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Force and Motorist

The Drug Enforcement Administration investigated Aleia Tousis. Based on that investigation, the DEA obtained a warrant to place a tracking device on his car. In addition to providing investigators with the location of the vehicle, the device tracked the speed at which it was traveling. The investigating agents believed that Tousis was involved in drug trafficking, that he had a source named Vernon Turner, and that he would be going to Turner's home that day to procure drugs. Surveillance confirmed the drug pick-up.

Agents requested assistance from the Sheriff's Office to effect a traffic stop. When the Deputy attempted the stop, Tousis fled at high speeds, with the tracking device showing that the car accelerated from 65 mph to 115 during the chase. Because of the danger to the officers and the public posed by Tousis' reckless flight, the officers ended their pursuit. The tracking device continued to show Tousis' location and speed, and the officers followed his progress.

Deputy Billiot tracked the Defendant's vehicle. When he was stopped at a red light, Billiot decided that it was a good place to make a traffic stop. Billiot pulled in front of Tousis' vehicle. After stopping his car, Billiot grabbed his rifle, exited his car wearing a well-marked DEA law enforcement vest, and ran towards Tousis' stationary car, shouting commands at him to turn off the car and exit the vehicle. Tousis ignored Billiot's orders. Instead, Tousis moved the car forward. There was nothing between Agent Billiot and Tousis' car. As soon as Tousis' car pulled forward, Billiot fired a single shot at Tousis with his rifle with fatal results. The police officers recovered approximately 300 grams of cocaine from Tousis' car.

Issue:

Did Deputy Billiot reasonably believe that Tousis posed a serious imminent threat to him or others in the vicinity? **Yes**.

Reasonable Force:

Apprehending a suspect through the use of deadly force is considered a Fourth Amendment seizure of the person. Therefore the courts must determine if the officer acted in an objectively reasonable manner when he "seized" Tousis using deadly force or if he violated Tousis' right to be free from unreasonable seizures. S*ee Scott v. Harris*, (S.Ct. 2007); *Graham v. Connor*, (S.Ct.1989).

In determining reasonableness, the Supreme Court has instructed courts to examine the "facts and circumstances confronting [the

officers], without regard to their underlying intent or motivation." And courts must also view the specific use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." When "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, (S.Ct.1985). To assess reasonableness, courts are to consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." See, *Graham*.

"The calculus of reasonableness must embody allowance 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." Unlike the court, the officers "lacked [the] luxury of pausing, rewinding, and playing the videos [of the incident] over and over.."

When an officer reasonably believes a suspect's actions place him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force. An officer does not violate the Fourth Amendment by firing at a suspect when the officer reasonably believed that the suspect had committed a felony involving the threat of deadly force, was armed with a deadly weapon, and was likely to pose a danger of serious harm to others if not immediately apprehended. Thus, if the suspect threatens the officer with a weapon [here, a vehicle] or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. *Tennessee v. Garner*, (S.Ct.1985).

"Outrageously reckless driving" that "poses a grave public safety risk" can be enough to justify the use of deadly force under some circumstances. *Plumhoff v. Rickard*, (S.Ct.2014), reversing denial of summary judgment for officers who shot at fleeing suspect to end car chase.

Court's Ruling:

"There are two inquiries in determining whether qualified immunity applies: whether the facts, taken in the light most favorable to the party asserting the injury show that the officer's conduct violated a constitutional right; and whether the right at issue was 'clearly established' at the time of the officer's alleged misconduct. *Pearson v. Callahan*, (S.Ct. 2009)."

"We exercise our discretion to focus on … whether Billiot's use of deadly force in this situation violated clearly established law.

'Clearly established' means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. The Supreme Court has held that 'where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.' *Tennessee v. Garner*, (1985). The fact-specific nature of whether an officer used excessive force depends on the totality of the circumstances surrounding the encounter. If a suspect threatens the officer with a weapon, that risk of serious physical harm has been established."

"An automobile may be used as a deadly weapon. As is the case here, in *Tolliver v. City of Chicago*, (7th Cir. 2016), the plaintiff was a driver who was involved in an altercation with police officers attempting to make an arrest. In remarkably similar circumstances, the officers who fired the shots that injured Tolliver were fewer than two car lengths away and on foot when Tolliver's car began to move forward in the general direction of the officers. As is the case here, one of the officers was injured when he fell as he tried to evade the moving car. Tolliver asserted that he was moving forward at only three miles per hour, too slowly to injure the officers, but we noted that the officers had only seconds to react and could not know whether Tolliver would accelerate and close the distance more quickly, shortening the space and time in which to react. They knew only that they had stopped a car being driven by a man purportedly transporting cocaine, and that the man had responded by first backing up and then by moving towards them as they stood in front of the car. We concluded that qualified immunity applied to the officers' actions because 'reasonable officers in their circumstances would have perceived the car as a deadly weapon that created a threat of serious physical harm.' "

"As in *Tolliver*, Billiot was immediately in front of Tousis' car, much less than two car lengths away, when the vehicle began to move forward. That the wheels were turned to the right does not change the calculus. First, in a very small space, even a car maneuvering to the right poses a serious danger to a person standing in front of it. Cars making turns do not proceed horizontally; they follow an arc, and the undisputed evidence establishes that Billiot was standing very close to the front end of Tousis' car when it began to move forward and to the right. Second, Billiot had no way of knowing whether Tousis would change direction or accelerate. As in *Tolliver*, a reasonable officer in these circumstances would be in fear of being hit by the moving vehicle."

