LEGAL EAGLE

August 2024

Unreasonable Force

Just after 9:00 a.m., police dispatchers received two 911 calls reporting an unfolding incident at Burger King. Both callers described a man, later identified as Danquirs Franklin, who was threatening patrons and staff with a firearm. Officers Kerl and Deal responded to the call. Before arriving, Franklin exited the restaurant and crouched next to the passenger side of a vehicle parked in the restaurant parking lot. Both officers exited their vehicles, weapons drawn. Immediately, each officer shouted, "Let me see your hands," and "Let me see your hands, now!"—a total of four commands.

Both officers changed their commands to variants of "Drop the gun!" "Drop it!" "Drop the weapon!" "I said drop it!" "Put it on the Ground!" Although neither officer remembers hearing it, the body camera audio picks up Franklin's response: "I heard you the first time." Throughout the encounter, Franklin's demeanor appeared passive. As the officers barked instructions to drop his weapon, Franklin's body stayed still. Finally, without moving his head or legs, Franklin slowly reached into the right side of his jacket and retrieved a black handgun with his right hand. When Franklin's gun was in Officer Kerl's view, her body camera showed that it was not in a firing grip; Franklin held it by the top of the barrel slide with the grip-side closest to the officers and the muzzle pointed away from them. Immediately, Officer Kerl discharged her weapon twice, striking Franklin in the left arm and abdomen. As he slumped to the ground, Franklin looked in the officers' direction and uttered his final words: "You told me to."

Body cam video confirmed that forty-three seconds elapsed between Officer Kerl's arrival on the scene and when she fatally shot Franklin. In that time, *the officers had shouted twenty-six commands—variations of "let me see your hands" four times, and of "drop the weapon" twenty-two times in a row.*

Officer Kerl said she expected Franklin to communicate his intention to comply with her commands. Because she did not hear Franklin attempt any communication, Officer Kerl stated that she felt his movement toward his jacket was a threat. In her words: "I don't know what he was going to do." "I can't wait for him to pull it all the way out to who's it pointed at …I had to worry about the people that were around me." In her mind, she had no opportunity for "any de-escalation." Nor did it occur to her that Franklin's actions were an attempt to comply with her commands to drop his gun.

In this issue:

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According to Officer Kerl, "he shouldn't be reaching for anything when an officer is there" without first conveying his intentions. She stated that she perceived a threat given the nature of the 911 call and the number of bystanders in the vicinity.

The trial court found reasonable Officer Kerl's perception that Franklin's decision to reach for the gun posed an imminent lethal threat. For the same reasons, it determined Officer Kerl's decision to shoot Franklin was not excessive under the Fourth Amendment. On appeal, the 4th Circuit disagreed and ruled she was not entitled to qualified immunity on Franklin's § 1983 claim against her.

Issue:

Given the totality of the circumstances was the Officer's use of deadly force reasonable? **No**.

Objective Reasonableness:

"Although suspects have a right to be free from force that is excessive, they are not protected against a use of force that is necessary in the situation at hand." And "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham v. Connor*, (S.Ct.1989).

No precise test or "rigid preconditions" exist for determining when an officer's use of deadly force is excessive. See, *Scott v. Harris*, (S.Ct.2007). Thus, in deciding the merits of a claim of excessive force, the court must determine whether, given all the facts and circumstances of a particular case, the force used was "reasonable" under the Fourth Amendment. "In determining the reasonableness of the force applied, we look at the fact pattern from the perspective of a reasonable officer on the scene with knowledge of the attendant circumstances and facts and balance the risk of bodily harm to the suspect against the gravity of the threat the officer sought to eliminate." *McCullough v. Antolini*, (11th Cir.2009).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." And we must allow "for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." See, *Graham*. "We are loath to second-guess the decisions made by police officers in the field." *Vaughan v. Cox*, (11th Cir.2003).

Court's Ruling:

"The Constitution tolerates the use of deadly force by police officers only when necessary to thwart an imminent threat to life, which requires the officer to reasonably perceive danger. The dividing line between reasonable and unreasonable justifications for claiming a human life, though notoriously elusive, must be meticulously sketched and jealously preserved. When an officer issues a clear command to an armed suspect to do one thing and that person does another, we seldom question the officer's use of force. *But when the officer's abstruse commands require the suspect to divine their meaning, the law cannot be so forgiving*. In those circumstances, courts are duty-bound to engage in a searching examination of an officer's resort to deadly violence. Today, we deal with such a case."

"Three factors, established by the Supreme Court in *Graham v. Connor*, (1989), govern this analysis: 1. the severity of the crime; 2. whether the suspect poses an immediate threat to the safety of the officers or others; and 3. whether he is actively resisting arrest or attempting to evade arrest. When assessing these factors, the Court should focus on 'the totality of the circumstances' based on the information available to the [officer] immediately prior to and at the very moment [she] fired the fatal shots."

