the driver admitted there was a gun in the trunk. Both occupants were asked to step to the front of the vehicle, and the driver gave the officers permission to search. No gun was found.

First Officer then approached the front passenger's side where Benjamin had been sitting. The passenger door was open, and he could see, in open view, the half-inch tip of the barrel of a handgun underneath the passenger seat. First Officer retrieved the handgun, and Benjamin was arrested and charged with carrying a concealed firearm.

The defendant filed a pre-trial motion to dismiss, arguing that if the officer could see the firearm in plain view while outside the vehicle it was not concealed. The State presented evidence in support of its motion to deny Benjamin's motion to dismiss. Of note, Second Officer testified that at no point did he see a gun visible in the vehicle while he was standing outside the passenger door. The trial court granted the motion to dismiss. On appeal, the 4th D.C.A. reversed that ruling.

Issue:

Did the officer's testimony establish a prima facie case such that a reasonable jury could find the defendant guilty of C.C.F. in a light most favorable to the State? **Yes**.

Concealed Firearm:

The 4th D.C.A. has had the opportunity to explain concealment for the purposes of a firearm in a vehicle numerous times. One of the earliest and most thorough discussion can be found in *State v. Smith*, (4DCA 2011). There the court set out the legal basis for the charge of C.C.F.

"Section 790.01(2), F.S., reads in pertinent part: 'A person who carries a concealed firearm *on or about his or her person* commits a felony of the third degree.' Concealed firearm is defined by section 790.001(2), Florida Statutes (2009): 'Concealed firearm' means any firearm, as defined in subsection (6), which is carried on or about a person in such a manner as to conceal the firearm from the *ordinary sight* of another person."

"In *Ensor v. State*, (Fla. 1981), the Supreme Court held: *We . . . find that absolute invisibility is not a necessary element to a finding of concealment* under section 790.001. The operative language of that section establishes a two-fold test. For a firearm to be concealed, it must be (1) on or about the person and (2) hidden from the ordinary sight of another person. The term 'on or about the person' means physically on the person or *readily accessible* to him. This generally includes the interior of an automobile and the vehicle's glove compartment, whether or not locked. The term 'ordinary sight of another person' means the casual and ordinary observation of another in the normal associations of life. Ordinary observation by a person other than a police officer does not generally include the floorboard of a vehicle, whether or not the weapon is wholly or partially visible."

After reviewing numerous cases the DCA noted that at the time the officer approached the automobile, the defendant was seated in the car and the gun was on or about his person and readily accessible to him under the front seat. The court concluded that when the officer first encountered the defendant, the firearm was under his seat. "The charge against [defendant] alleged sufficiently that the firearm was *simultaneously on or about his person and concealed*."

Court's Ruling:

"The critical question from *Ensor*—whether either officer could see the firearm by ordinary observation while standing beside the vehicle with the passenger seated in the passenger seat—was not directly asked during the hearing in this case. However, the State asked Second Officer, who was the first to approach the passenger's side, if he could see inside the vehicle. He answered in the affirmative, and stated that he could see the area around Benjamin, while he was seated in the vehicle, and he saw nothing obvious nor any firearm in open view. Common sense would suggest that the firearm under the passenger seat was concealed from Second Officer, since he did not see it as he stood on the passenger's side speaking with the seated Benjamin. It was not until Benjamin was outside the vehicle being detained by Second Officer, that First Officer saw the firearm under the passenger seat."

"The main evidence that Benjamin attempted to conceal the firearm is (1) the location of the firearm under the passenger seat with just a half-inch tip of the firearm exposed, (2) the fact that neither officer saw the tip of the firearm while both the driv-

er and Benjamin were inside the vehicle, and (3) First Officer did not see the tip of the firearm during his search of the vehicle until he approached the open door of the passenger's side. The fact that First Officer recognized immediately that the half-inch tip of an object was, in fact, a gun does not mean the State could not make a prima facie showing that the firearm was concealed."

"Because the observation of the half-inch tip of the firearm from underneath the passenger seat did not occur until after the passenger door was open and the passenger was removed from the seat, the analysis under *Ensor* ...regarding a partially-visible firearm dictates that it is a jury question as to whether the firearm was within 'the casual and ordinary observation of another in the normal associations of life.' We agree with the State that such facts could yield different inferences as to whether the firearm was concealed within the meaning of the statute, thus, precluding a ... dismissal of the charge. Reversed."

Lessons Learned:

On those occasions where a defendant is stopped and/or arrested while outside his vehicle and a subsequent inventory search discloses a firearm secreted under the driver's seat, the earlier cases would not support a charge of C.C.F. In the instant case *the defendant and the firearm were simultaneously inside the vehicle when confronted by the officer*. That fact pattern will support a charge of C.C.F. if the firearm is concealed and NOT securely encased. It is important to keep in mind that Florida statute exempts from the crime of C.C.F. firearms that are securely encased inside a vehicle even if hidden from open view.

Section 790.25(5) provides that it is not a violation of C.C.F. to possess a concealed firearm without a license within the interior of a private conveyance "if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use." Thus firearms found in a zippered duffle bag behind the front seat were ruled securely encased by the D.C.A.

"Readily accessible for immediate use" is defined by section 790.001 (16) to mean "that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person." Thus where the firearm was unloaded and stuck between the two front seats and the ammunition was in the closed, but unlocked glove box, the court ruled the firearm was not readily accessible because it could not be used "easily and quickly as if carried on the person."