"[Plaintiff] Aleia Tousis is convinced that her father did not intend to hit the officer but was simply trying to 'evade Agent Billiot.' Even if we assume that Aleia's speculation is correct, Billiot had no way of knowing Tousis' intentions and was forced to react in a matter of seconds to Tousis' actions based on what Billiot knew at the time. Billiot knew that Tousis had already fled law enforcement once, only minutes earlier, at reckless speeds, weaving in and out of traffic, endangering the lives of officers in pursuit and members of the public with whom he shared the road. Billiot was concerned not only for his own safety but for that of the public because of Tousis' extremely reckless flight. [As noted by the Supreme Court in *Plumhoff v. Rickard*, (S.Ct.2014)]. 'Under the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road.' In those circumstances, the Court concluded that the police acted reasonably in using deadly force to end that risk."

"Once again, the circumstances are remarkably similar to the situation presented here. Tousis had engaged in a lengthy, reckless flight at speeds in excess of 114 miles per hour, weaving in and out of traffic as he fled officers who were forced to abandon the pursuit in the interest of public safety. By Aleia's own admission, at the time that Billiot fired the shot, Tousis was maneuvering to the empty right lane in order to evade the police once again. A reasonable officer could have concluded both that Tousis was intent on resuming his flight and that he would again pose a serious danger to public safety. In light of *Tolliver* and *Plumhoff*, Billiot's actions thus did not violate clearly established law; in fact, established law holds to the contrary that the officer's actions were objectively reasonable in substantially similar situations."

"Aleia contends that Billiot created the danger by leaving the relative safety of his police car to stand in front of Tousis' car, knowing that Tousis' vehicle might strike him. According to Aleia, under *Starks*, Billiot unreasonably placed himself in danger by running toward Tousis's car and threatening Tousis with deadly force. Aleia concedes that, if an individual is driving towards an officer, then the officer is justified in using deadly force and will be protected by qualified immunity. Under *Estate of Starks v. Enyart*, (7th Cir. 1993), she contends, an officer may not step into the path of the vehicle and unreasonably create the threat that then justifies the use of deadly force. But her contention is missing an important word that distinguishes *Starks* from this case: *Starks* hints only that *an officer may not step into the path of a* ***moving vehicle*** *and then justify the use of deadly force by claiming to be threatened by the use of the car as a deadly weapon*. In this instance, Billiot exited his car to stand before a **stationary vehicle** that was initially blocked in by traffic. *Billiot did not create the danger; Tousis did when he began to move forward toward the officer. Starks* thus did not place the constitutional question confronted by Agent Billiot beyond debate."

"In sum, in the circumstances presented here, Billiot had an objectively reasonable belief that his own life and the lives of the public were at risk when he fired the shot that killed Tousis, and there was no case law warning Billiot that his actions under those circumstances amounted to excessive force in violation of the Fourth Amendment. Billiot was therefore entitled to summary judgment on his claim of qualified immunity. REVERSED."

Lessons Learned:

The U.S. Court of Appeals in *Cass v. Dayton Police Dept.*, (6th Cir. 2014), confirmed: "Since *Garner*, we have applied a consistent framework in assessing deadly-force claims involving vehicular flight. ...The critical question is typically whether the officer has 'reason to believe that the [fleeing] car presents an imminent danger' to 'officers and members of the public in the area.' An officer is justified in using deadly force against

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SUPPORTING Officer Safety THROUGH Family Wellness | Injury Reduction

Being a law enforcement officer has routinely been ranked as one of the most dangerous jobs.[1] On average, officers sustain **30,900 injuries** a year that require at least one day away from work.[2] Officers and their families can work together to take steps to keep officers healthy and reduce injuries. The following are topics officers should be mindful of when it comes to injury reduction and tips on how an officer's family can help.

Shift Work

Law enforcement officers often work long hours that could potentially increase risk for injury. Working a night shift presents extra challenges to the body's natural circadian clock and ability to focus. Night shift officers are more likely to sustain an injury than daytime officers.

For more information about night shifts, sleep deprivation and how families can help check out *Supporting Officer Safety Through Family Wellness: The Effects of Sleep Deprivation*.

Night shift scheduling may be unavoidable, extra caution should be taken to remain alert and focused.

The first night of the shift week is the most dangerous for officers.[3] Work to maintain a consistent sleeping schedule on days off to avoid extreme fatigue.

Developing a family routine for sleeping, eating, and spending time together can contribute to a healthy sleeping environment for officers who work a night shift.

Law enforcement officers are at a higher risk of obesity than civilians.

Overweight officers suffer more severe injuries and take longer to return to work than physically fit officers.