"Despite receiving 911 accounts of a man terrorizing people at a fast-food restaurant, the officers arrived at a very different scene than the one described in those reports. Franklin was no longer inside the restaurant, nor was he aggressive or outwardly threatening when Officer Kerl approached him. He also made no attempt to resist the officers or flee the area. One restaurant employee felt comfortable enough to walk up to Franklin during the confrontation before the officers ordered her to step back. Watching the events unfold, one cannot help noticing that the intensity of the situation emanated not from Franklin, but from *the volume and vigor of the officer's commands*."

"Speaking of commands, the instructions the officers gave to Franklin to drop his weapon conflicted with their earlier orders and put Franklin in an awkward position. … Throughout the encounter, not much can be heard over the twenty-two orders to 'drop the weapon.' A close listen reveals that Franklin responded

at one point by telling the officers, 'I heard you the first time.' Perhaps that response was not the acquiescence Officer Kerl was looking for, but the content of Franklin's response does not seem to matter. The *officers were so boisterous that neither recalled hearing him say anything at all*. And ultimately, Franklin did comply. We know now that Franklin's gun was concealed under his jacket, not in his hands. So, **the only way for him to obey the officers' commands to drop the gun was to reach into his jacket to retrieve it**. When he did just that, Officer Kerl interpreted his movement as a threatening maneuver."

"In her defense, Officer Kerl urges us to look beyond the seconds before she pulled the trigger and consider Franklin's general unresponsiveness to numerous commands. She emphasizes that Franklin's hands were hidden and he never showed them (despite the initial commands to do so). When Franklin moved unexpectedly toward his jacket rather than dropping the gun, which Officer Kerl believed was in his hands, Officer Kerl says she felt threatened."

"The difficulty with Officer Kerl's argument, however, is that **her commands simply were too ambiguous to transform Franklin's hesitation into recalcitrance**. Police officers are trained to give various commands to achieve specific results precisely because one misjudgment could endanger the officers or the public. *Here, after demanding to see Franklin's hands, the officers then pivoted to an inconsistent instruction, ordering him to drop his gun.* Concededly, Franklin hesitated through twenty-some-odd commands as if 'contemplating something.' Perhaps he was deciding how to drop a gun he was not holding—or maybe he was just frightened by the torrent of shouting and gun-pointing. Regrettably, we will never know because Franklin is not here to explain himself."

"Officer Kerl admits, she could not see Franklin's hands from her vantage point. It was unreasonable under these circumstances to assume that Franklin *must be* holding a weapon in his hands without leaving any daylight for the possibility that he was not. Acting on her unreasonable assumption, Officer Kerl's demand for Franklin to drop his weapon overlooked that possibility. Such a flawed view would make any movement or further handling of the weapon appear non-compliant and threatening. Yet, because it was elsewhere on Franklin's person, *a foreseeable consequence of Officer Kerl's commands to drop the weapon is that he needed to retrieve it first before dropping it.* **A reasonable officer should understand the common-sense ramifications of her orders**."

"How Franklin handled the firearm once it was in plain sight matters too. … Body camera footage clearly shows: Franklin carefully pulled the firearm out of his jacket, pointed it at no one, and held it with just one hand from the top of the barrel. … Viewing the non-threatening way Franklin handled the weapon once he retrieved it, a jury may conclude that this was not a menacing act, but mere compliance with orders."

"It is not lost on us that we issue this decision from the calm of a courthouse. In making our decision, we have had the opportunity to replay the unfortunate events of that morning. *Unlike us, Officer Kerl could not press pause or rewind before determining whether Franklin posed an imminent threat*. Still, we remain resolute that qualified immunity is not appropriate for the disposition of this case. The officers rushed headlong onto a scene that had subsided, established no dialogue, and shouted at Franklin loudly enough that they did not hear him try to communicate back. In their zeal to disarm Franklin, it hardly occurred to the officers that their commands defied reality. As a result, Franklin faced a Catch-22: obey and risk death or disobey and risk death. These facts entitle a jury of community members to decide whether Officer Kerl shot Franklin unlawfully."

"In sum, the [trial] court erred in holding that Officer Kerl's mistake in shooting Franklin was reasonable. Therefore, she is not entitled to qualified immunity on Mrs. Franklin's § 1983 claim against her. REVERSED"

Lessons Learned:

This isn't an isolated incident (calling out conflicting orders) and can be perceived to be a training issue, and thereby potential liability. Ordering the suspect to drop the gun requires him to reach for it and hold it thereby increasing the perception of danger to the officers present. Directing the subject face down on the ground with his hands away from his body would avoid any confusion.

Though not an issue in the present case, the fact is the officer used deadly force without providing a verbal warning. That issue was

(Continued on page 12)

MOSQUITOES CAN SPREAD ILLNESS

Protect Yourself with Repellent

Always read label directions carefully for the approved usage before you apply a repellent.

Apply insect repellent to exposed skin or clothing, but not under clothing.

Treat clothing and gear with products containing 0.5% permethrin. Do not apply permethrin directly to skin.

Some repellents are not suitable for children. Ensure repellent is safe for children and age appropriate.