State v. Benjamin
4th D.C.A. (March 16, 2016)

Video Voyeurism

Melvin Holmes was arrested and charged after his wife discovered that he had been surreptitiously photographing and video recording her daughter (his step-daughter).

A total of twenty-three videos depicting Q.H. were recovered. Fifteen of those videos were recorded with a camera hidden somewhere in the bathroom above countertop level. Eight videos were recorded with a video camera hidden under the lip of the vanity countertop. In those eight videos, Q.H. is seen completely naked, fully or partially clothed, or wearing a towel or her underwear. From time to time her nude pubic area is plainly visible in those videos. Those eight videos were introduced at trial.

Issue:

Were the photographs and videos of the minor step-daughter naked and going through normal daily routines child pornography? **Yes**.

Florida Related Statute:

While this case was decided in federal court, interpreting a federal statute, there is a Florida statute more on point. Specifically, F.S. 810.145, Video Voyeurism, which provides in part:

"(2) A person commits the offense of video voyeurism if that person: (a) For his or her own amusement, entertainment, sexual arousal, gratification, or profit, or for the purpose of degrading or abusing another person, intentionally uses or installs an imaging device to secretly view, broadcast, or record a person, without that person's knowledge and consent, who is dressing, undressing, or privately exposing the body, at a place and time when that person has a reasonable expectation of privacy..."

The Florida Jury Instructions provides: "To prove the crime of Video Voyeurism, the State must prove the following four elements beyond a reasonable doubt:

1. (Defendant) intentionally used or installed an imaging device to secretly view or record (victim) for his own sexual arousal gratification.
2. (Victim) was thereby viewed or recorded at a time when the (victim) was dressing undressing or privately exposing her body.
3. At the place and time when (victim) was viewed or recorded she had a reasonable expectation of

privacy.
4. The viewing or recording of (victim) was without the knowledge and consent of (victim)."

The Jury Instructions provide the following definitions, "Imaging device" means any mechanical, digital, or electronic viewing device; still camera; camcorder; motion picture camera; or any other instrument, equipment, or format capable of recording, storing, or transmitting visual images of another person.

"Place and time when a person has a reasonable expectation of privacy" means a place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that his or her undressing was being viewed, recorded, or broadcasted by another, including, but not limited to, the interior of a bathroom, changing room, fitting room, dressing room, or tanning booth.

"Privately exposing the body" means exposing a sexual organ.

Court's Ruling:

What makes this case of particular interest is the U.S. Court of Appeals, 11th Circuit, noting that, "the question presented here is whether the statutory phrase 'lascivious exhibition of the genitals or pubic area' may include depictions of the 'otherwise innocent' conduct of a minor which are surreptitiously taken by an alleged producer and *made lascivious based upon the actions of the producer, not the child.*"

The crime of possession of child pornography involves the knowing possession of a visual depiction that involves a minor engaging in sexually explicit conduct. "Sexually explicit conduct" is defined by the federal statute as: ... "Lascivious exhibition of the genitals or pubic area of any person."

The Court of Appeals then explained, "Here, Holmes contends the images depict 'mere nudity,' making him at most a voyeur. And based upon his contention that the images do not depict a 'lascivious exhibition of the genitals or pubic area' Holmes argues he cannot be guilty of producing, attempting to produce, or possessing child pornography."

"In support of his argument, Holmes notes that Q.H. did not knowingly engage in sexually explicit conduct while she was being videoed. Rather, she was secretly recorded while in her bathroom performing normal, everyday activities. Holmes contends that it necessarily follows that the videos and pictures themselves, even the ones in which Q.H.'s pubic area is fully visible, do not depict sexually explicit conduct. We disagree. In doing so, we join each of our sister circuits who have addressed this issue and concluded that depictions of otherwise innocent conduct may in fact constitute a 'lascivious exhibition of the genitals or pubic area' of a minor based on the actions of the individual creating the depiction."

"Today, we join [other] Circuits and hold that a lascivious exhibition may be created by an individual who surreptitiously videos or photographs a minor and later captures or edits a depiction, even when the original depiction is one of an innocent child acting innocently. Viewing the evidence in the light most favorable to the government, a reasonable jury could have found that Holmes's conduct—including placement of the cameras in the bathroom where his stepdaughter was most likely to be videoed while nude, his extensive focus on videoing and capturing images of her pubic area, the angle of the camera set up, and his editing of the videos at issue—was sufficient to create a lascivious exhibition of the genitals or pubic area. …

Accordingly, for all these reasons, we AFFIRM."

Lessons Learned:

The 4th D.C.A., in *Lockwood v. State*, (4DCA 1991), dealt with a similar factual scenario. There the police discovered some videotapes, which, upon viewing, they found to depict a sixteen-year-old girl. The defendant was charged with violating section 827.071, F.S., which prohibits the possession of a motion picture that includes a sexual performance by a child. The defendant argued the video merely depicted nudity.

The D.C.A. ruled, " The record reflects that the tape does not show a presentation of sexual conduct as defined by the statute. The presentation shows, rather, the innocent, normal everyday occurrence of a female child undressing, showering, performing acts of female hygiene and donning her clothes, none of which meets any of the detailed sexual acts contained in the statute. It thus appears that the motion for judgment of acquittal should have been granted."

Thus, given the legislature's effort to criminalize the exact conduct described here under the Video Voyeurism statute that would appear to be the ideal charging statute. Also, under the scenario of the step father videotaping his step daughter, that relationship would increase the penalty of Video Voyeurism to a second degree felony as provided in F.S. 810.145(8).