Overweight officers miss an average of twice as many days after an injury as officers with a healthy weight.[4]

Fitness and Nutrition

Ensuring proper fitness and nutrition routines can lead to a lower rate of injury, as well as decrease recovery time should an injury occur.

Make fitness a family effort. Go on a bike ride, a swim, or take a hike.

Develop healthy eating habits at home with the family and while on duty.

For more information about family and officer nutrition check out *Supporting Officer Safety Through Family Wellness: Nutritional Needs*.

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Recent Case Law

Fresh Pursuit

Officer testified that while on patrol in New Port Richey, he observed a motorcycle speed by him. The officer followed the motorcycle and saw it heavily accelerate, weave around and between cars, and drive over 100 miles per hour—more than twice the speed limit. The officer never lost sight of the motorcycle and it eventually slowed, which allowed the officer to reach Defendant without jeopardizing the safety of other motorists. After the motorcycle and the officer crossed municipal lines into Port Richey, the officer activated his lights and sirens and pulled the motorcyclist over on the side of the road.

During the defense cross-examination and the State's redirect, the officer testified that he had the authority to stop the motorcyclist in Port Richey because he was also a deputy with the Pasco County Sheriff's Office (PCSO) pursuant to a mutual aid agreement. The trial judge, without prompting from defense counsel stopped the trial, sent the jury out of the room, and told the State: "I need for you to show me that [the officer] has unbridled discretion as a Pasco County Sheriff's deputy to handle any kind of cases" in Port Richey.

The State responded on the fly and provided the trial court with the officer's credentials and a mutual aid agreement between New Port Richey and Port Richey. The State also reminded the trial court that *the reckless driving charge began in New Port Richey and that an officer in fresh pursuit has the authority to make an arrest in another jurisdiction*. The Court found that the State could not prove that the officer complied with the mutual aid agreement when he stopped the Defendant. The trial court dismissed the State's case. The State timely appealed. On appeal, the trial court's ruling was *firmly* reversed.

Issue:

Was the officer's arrest out of jurisdiction lawful as being in fresh pursuit? **Yes**.

Arrest Outside Officer's Jurisdiction:

"As a general principle, public officers of a county or municipality have no official power to arrest an offender outside the boundaries of their county or municipality." Additionally, an officer may arrest an offender outside his jurisdiction "when two enforcement agencies entered into a mutual aid agreement that permits the extra-territorial conduct by the outside police municipality." *Daniel v. State*, (4DCA 2009).

Section 901.15 (1), F.S., states: "When arrest by officer without warrant is lawful - A law enforcement officer may arrest a person without a warrant when: The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. Arrest for the commission of a misdemeanor or violation of a municipal or county ordinance shall be made immediately or in *fresh pursuit*."

Section 901.15 (5), F.S., states: "A violation of chapter 316 has been committed in the presence of the officer. Such an arrest may be made immediately or in *fresh pursuit. …"*

In a case where the police observed the defendant driving erratically and a high-speed chase ensued onto the defendant's property and into an attached garage, with the officers in close pursuit. As the defendant exited his vehicle, the officers entered the garage and arrested him, ultimately charging him with DUI. The DCA ruled, "[The defendant] waived any expectation of privacy he may have had in his garage by engaging in the high-speed chase previously described and leading the officers directly to the place of his arrest. The enforcement of our criminal laws, including serious traffic violations, is not a game where law enforcement officers are 'it' and one is 'safe' if one reaches 'home' before being tagged." "A suspect may not defeat an arrest which has been set in motion in a public place ... by the expedient of escaping to a private place."

Section 901.25(2), F.S., provides that "any duly authorized state, county, or municipal arresting officer is authorized to arrest a person outside the officer's jurisdiction when in fresh pursuit." This statute expands on the common law rule that "an officer may pursue a felon or a suspected felon, with or without a warrant, into another jurisdiction and

arrest him there." *Porter v. State*, (4DCA 2000). And the statute plainly defines "fresh pursuit" to include "the pursuit of a person who has violated a county or municipal ordinance or *chapter 316* or has committed a misdemeanor."

Court's Ruling:

"Turning to the merits, the trial court concluded that the arresting officer from New Port Richey lacked authority to conduct a traffic stop in Port Richey. It also believed that the mutual aid agreement between the two municipalities was the deciding factor. But we needn't delve into the terms of the agreement or what proof of compliance the State offered because *the officer was in fresh pursuit of Mr. Reddin when the officer stopped him in Port Richey*."

"Here, the record establishes that the officer pursued Mr. Reddin for suspicion of reckless driving, which is both a violation of chapter 316 and a misdemeanor. The pursuit began in the officer's municipality and carried over to a neighboring municipality because of the speed at which Mr. Reddin was allegedly driving. Under these circumstances, section 901.25(2) authorized the officer 'to arrest [Mr. Reddin] outside the officer's jurisdiction,' regardless of the mutual aid agreement or the officer's PCSO credentials. *See State v. Potter*,(2DCA 1983) (holding that an officer who stopped a vehicle beyond his city limits, where the officer first observed the vehicle within his city limits weaving and crossing the center line in violation of chapter 316, was authorized 'to arrest on fresh pursuit across jurisdictional lines'); *State v. Joy*, (3DCA 1994) (concluding that an officer who observed a truck speed by him, and who left his jurisdiction while following the truck at an unusually high rate of speed, was 'engaged in fresh pursuit of a suspected speeder' and was authorized to make the stop under section 901.25)."