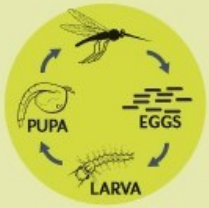
Around Buildings

At least once a week, empty or cover anything that could hold water, such as:

- Buckets
- Toys
- Child Pools and Pool Covers
- Birdbaths
- Trash, Containers, and Recycling Bins
- Boat or Car Covers
- Roof Gutters
- Coolers
- Pet Dishes
- Tires

Stop Mosquitoes from Breeding

Mosquitoes can live indoors and will bite at any time, day or night.



Mosquitoes breed by laying eggs in and near standing water.

As little as one teaspoon or bottle cap of water standing for more than one week is enough for mosquitoes to breed and multiply.

Keep them Outside

Use Air Conditioning

Keep Screens on All Windows

Florida HEALTH

Recent Case Law

Miranda Basics 2024

James Herard was a member of the national Crips gang. In the early morning hours, Herard and two fellow gang members drove the streets in search of a victim for their ongoing body count competition. An indictment and a trial on 19 felony counts ensued. The backbone of the State's case at trial consisted of incriminating statements that Herard made to law enforcement during a series of interviews in the two days after his arrest.

Herard's initial custodial interview was conducted at the Police Department. Before questioning began, a detective read Herard his *Miranda* rights from a waiver of rights form. Herard initialed the form to indicate that he understood his rights. The detective then said words to the effect, "With your rights in mind, are you willing to answer any questions right now and talk with me at all about what happened?" Herard said, "I don't agree to that," and added that he wanted an attorney. The detective replied, "Oh, okay, that's no problem."

Immediately thereafter, the detective collected her paperwork to leave the room, Herard said: "Hold on, hold on. If I get an attorney do I gotta wait?" A brief conversation ensued where the detective explained to Herard that he would not wait in the interview room but would be booked and remain there until an attorney arrived. Herard then said, "I don't want an attorney." The detective responded, "Do you want to talk or not?" *Herard then asked to sign the paperwork*. The detective again asked, "Do you want to talk to us?" Herard answered "yes" and proceeded to sign the waiver of rights form. During the ensuing interview, Herard made incriminating statements.

Herard made the next set of statements in response to questioning by officers from various law enforcement agencies while he was in custody. It is undisputed that Herard was again *Mirandized* and that he signed a new waiver of rights form before this interview began.

Herard argued that the trial court erred in denying his motion to suppress any statements he made over two days of questioning in that they were tainted and inadmissible. According to Herard, once he invoked his right to an attorney, there should have been no further questioning without an attorney present. The trial court rejected that argument after finding that Herard himself reinitiated communication with the police and then validly waived his *Miranda* rights.

Issue:

Did the Defendant waive his right to remain silent and to representation by counsel when he called the Detectives back to the table after they prepared to leave? **Yes.**

Miranda Basics:

The U.S. Supreme Court in deciding *Miranda v. Arizona*, (1966), in essence, asked the rhetorical question, "What's the use of the 5th Amendment's right to remain silent if the suspect does not know he has that right?" The sole purpose of reciting what is now known as *Miranda* rights is to require the police to advise a suspect prior to any questioning that he has a right to remain silent, and if he chooses to speak to the police, the right to have a lawyer present when he does.

Later court decisions have made clear that a suspect has the power to waive his right to remain silent and/or his right to the presence of an attorney. The legal issues arise when the Defendant's response to the recitation of *Miranda* is either a question or an equivocal statement. Either one will cast doubt on his understanding and the implications of his rights and must be resolved. Failure to do so will call into question whether the waiver was voluntarily, knowingly, and intelligently made.

When a suspect asks a clear unambiguous question that pertains to his *Miranda* rights, what they mean, or how they apply to him, the officer must stop, acknowledge the question, and then answer the question directly and fairly. The Florida Supreme Court has stated in that regard, "that if, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer." *Almedia v. State,* (Fla. 1999). In those instances where the officer ignores the question or answers by misleading the suspect as

to his legal position and rights the resulting statement will be suppressed.

However, after the defendant acknowledges that he understands his rights, and chooses to waive them, only a clear unequivocal assertion of his rights stops the questioning. "After a prior voluntary, knowing, and intelligent waiver, the police do not have to stop an interrogation and clarify equivocal or ambiguous invocations of Fifth Amendment rights." *State v. Owen* (Fla.1997).

Court's Ruling:

"Our Court's recent decision in *State v. Penna*, (May 2, 2024), explained the legal test that governs a claim like Herard's. At the threshold, 'when a suspect unequivocally invokes the *Miranda* right to counsel, the officers must immediately stop questioning the suspect.' The parties here have assumed that Herard's invocation of his right to counsel was unequivocal, so we will, too. That takes us to the next steps in the analysis."

"There can be no subsequent interview of the suspect without counsel present unless two conditions are met: 1. the suspect must reinitiate contact with the police; **and** 2. the suspect must knowingly and voluntarily waive his earlier-invoked *Miranda* rights. 'The latter inquiry turns on the totality of the circumstances.' We have no difficulty finding these conditions met here."