"Thus, the trial court erred in dismissing the State's case based on the officer's purported lack of authority. Because the trial court erred in finding that the arresting officer lacked authority to stop Mr. Reddin, we reverse the order dismissing the State's case. Reversed."

Lessons Learned:

The State was caught off guard concerning the mutual aid agreement issue, but it is a learning opportunity. *Mattos v. State*, (4DCA 2016), is instructive:

"In the instant case, Officer Pedrero detained and arrested Mattos for DUI, a misdemeanor. Although Officer Pedrero testified that the Miramar and Pembroke Pines Police Departments had a mutual aid agreement, he was completely unaware of the contents of the agreement and the State failed to introduce into evidence a copy of any such agreement. Thus, that exception to the general rule barring extra-territorial arrests does not apply in that the State failed to present any competent evidence as to the substance of the mutual aid agreement between the two cities."

This case makes it too obvious for words that an officer relying on a mutual aid agreement to legitimize an arrest should *provide the prosecutor with a copy of that agreement at case filing and for introduction into evidence at the inevitable suppression motion*.

The Court of Appeals in the present case was not particularly happy with the actions of the trial judge. "We also caution trial courts against the actions that led to the dismissal of this case. Although courts are duty-bound to investigate potential defects in their subject matter jurisdiction, this duty does not extend to other legal issues such as the officer's territorial jurisdiction and his authority to stop Mr. Reddin in this case. As we have explained, 'a judge must not independently investigate facts in a case and must consider only the evidence presented.' Likewise, a 'court is not authorized to become a party's advocate and raise a legal issue *sua sponte*.' And 'every litigant, *including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge*.' *Livingston v. State*, (Fla.1983) ."

State v. Reddin
2nd D.C.A.
(Dec. 15, 2023)

Miranda Limitations

Shanta Freeman got into an argument over her rudeness with her mother. A friend of Freeman's mother chastised Freeman for being disrespectful. The friend and Freeman began exchanging punches. The friend tried to stop the argument by walking to her car. Freeman blocked her from closing the car door. Freeman then stabbed the victim with a pocketknife, piercing her right earlobe and neck.

Law enforcement arrived on the scene. An officer informed Freeman of her *Miranda* rights. Freeman confirmed that she understood her rights. Freeman then stated to the officer, "I hope she dies," and "I hope I go to jail for life or even be killed. I don't care because nothing matters." Freeman told officers that

she and the victim had verbal arguments in the past. But that day, Freeman explained, she "*was in the mood to stab someone*."

The State charged Freeman with Aggravated Battery with Great Bodily Harm and with a weapon. Freeman moved to dismiss, claiming immunity from prosecution under Stand Your Ground Law, which was denied. Freeman also moved to suppress her statements to law enforcement, arguing she did not freely and intelligently waive her *Miranda* rights because she is bipolar, and that condition impaired her waiver. At the suppression hearing, the parties presented competing expert testimony on Freeman's competency. The court also reviewed Freeman's recorded police interview. The court denied the motion to suppress.

Issue:

Did the Defendant's undisclosed mental impairment issue (if it existed) defeat the *Miranda* warnings provided to, and acknowledged by, the Defendant? **No**.

Miranda Basics:

The U.S. Supreme Court in deciding *Miranda v. Arizona,* (1966), in essence asked the rhetorical question, "What is the value of the 5th Amendment's right to remain silent, if the suspect is not aware he has that right?" The sole purpose of reciting what is now known as *Miranda* warnings 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 *Miranda* rights and must be resolved. Failure to do so will call into question whether the waiver was voluntarily, knowingly, and intelligently made.

"If at the beginning of an interrogation, the defendant attempts to invoke his rights rather than waive them, and the invocation is equivocal or ambiguous, the police must seek clarification before proceeding further; equivocation and ambiguity may cast doubt on the voluntary, knowing, and intelligent nature of a purported waiver and subsequent confession." *Alvarez v. State* (4DCA 2009).

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).

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 has been suppressed.

Court's Ruling:

The published opinion of the First District in the present case was limited to a discussion of where the burden of proof lies in a stand-your-ground prosecution. In addition, however, a concurring opinion was also published. A concurring opinion is an appellate opinion of one or more judges that supports the result reached in the case for reasons not stated in the majority opinion. Concurring opinions are not binding since they did not receive the majority of the court's support, but they can be used by lawyers as persuasive material.

"I join the majority opinion in full. I address here a question raised by Freeman's other issue on appeal. Freeman argued the trial court erred in denying her motion to suppress statements she made during a post-incident law enforcement interview. Freeman argued a *Miranda* violation warranted suppression. I write to discuss the latest *Miranda* developments, why they warrant our renewed attention, and why, ultimately, Freeman's *Miranda* claim fails."

"Let us begin with *Miranda* itself. Thanks in large part to Hollywood movies and television programs, but with no small contribution from real-world criminal cases, the warnings have developed into a sort of American legal and cultural

sacred cow. It has created a strange paradox. The average American can recite the warnings, yet few can explain where they came from. Most assume the warnings are required by the Constitution. Even some lawyers have seemingly forgotten the warnings' genesis. And so, we start there. *Miranda* warnings are extra-constitutional. They are a creation of the U.S. Supreme Court. ..."

"*Miranda*, as a judicial policy creation, purports to protect against potential police compulsion. It 'adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation.' *Maryland v. Shatzer*, (S.Ct.2010). The warnings are 'employed to dispel the compulsion inherent in custodial surroundings' and ensure the statement is obtained from the defendant as a 'product of his free choice.' "

"Since *Miranda* issued, the Court has been busy restricting its use and admonishing lower courts for its overzealous application. *See, e.g.*, *Beckwith v. United States*, (S.Ct.1976) (holding that an interrogation did 'not present the elements which the *Miranda* Court found so inherently coercive as to require its holding.'); *Colorado v. Connelly*, (S.Ct.1986) (holding that when a defendant's mental health condition prevents a voluntary *Miranda* waiver but there is no coercive government conduct, 'suppressing [the defendant's] statements would serve absolutely no purpose in enforcing constitutional guarantees.'); *Illinois v. Perkins*, (S.Ct.1990) (rejecting *Miranda*-based suppression, even when there is a custodial interrogation 'in a technical sense,' if there is no government coercion)."

"While cautioning lower courts on its use, the Court has clarified that *Miranda* warnings are a court-created prophylactic rule and are not required by the Constitution. *New York v. Quarles*, (S.Ct.1984) (holding that in some cases 'adherence to the literal language of the prophylactic rules enunciated in *Miranda'* is not required). Instead, *Miranda* simply 'adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right.' *Maryland v. Shatzer*, (S.Ct.2010)."

" 'The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion' " *Colorado v. Connelly*, (S.Ct.1986). *Miranda*-based suppression, then, may be applied only to cases when it can conceivably act in furtherance of this goal. Now, as with the application of every other court-created prophylactic rule, courts must evaluate the circumstances at issue and the relevant police conduct. If a *Miranda*-based suppression would not protect against government compelled self-incrimination, it should no longer be used."

"To determine whether an otherwise relevant statement should be excluded on *Miranda*-based prophylactic grounds, courts must make case-specific inquiries into the circumstances of the alleged improper government conduct. Before excluding relevant evidence, courts must: 1. identify government misconduct, 2. conclude that exclusion will deter that misconduct, and 3. conclude that the benefit of exclusion outweighs its costs. *Wingate v. State*, (1DCA 2020) (citing *United States v. Herring*, (11th Cir. 2007)). But to weigh the benefits of a *Miranda*-based suppression, courts must understand its purpose."

"In case after case, we find voluntary confessions excluded and convictions reversed in the name of *Miranda*. Moving forward, courts must be more circumspect. We must carefully evaluate the alleged government misconduct, ensure that exclusion will protect against government coercion, and confirm that exclusion will be worth its heavy costs."

"Let us turn now to Freeman's argument on appeal. Freeman claims we must reverse, but not because law enforcement failed to provide thorough and timely warnings. They did. And not because they failed to obtain a waiver. They did. The whole interview is on video. Freeman heard the warnings, discussed them, verbally indicated her waiver, and completed a written waiver. Freeman acknowledges all of this. Yet she argues it was still not enough to satisfy *Miranda* because she is bipolar, and that condition impaired her waiver. But the Fifth Amendment protects against *government compelled* self-incrimination. There is no allegation that law enforcement or any other government actor compelled Freeman's statement. The police officer actually stopped Freeman from making a statement until he could fully explain all of the *Miranda* warnings. When he was done, she took the pen and rights waiver and, as she signed, said, 'I really don't care. I hope she dies.' She then provided a full and frank statement about what occurred. 'The Fifth Amendment privilege is not concerned with moral and psychological pressures to confess ema-

nating from sources other than official coercion.' *Colorado v. Connelly*, (S.Ct.1986) (citing *Oregon v. Elstad*, (S.Ct.1985)). 'Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained.' "

"When we apply the exclusion rubric to Freeman's claim, we see that it fails on the first inquiry. There is no government misconduct. We in turn need not reach any analysis on the benefit and cost prongs. Because Freeman does not allege any improper police conduct, suppression would not serve its purpose. For this reason, the trial court's decision to deny the motion to suppress must be affirmed."