[The *Penna* decision eliminated the need to re-advise the suspect of his *Miranda* rights after he reinitiates communication.]

"When Herard stated that he wanted an attorney, the detectives acknowledged the request and began to leave the room. But Herard immediately reinitiated communication, asking whether he would be booked and if he would have to wait for an attorney. After a detective answered Herard's questions, Herard indicated that he wanted to sign the waiver form. The detective then asked a couple of follow-up questions to clarify Herard's wishes before giving him the form to sign. The entire exchange—from the detective reading the rights disclosure and waiver form, to Herard saying he wanted an attorney, to Herard then changing his mind and signing the form—*took less than three minutes*. Under these circumstances, the trial court was right to deny Herard's motions to suppress the statements he made to the detectives."

"In its order denying Herard's motion to suppress, the trial court found the following facts: Defendant was in custody … for approximately 12 hours. He was fed, was allowed to take at least three naps which totaled at least 3.5 hours, was given at least two bathroom breaks, and other breaks in between questioning. While this Court found it unsettling that Defendant urinated twice in his McDonald's cup, he was in fact afforded bathroom breaks. The trial court summed up its ruling by explaining that Herard 'was not threatened or coerced, nor was he deprived of any of his basic needs including food, rest and an opportunity to use the bathroom.' "

" 'Whether a confession is voluntary depends on the totality of the circumstances surrounding the confession.' *Sliney v. State*, (Fla. 1997). When the voluntariness of a confession is in dispute, it is the State's burden to prove voluntariness by a preponderance of the evidence. Proof that a defendant validly waived his *Miranda* rights is a significant but not dispositive factor in determining the voluntariness of a confession."

"We find no error in the trial court's ruling. Its factual findings are supported by the record, and its conclusion about the voluntariness of Herard's statements is consistent with precedents of this Court finding confessions voluntary under comparable circumstances. *See, e.g.*, *Perez v. State*, (Fla. 2005) (voluntary confession stemming from 25-hour interview where the defendant was permitted to take smoking and restroom breaks, provided with food and drink, and slept for about six to eight hours); *Chavez v. State*, (Fla. 2002) (upholding voluntariness of a confession where the defendant was in custody for over 54 hours but provided with food, drink, and cigarettes as requested, given frequent breaks and a six-hour rest period, and repeatedly *Mirandized*)."

The Defendant then raised an interesting challenge to a statement he gave detectives investigating a different set of crimes than the gang shooting. Earlier that day, Defendant attended his First Appearance hearing for an earlier charge. There, he was aided by the Public Defender's Office, which had him execute a "Notice of Defendant's Invocation of His/Her Right to Remain Silent and Right to Counsel." Herard argued at trial that because he invoked his right to counsel at this First Appearance hearing, the detectives were prohibited from questioning him that afternoon without counsel present. The trial court

disagreed. In this appeal, the Florida Supreme Court affirmed that ruling.

"In *Sapp v. State*, (Fla. 1997), this Court held that under both federal law and Article 1, section 9 of the Florida Constitution, a claim of rights form is ineffective to invoke a suspect's *Miranda* right to counsel if signed *before custodial interview has begun or is imminent*. This is because the '*Miranda* right to counsel is a prophylactic rule that does not operate independent from the danger it seeks to protect against—'the compelling atmosphere inherent in the process of in-custody interview'—and the effect that danger can have on a suspect's privilege to avoid compelled self-incrimination.' (quoting *Alston v. Redman*, (3d Cir. 1994))."

"*Sapp* controls here. When Herard signed the form purporting to invoke his *Miranda* rights, an interview was neither underway nor imminent. Hours later, when the detectives met with him in the county jail, Herard was again informed of his *Miranda* rights, and he validly waived them [again]."

"To the extent Herard makes an argument based on his Sixth Amendment right to counsel, that argument is also unavailing. Unlike the Fifth Amendment-based *Miranda* right to counsel, the *Sixth Amendment right to counsel is offense-specific. See Owen v. State*, (Fla. 2008); *Durocher v. State*, (Fla. 1992) (attachment of Sixth Amendment right to counsel for charged crime *did not preclude police questioning about other crime*). Assuming a Sixth Amendment right to counsel attached at Herard's First Appearance, that right pertained only to the [earlier] charge... Herard was still only a suspect in the crimes he was questioned about later that day—the Dunkin' Donuts robberies and the Sunrise attempted murder. Therefore, the detectives' questioning of Herard did not implicate his Sixth Amendment right to counsel."

"Because Herard has not demonstrated any reversible error, we affirm his convictions and death sentence. It is so ordered."

Lessons Learned:

While it is common practice, it should be remembered that the last question posed by the detective, "With your rights in mind, are you willing to answer any questions right now and talk with me at all about what happened…" is not required by the Supreme Court's ruling in *Miranda v. Arizona*. Once the suspect acknowledges that he understands his rights the officer can proceed with his interview.