Lessons Learned:

The United States Supreme Court addressed the mental health issue in *Colorado v. Connelly*, (S.Ct.1986). Defendant approached a Denver police officer and stated that he had murdered someone and wanted to talk about it. The officer advised Defendant of his *Miranda* rights, he said he understood those rights but still wanted to talk about the murder. He then openly detailed his story to the police and subsequently pointed out the exact location of the murder. He was held overnight, and the next day he became visibly disoriented during an interview with the public defender's office and was sent to a state hospital for evaluation. Interviews with a psychiatrist revealed that Defendant was following the "voice of God" in confessing to the murder. On the basis of the psychiatrist's testimony that Defendant suffered from a psychosis that interfered with his ability to make free and rational choices and, although not preventing him from understanding his rights, motivated his confession. The trial court suppressed Defendant's initial statements and custodial confession because they were "involuntary," notwithstanding the fact that *the police had done nothing wrong or coercive in securing the confession*. The court also found that Defendant's mental state vitiated his attempted waiver of the right to counsel and the privilege against self-incrimination. The Colorado Supreme Court affirmed, holding that the Federal Constitution required a court to suppress a confession when the Defendant's mental state, at the time he confessed, interfered with his "rational intellect" and his "free will." The court further held that Defendant's mental condition precluded his ability to make a valid waiver of his *Miranda* rights and that the State had not met its burden of proving a waiver by "clear and convincing evidence."

On appeal to the Supreme Court, they disagreed. "Coercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause. Here, the taking of [Defendant's] statements and their admission into evidence constituted no violation of that Clause. While a Defendant's mental condition may be a 'significant' factor in the 'voluntariness' calculus, this does not justify a conclusion that his mental condition, by itself and apart from its relation to *official coercion*, should ever dispose of the inquiry into constitutional 'voluntariness.' "

"Whenever the State bears the burden of proof in a motion to suppress a statement allegedly obtained in violation of the *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence. *Lego v. Twomey*, (S.Ct.1972), Thus, the Colorado Supreme Court erred in applying a 'clear and convincing evidence' standard. That court also erred in its analysis of the question whether [Defendant] had waived his *Miranda* rights. Notions of 'free will' have no place in this area of constitutional law. [Defendant's] perception of coercion flowing from the 'voice of God' is a matter to which the Federal Constitution does not speak."

Further, the court in *State v. Stewart*, (3DCA 1991), noted, "In Florida, diminished mental capacity does not in and of itself affect the admissibility of a confession, absent improper coercive police conduct: 'The defective mental condition of the accused even when clearly established in a timely manner in support of an effort to exclude the statements, *does not by itself render the statements involuntary* within the meaning of the due process clause of the United States Constitution.' See, *Copeland v. Wainwright*, (Fla.1987); see also *Keeton v. State*, (3DCA 1983) (Neither youthful age nor mental weakness, alone, renders any confession involuntary. *Ross v. State*, (Fla.1980)).

"The trial court found that no coercion had been exercised upon the defendant. Accordingly, we reverse the suppression and remand for further proceedings."

Freeman v. State
1st D.C.A.
(Oct. 4, 2023)

"Let me see your I.D."

Roland Edger was a mechanic. One of his long-time clients' Camry vehicle broke down at the Church parking lot. Around 2 p.m., Edger went to the Church to pick up the keys and to inspect the Camry. He determined he would need to come back later with tools to fix the car. That evening, he returned to the Church with his stepson, Justin Nuby, intending to either fix the Camry on-site or take it back to the shop for further repairs. They drove his black hatchback to the Church.

The Church's security guard observed them and grew concerned. He called 911 and told dispatch: "I have two Hispanic males, messing with an employee's car that was left on the lot." About 30 minutes later Officer Krista McCabe arrived.

Officer McCabe's body camera showed, she pulled into the Church parking lot and parked in front of where Edger and Nuby were working. As she stepped out of the squad car, Edger was laying on the ground next to the car, with the Camry's tire removed. Nuby greeted Officer McCabe as she exited her vehicle and approached the Camry. Edger continued to work, and the following conversation began:

Officer McCabe: Alright. Take a break for me real fast and do y'all have driver's license or IDs on you?

Mr. Edger: I ain't going to submit to no ID. Listen, you call the lady right now. Listen I don't have time for this. I don't mean to be rude, or ugly, but ...

Officer McCabe: Are you refusing me—are you refusing to give me your ID or driver's license?

Mr. Edger: I'm telling you that if you will call this lady that owns this car...

Backup Officer seized Edger from behind. He led Edger to the side of the Camry and started handcuffing him. During this time, the video shows that Edger offered his driver's license at least three times before the officers could finish handcuffing him. Throughout this process, *the officers never asked Edger or his stepson for their names or addresses.* Edger was charged with obstructing governmental operations. The prosecutor dropped all charges relating to this incident. Edger sued alleging a false arrest in violation of his Fourth Amendment rights against unlawful searches and seizures, as well as a state law false arrest claim. The trial judge granted the officers qualified immunity. It reasoned that even though Edger committed no acts giving rise to *actual* probable cause, a reasonable but mistaken officer could nonetheless have believed his refusal to produce physical identification was a crime, and the officers thus had *arguable* probable cause to make the arrest. On appeal, that ruling was reversed.

Issue:

Did the officers have a legal basis to detain Edger? **No**. Did the officers' actions constitute a seizure for Fourth Amendment purposes? **Yes**.

Encounter or Seizure?