HOWEVER, in the recent *Penna* case where the Supreme Court eliminated the need to readvise a suspect of his *Miranda* rights when **HE** reinitiates contact, they went on to say,:

"We add a final observation. Although we hold that there is no *per se* requirement that an officer remind or readvise a defendant of his *Miranda* rights, **evidence of such would certainly be relevant to an overall analysis of whether the defendant voluntarily waived those rights**."

Similarly, adding the last question regarding the suspect's desire to engage with the police would likewise establish "whether the defendant voluntarily waived those rights."

Lastly, it is important to remember that while an officer can mislead the suspect as to the facts, i.e. the existence of co-conspirator statements, or blood, fingerprint, or DNA evidence, the officer is prohibited from misleading the suspect as to his legal position or his rights. The question, "Am I better off confessing?" may not be answered with a response that deludes the suspect as to the seriousness of his position, and the importance of a confession to the State in prosecuting him.

In *State v. Glatzmayer*, (Fla. 2001), when the suspect asked the detective during the recitation of his *Miranda* rights, "Do you think I need a lawyer?" the officer responded, "That's not our decision to make, that's yours, it's up to you." On appeal, the Florida Supreme Court found the officer's response appropriate. "[The defendant] in effect was soliciting the officer's subjective opinion, and the officers told him that their opinion was beside the point, that he needed to make up his own mind. Their response was simple, reasonable, and true."

"*All that is required of interrogating officers…is that they be honest and fair when addressing a suspect's constitutional rights*."

As a total aside, the *Miranda* case as it arrived at the Supreme Court was a consolidated case. The full case name was *Miranda v. State of Arizona*; *Westover v. United States*; *Vignera v. State of New York*; and *State of California v. Stewart.* Ernesto Miranda had the lowest case number, thus his name appears first in the case heading. But for that, we might be reading Westover, or Vignera, or Stewart warnings to suspects in custody instead of Miranda warnings.

Herard v. State
Supreme Court of Florida
(July 3, 2024)

Raw Marijuana Smell

Trooper Garcia and another trooper, each in separate patrol cars, saw a speeding vehicle swoop across three or four lanes of traffic without engaging its signal indicator. As the Troopers approached the vehicle, they smelled the distinctive odor of marijuana. Aldama, a juvenile at the time, was the only occupant of the car. He denied having marijuana in the vehicle. Trooper Garcia asked Aldama if he had a medical marijuana card, and he replied "No." Confronted with the odor of marijuana and no assertion of lawful possession, the Troopers searched the vehicle and found a gun and ammunition. Aldama was arrested for possession of a firearm by a convicted felon.

Aldama moved to suppress the items recovered during the search.. The trial court denied the motion.

Issue:

Was the Trooper's detecting the odor of fresh marijuana a sufficient basis for the vehicle search? **Yes**.

Marijuana and Vehicle Search:

Under the "automobile exception" to the general warrant requirement, "police may search a vehicle without a warrant so long as they have probable cause to believe that it contains contraband or evidence of a crime." "Probable cause exists where the facts and circumstances within (the officers') knowledge ... [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *State v. Tigner*, (4DCA 2019) (quoting *State v. Betz*, (Fla. 2002)).

An officer may lawfully extend the traffic stop if he acquires an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring. In determining whether the extension of a stop is justified by reasonable suspicion of criminal activity, courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, (S.Ct.2002). If a stop is unlawfully prolonged without reasonable suspicion in violation of the Fourth Amendment, any evidence obtained as a result of that constitutional violation generally will be suppressed.

In determining whether probable cause exists to search a vehicle, courts must utilize a "totality of the circumstances" approach. That approach "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person."

Case law, both federal and Florida, has held that the odor of *burnt marijuana* provides an officer with probable cause that a crime is being committed. "Officer Turner testified that while he was getting Cheeks' driver's license, he smelled the odor of burnt marijuana and saw marijuana residue on the inside of the passenger door. *Our precedent makes clear that an officer's level of suspicion rises to the level of probable cause when he detects 'what he [knows] from his law enforcement experience to be the odor of marijuana*.' Accordingly, the smell of marijuana gave Officer Turner reasonable suspicion that additional criminal activity had occurred or was occurring, which justified extending the stop" *United States v. Cheeks*, (11th Circuit 2019).

However, after amendments to the Florida Statutes authorized the use of medical marijuana and authorized the possession of hemp, the principle that the "smell of marijuana alone" provides probable cause to search has come under scrutiny. That is because both medical marijuana and hemp can now be legally possessed in Florida and, arguably, the smell of either is indistinguishable from illegally possessed marijuana. In Circuit Court case, *State v. Fonesca*, (Fla. 11th Cir. 2022), the court concluded that an officer who stopped a car for traffic infractions and recognized the aroma of raw marijuana upon his approach was "entitled to reach the common-sense conclusion that someone in the car illegally possessed marijuana."

These rulings relied on *Owens v. State*, (2DCA 2021), which held that "regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell of marijuana emanating from a vehicle continues to provide probable cause for a warrantless search of a vehicle." Notably, in the present case, the trial court found that the trooper's factual basis was more compelling than Fonseca's, as the troopers specifically asked Aldama if what they smelled was hemp or medical marijuana, and he told them that it was not.

Court's Ruling:

"Florida courts are required to follow the United States Supreme Court's interpretations of the Fourth Amendment. See, *State v. Betz*, (Fla. 2002).

Under the 'automobile exception' to the general warrant requirement of the Fourth Amendment, 'police may search a vehicle without a warrant so long as they have probable cause to believe that it contains contraband or evidence of a crime.' *Hatcher v. State*, (1DCA 2022) (citing *Pennsylvania v. Labron*, (S.Ct.1996)). 'Probable cause is a 'flexible, common-sense standard.' ' (quoting *Florida v. Harris*, (S.Ct.2013))."

"In determining whether probable cause exists to search a vehicle, courts must utilize a 'totality of the circumstances' approach. *State v. Fortin*, (4DCA 2024). Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Brinegar v. United States*, (S.Ct.1949)).

Over two decades ago in *Betz*, the Supreme Court of Florida concluded that probable cause existed to search an automobile where the totality of the circumstances included an officer's smell of a strong odor of marijuana coming out of a car window, and where the driver acted nervous, jittery and in an extraordinarily suspicious manner."

"Aldama contends that based upon developments in Florida law legalizing possession of medical marijuana and hemp, the trial court erroneously concluded that odor alone still sufficed for probable cause to justify the warrantless search of his car. He urges us to reject the recent conclusion to the contrary in *Owens*, and instead adopt the reasoning of the special concurrence in *Hatcher v. State*, (1DCA 2022), where the Judge concluded that if a substance smelled by an officer might have been legal hemp, its smell can no longer provide probable cause to search a vehicle or its occupants. The State counters that odor alone remains sufficient to justify the search of a vehicle, as an officer must only have probable cause to search. The State further argues that the trial court correctly denied the motion to suppress as the totality of the circumstances known to the Trooper satisfied the 'odor-plus' standard …and was sufficient for a finding of probable cause."

"Here, the trial court concluded that the Troopers possessed probable cause to believe that the offense of illegal possession of marijuana was being committed based on the distinctive scent of *raw marijuana*, and that nothing more was required. However, we need not reach the issue of whether plain smell of marijuana alone supports probable cause to search an automobile, ***as the troopers' questioning of Aldama eliminated the only lawful explanations for the smell prior to their search***. Thus, the totality of the circumstances provided the Troopers with probable cause to conduct the automobile search upon the plain smell of marijuana and the dispelling of any lawful explanations for such in the vehicle. … Accordingly, we affirm the judgment and sentence entered pursuant to Aldama's plea after denial of his motion to suppress. AFFIRMED."

Lessons Learned:

Under recently enacted Florida statutes, there may be circumstances where "an occupant of a vehicle may have a legitimate explanation for the presence of the smell of fresh (not burning or burnt) marijuana in the vehicle, such as where the individual has a lawful prescription for it, or that the substance is, in fact, hemp." The advent of medical marijuana and hemp laws has resulted in some defendants challenging the "plain smell" doctrine. Significantly, *Hatcher v. State*, (1DCA 2022), (referenced above) has a concurring opinion calling into question the continued validity of the "plain smell" alone doctrine in the context of *fresh marijuana* and hemp.

Florida Statute continues to criminalize smoking marijuana in a vehicle, thus the smell of burnt marijuana should continue to provide probable cause for a search following a lawful traffic stop. The medical-marijuana laws do not authorize smokable marijuana, see § 381.986 (1)(j)(2), Fla. Stat. (2017) (excluding from 'medical use' the 'use, or administration of marijuana in a form for smoking'). Even if smoking marijuana was totally legal, the officers would have probable cause based on the fact that the suspect **was operating a car**. See § 316.193(1)(a), Fla. Stat. (criminalizing driving under the influence of drugs). Finally, even putting all of this aside, the possibility that a driver might be a medical-marijuana user would not automatically defeat probable cause. The probable cause standard, is, after all, a 'practical and common-sensical standard.' *Florida v. Harris*, (S.Ct.2013). It is enough if there is "the kind of 'fair probability' on which 'reasonable and prudent people, not legal technicians, act."

Aldama v. State
3rd D.C.A.
(July 17, 2024)

Equivocal Invocation

The police brought Carl Denson into the station to question him about a recent homicide. The officer read him his *Miranda* warnings. Denson voluntarily waived his rights and actively participated in the interview. About fifteen minutes in, Denson turned to the side and softly stated, "Listen man, 'cause it don't matter, shit, 'cause I feel like I'm being tricked into it. *I just don't want to say nothing*, you feel me?" The officer responded, "I gotcha." Denson immediately continued, "That's why I know, I know y'all never gonna let me go, you feel me? I'm stuck with all this." The officer responded, "Yeah, but it's the difference between being stuck with premed versus what really happened. And that's all I want to know, what really happened, alright?" Mr. Denson continued to talk. After about another half an hour, Denson broke a moment of silence declaring, "You know, fuck it, man. It is what it is. Yeah, I shot the man in the back of his head."