"During a consensual encounter, a citizen may either voluntarily comply with a police officer's requests or choose to ignore them" and, since the citizen is free to leave during a consensual encounter, no reasonable, articulable, or founded suspicion is required. *Popple v. State*, (Fla. 1993). The courts have recognized that there is no bright-line test for distinguishing a consensual encounter from a stop. Rather, the court's analysis relies on an evaluation of the totality of the circumstances. "A consensual encounter becomes a *Terry* stop 'when an officer makes an official show of authority from which a reasonable person would conclude that he or she is not free to end the encounter and depart.' " *Smith v. State*, (1DCA 2012).

An officer may approach a person on a public street and ask him or her questions and because they are free to ignore the officer and leave that police-citizen contact constitutes a consensual encounter. This has been found to be true even when the suspect is on a bicycle and stops to speak with the officer. See, *State v. Davis*, (3DCA 1989). However, when the officer makes a show of authority such as directing the person to remove his hands from his pockets, or step out of a car, or roll down the vehicle windows, or get off the bicycle and sit on the curb, such show of authority will convert the encounter into a stop protected by the Fourth Amendment. See, *Williams v. State*, (2DCA 1997) (finding officer's instructions to a defendant to pull his waistband of his pants forward converted the consensual encounter into a stop).

A legal basis to support a stop (or an arrest) exists where "a reasonable officer could conclude—considering all of the surrounding circumstances, including the plausibility of the explanation itself—that there was a 'substantial chance of criminal activity.' " *Illinois v. Gates*, (S.Ct.1983). In the false arrest context, *arguable probable cause* exists where 'a reasonable officer, looking at the entire legal landscape at the time of the arrests, could have

interpreted the law as permitting the arrests. Importantly, whether an officer possesses either actual or arguable probable cause "depends on the elements of the alleged crime and the operative fact pattern."

Court's Ruling:

"Applying these principles [probable cause] to this case, Mr. Edger was charged with obstructing governmental operations. A person violates this section if, 'by means of intimidation, physical force or interference or by any other *independently unlawful act*, he..." obstructs a governmental function. Our inquiry therefore asks whether the officers had probable cause to believe Mr. Edger obstructed governmental operations in violation of this statute. If not, our inquiry is whether it was clearly established that there was no probable cause to arrest Mr. Edger for this crime."

"Turning first to the theory that Mr. Edger obstructed the officers by using 'intimidation' or 'physical force.' …The final interaction between Mr. Edger and [both] Officers is depicted from four separate angles on four separate cameras—two body-worn police cameras and two dash cameras. In each video, the Camry slips off the jack, slamming into the ground in front of Mr. Edger. In each, he stands up, slapping his leg, and turns to answer Officer McCabe's questions. Though he is clearly frustrated and gesturing as he speaks, his hands are empty. He stands in one spot without walking towards Officer McCabe. Looking to all the facts within the surrounding circumstances, no reasonable officer could have observed Mr. Edger and concluded he was using 'intimidation' or 'physical force' to 'intentionally obstruct' Officer McCabe's investigation. Accordingly, … there was no probable cause to support Mr. Edger's arrest."

"Second, the defendants argue that Mr. Edger's noncompliance and 'aggressive demeanor' obstructed Officer McCabe's investigation and provided her probable cause to arrest Mr. Edger. But words alone fail to provide culpability under [the] obstruction statute. So, Mr. Edger's statements and noncompliance without more do not begin to support arguable probable cause—much less actual probable cause—for arrest. This theory does not support the grant of qualified immunity to the officers."

"Turning now to the defendant's theory that probable cause existed to support Mr. Edger's arrest because he violated Stop-and-Identify statute. The Stop-and-Identify statute allows a police officer who 'reasonably suspects' a crime is being, has been, or is about to be committed to stop a person in public and 'demand of him his *name, address and an explanation of his actions*.' "

"Mr. Edger argues that he cannot possibly have violated [the statute], because it clearly delineates three things the police may ask him for: his name, his address, and an explanation of his actions. He argues *nothing in the statute requires him to produce physical identification*, and that Officer McCabe's question, 'Do y'all have driver's license or IDs on you?' and repeated references to 'IDs' were clearly demands for him to produce physical identification of some kind. He notes that physical identification is not one of the three enumerated things that the police may ask for under [the] law, and that he was never asked for his name or address. We agree."

"Here, the video evidence is clear that neither Officer asked for Mr. Edger's name or address. Additionally, Mr. Edger's objection was clearly related to the *unlawful demand* that he produce physical identification. ... Because the statute, by its plain text, does not permit the police to demand physical identification, the officers lacked probable cause and thus violated Mr. Edger's Fourth Amendment rights by arresting him."

"Where we part ways with the [trial] court is on the issue of *arguable probable cause* or the 'clearly established law' prong of the qualified immunity analysis. We hold that the plain text of the statute is so clear that no reasonable officer could have interpreted it to permit Mr. Edger's arrest for failing to produce his 'ID' or 'driver's license.' "

"Three related premises lead us to this conclusion. First, the broad background rule is that the police may ask members of the public questions and make consensual requests of them, *Florida v. Bostick*, (S.Ct.1991), 'as long as the police do not convey a message that compliance ... is required.' But the person 'need not answer any question put to him; indeed, he may decline to listen to questions at all and may go on his way.' *Florida v. Royer*, (S.Ct.1983)."