Defendant filed a motion to suppress his statements based on his assertion that, "*I just don't want to say nothing*" invoked his right to remain silent. The trial court agreed and suppressed the incriminating statement. On appeal, the State argued that Denson's invocation was equivocal, the D.C.A. agreed and reversed the trial court's ruling.

Issue:

Did Denson unequivocally invoke his right to remain silent? **No**.

Asserting *Miranda* Rights:

The U.S. Supreme Court in 1994 ruled that a defendant's invocation of his right to counsel must be unambiguous (*Davis v. U.S.*). If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* right to an attorney. There is no requirement for officers to ask, "Having these rights in mind, do you wish to talk to us now?"

The Court in *Berghuis v. Thompkins*, (S.Ct.2010) reasonably applied its *Davis* precedent to reject the claim that Thompkins had affirmatively invoked his right to remain silent. After receiving his *Miranda* rights explained and indicated he understood Thompkins remained silent for the duration of the interview.

Supreme Court ruled that by remaining silent and not affirmatively asserting his desire to remain silent, he had not invoked that right. After *Davis*, it does seem readily to follow that an equivocal invocation of the right to silence would be ineffective. In *Davis*, the issue was whether the suspect had invoked his right to counsel because the suspect had already explicitly waived his right to counsel before the interview began and therefore, was required to make a showing that he had subsequently invoked the right before he could be said to have triggered an obligation on the part of the police to cease their questioning.

In *Thompkins*, by contrast, there was never an explicit waiver of the right to remain silent. The Court nonetheless found that Thompkins's failure to invoke his right to silence after receiving and understanding the warnings, coupled with his voluntary responses to questions, amounted to a waiver.

The Supreme Court crafted the *Miranda* warnings as a protective device, meant to empower the suspect to resist the inherent compulsion of custodial questioning.

The Court acknowledged that "some language in *Miranda* could be read to indicate that waivers are difficult to establish absent an explicit waiver or a formal, express oral statement" and quoted *Miranda* saying that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." This, however, was precisely the foundation for the Court's conclusion that Thompkins had waived his rights: Thompkins received (and understood) warnings and eventually gave a confession. He never indicated — other than by his silence, and by his eventual confession —a wish to relinquish his right to remain silent.

Court's Ruling:

"Criminal defendants have the right against compelled self-incrimination. In support of this right, during a custodial interrogation, the suspect must be informed of his *Miranda* warnings, such as the right to remain silent and the right to an attorney. *Miranda v. Arizona*, (1966). The police may only continue questioning if the suspect voluntarily, knowingly, and intelligently waives his *Miranda* rights."

"The federal Constitution requires police to stop a custodial interrogation after the suspect has already waived his *Miranda* rights if the defendant invokes his right to an *attorney* during the interrogation. *Davis v. United States*, (S.Ct.1994).

Florida takes the rule one step further and requires the police to stop a custodial interrogation if the suspect unequivocally invokes *any Miranda* rights during the interrogation. *State v. Owen*, (Fla.1997). But the police need not stop the interview or ask any clarifying questions if a defendant who has received proper *Miranda* warnings makes only an equivocal or ambiguous request to terminate an interrogation after having validly waived his or her *Miranda* rights."

"A suspect unequivocally invokes the right to remain silent if, with sufficient clarity, he or she expresses a desire to end questioning in such a manner that a reasonable officer under the circumstances would understand that the suspect has invoked his or her right to end questioning. *Deviney v. State*, (Fla.2013). Further, such an invocation may include not only the words of a defendant, but also his or her *conduct.* Police fail to scrupulously honor a defendant's invocation of the right to remain silent, and therefore violate that right, when, in the face of the invocation of that right, the police persistently and repeatedly engage in efforts to wear down a suspect's resistance and make the suspect change his or her mind. (citing *Michigan v. Mosley*, (S.Ct1975))."

"Courts are more likely to find that a suspect unequivocally invokes his right to remain silent if the invocation is *before* substantive questioning. *Bailey v. State*, (1DCA 2009) (citing *Alvarez v. State*,(4DCA 2009)). Quoting the Fourth D.C.A., this Court reasoned, 'Where a suspect has heard, understood, and waived his *Miranda* rights, and has been answering substantive questions without incident and continues to do so**, a statement which may have been unambiguous if uttered initially may be objectively ambiguous when considered in context**.' (quoting *Alvarez*)."

"In *Cuervo v. State*, (Fla.2007), the Florida Supreme Court held that a defendant invoked his right to remain silent by stating (in Spanish) that he did not want to "declare anything" when asked at the *beginning of the interview* whether he wanted to talk. The Court reasoned that unlike in *Owen*, where the statements 'I don't want to talk about it' and 'I'd rather not talk about it,' could have been referring to specific crimes, the Defendant's statement in *Cuervo* was in direct response to a question about whether he wanted to talk after he was read his *Miranda* rights."

"We find that the facts here are more analogous to *Owen*, … than to … *Cuervo*. Like *Owen*, … Mr. Denson made a one-off statement during the interrogation that did not clearly suggest that he wished to discontinue the entire interview. Unlike *Cuervo*, Mr. Denson did not make the statement at the beginning of the substantive questioning or when being asked about whether he wished to talk. And unlike in *Scott v. State*, (1DCA 2014), ('No and I am through with this interview.'). Mr. Denson did not make repeated statements or clear desires to stop the discussion entirely. Further, the interviewing officer did not 'persistently and repeatedly engage in efforts to wear down [Mr. Denson's] resistance and make him change his ... mind.' (citing *Michigan v. Mosley*, (S.Ct.1975))."

"Mr. Denson sandwiched the soft-spoken statement 'I just don't want to say nothing' in between expressing that he did not want to be tricked and that he felt stuck with the consequences of the incident. … Mr. Denson 'essentially mumbled' his statement then continued talking. Like in *Owen*, Mr. Denson was not necessarily referring to not wanting to say anything *at all*, and he could have been referring to something specific. And the fact that Mr. Denson immediately proceeded to talk without the officer's prompting after saying that he 'just don't want to say nothing' suggests that he did not intend to make a blanket invocation of the right to remain silent. Mr. Denson's alleged invocation was thus equivocal."

"Because Mr. Denson's statement was equivocal, the officer was not required to stop the interview or ask clarifying questions. Mr. Denson's later confession to murder was therefore legally obtained. Thus, the trial court erred by granting Mr. Denson's motion to suppress. REVERSED."

Lessons Learned:

The courts clearly distinguish between a suspect who asks questions or makes comments while being advised of his rights, and a suspect who acknowledges his rights, agrees to engage with the officers, and then makes a comment that may, or may not, reflect a desire to terminate the interview. The former is clear, that the dialogue needs to be halted until the uncertainty is resolved. The latter is only operational if the request is direct, clear, and unequivocal.

"The United States Supreme Court announced in *Davis v. United States*, (1994), that neither *Miranda* nor its progeny require police officers to stop interrogation

when a suspect in custody, who has made a knowing and voluntary waiver of his or her *Miranda* rights, thereafter makes an equivocal or ambiguous request for counsel. Thus, under *Davis* police are under no obligation to clarify a suspect's equivocal or ambiguous request and may continue the interrogation until the suspect makes a clear assertion of the right to counsel."

"Our decision today is in harmony with those of other states which have also held in the wake of *Davis* that police are no longer required to clarify equivocal requests for the rights accorded by *Miranda.*" *State v. Owen*, (Fla.1997).

State v. Denson
1st D.C.A.
(June 12, 2024)

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Unreasonable Force

analyzed by the U.S. Court of Appeals, 11th Circuit, in *Quiles v. City of Tampa Police Department*, (11th Cir. 2015). The Court focused on the need for a verbal warning as a condition precedent to the use of deadly force.

"Although a warning is one factor that weighs in favor of reasonableness, the Supreme Court has stressed that '*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force.' Instead, reasonableness is determined based on all the facts and circumstances of each individual case."

"In the light of the Supreme Court's later clarification in *Scott v. Harris*, (S.Ct.2007) of the *Garner* legal standard, we now know ...that an officer's failure to issue a seemingly feasible warning—*at least, to a person appearing to be armed*—does not, in and of itself, render automatically unreasonable the use of deadly force. See *Penley v. Weippert*, (11th Cir.2010) (rejecting the argument that *Garner* mandates the issuance of a warning, and explaining that this Court has 'declined to fashion an inflexible rule that, in order to avoid civil liability, an officer must always warn his suspect before firing—particularly where such a warning might easily have cost the officer his life.')."

F.S. 776.05, Law enforcement officers; use of force in making an arrest, provides in part, "… However, this subsection shall not constitute a defense in any civil action for damages brought for the wrongful use of deadly force unless the use of deadly force was necessary to prevent the arrest from being defeated by such flight and, *when feasible, some warning had been given*."

Clearly, Florida law can be more restrictive than federal law, but the 11th Circuit has given a credible explanation for recognizing that, "an officer's failure to issue a seemingly feasible warning—*at least, to a person appearing to be armed*—does not, in and of itself, render automatically unreasonable the use of deadly force… particularly where such a warning might easily have cost the officer his life."

Franklin v. City of Charlotte
U.S. Court of Appeals, 4th Cir.
(April 4, 2023)

The relentless stress and demands of policing can lead to burnout, decreased job satisfaction and exacerbated mental health issues among officers. This high-stress climate also jeopardizes their physical health, often causing chronic fatigue and other stress-related ailments.

Additionally, the weight of public scrutiny and political pressures introduces further challenges, potentially deepening feelings of disillusionment and frustration within the ranks.

What are the implications of these pressures on the wellbeing of patrol officers?

That's the central question Police1 aimed to address with our fourth annual State of the Industry survey, intended to offer law enforcement leaders and communities strategies to enhance the physical and mental wellbeing of our nation's law enforcement officers.

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Find additional survey analysis at www.police1.com/what-cops-want