"Second, while the Fourth Amendment permits the police to briefly detain a person to investigate criminal activity, any obligation to answer police questions arises from state—not federal Constitutional—law. Finally, as noted, the statute is clear. It lists only three things that the police may ask about. This is not

an issue of 'magic words' that must be uttered. There is a difference between asking for specific information: 'What is your name? Where do you live?' and demanding a physical license or ID. …Further, neither the parties nor our own research can identify any [state] law that generally requires the public to carry physical identification—much less a [state] law requiring them to produce it upon demand of a police officer. There simply is no state law foundation for Officer McCabe's demand that Mr. Edger produce physical identification."

"In summary, [both] Officers violated Mr. Edger's clearly established Fourth Amendment rights when they arrested him with neither actual, nor arguable, probable cause. Accordingly, we **REVERSE** the [trial] court's grant of qualified immunity to the officers."

Lessons Learned:

In *Popple v. State,* the Florida Supreme Court enunciated three levels of police-citizen encounters: the consensual encounter, investigative "stop," and a seizure a.k.a. arrest. By recognizing the consensual encounter, the court made clear that not every police-citizen encounter invokes the 4th Amendment. An encounter has as its hallmark minimal police contact not involving a seizure. Thus, profiling issues are not implicated. The identifying characteristic of a consensual encounter is that the officer cannot hinder or restrict the person's freedom to leave, or freedom to refuse to answer inquiries.

The United States Supreme Court has stated that law enforcement officers do not violate the Fourth Amendment's prohibition against unreasonable seizures merely by approaching individuals on the street and asking them questions *if they are willing to listen*. *Golphin v. State*, (Fla. 2006). Thus, "It was not unreasonable for the officer to proceed with the computer check when he had not yet eliminated reasonable concern and justified articulable suspicion of criminal conduct." *State v. Baez*, (Fla.2004).

However, the second level encounter – a "stop," does invoke the 4th Amendment. Thus, a "stop" is permissible provided the detention is temporary and reasonable under all the circumstances and providing the officer acts with a "well-founded suspicion" based upon articulable facts. A stop may not be based on a hunch, gut feeling, or bare suspicion. A stop may be based on training, knowledge, and previous experience.

"An officer's introduction of himself, display of identification, and announcement of his law enforcement mission does not convert a consensual encounter into a seizure, even on a bus" (or in an airport). *U.S. v. Drayton*, (S.Ct.2002); *Florida v. Rodriguez*, (Fla.1984)

Implicit in the reasonable person standard is the notion that if a reasonable person would feel free to end the police encounter, but does not, and is not compelled by the police to remain and continue the interaction, then he or she has consented to the encounter. It is on that basis that Golphin's encounter with the Officer, including his act of providing her with his identification, was consensual in nature. *Golphin v. State,* (Fla. 2006).

Consensual encounters are easily escalated into an investigatory stop when the officer's conduct "leads the citizen to believe that he or she is no longer free to leave." The simple use of police vehicle emergency lights has been held to evince a stop rather than an encounter. *Young v. State*, (5DCA 2002). In a consensual encounter, a police officer has the right to approach an individual in public and ask questions or **request** identification without having a founded suspicion of criminal activity; the individual may, but is not required, to cooperate with the police at this stage. *Morrow v. State*, (2DCA 2003).

However, as this case points out, **demanding** the production of a physical I.D. or driver's license would convert a stop into a seizure, requiring probable cause. It should also be noted that Florida's Stop and Frisk statute does not include a lawful demand to see I.D. "...The officer may temporarily detain such person for the purpose of ascertaining the identity of the person temporarily detained and the circumstances surrounding the person's presence abroad…" F.S. 901.151. A demand to produce physical identification is conspicuously absent.

Edger v. McCabe
11th Cir.
(Oct. 10, 2023)

(Continued from page 3)

Force and Dangerous Motorist

'a driver who objectively appears ready to drive into an officer or bystander with his car.'"

"But, as a general matter, an officer may not use deadly force 'once the car moves away, leaving the officer and bystanders in a position of safety.' An officer may, however, continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when 'the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.' "

"Based on the fact that suspect had demonstrated that he either was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around, and based on officer's professional assessment of what can only be described as a 'tense, uncertain, and rapidly evolving' situation, officer's use of deadly force was objectively reasonable."

"In short, while it may be easy for [Estate] to say that each officer was safe once the officer was no longer in the direct path of [the vehicle], no reasonable officer would say that the night's peril had ended at that point. *Suspect remained behind the wheel, other *officers were on the scene, and Suspect had demonstrated a *willingness to injure officers trying to prevent him from fleeing… in his *quest to escape, posed a *continuing risk to the other officers present in the immediate vicinity... "

(*Each factor set forth by the Appellate Court comprises an effective report outline by giving the reviewing court positive factors to consider in their ruling).

Also, an effective argument can be found in *Ryburn v. Huff*, (S.Ct.2012), where the Supreme Court ruled that *precedent forbids Monday morning quarterbacking* of an officer's on scene determination of an imminent threat of personal harm. "Judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the [appeals court] concluded that it was unreasonable for petitioners [officers] to fear that violence was imminent. But we have instructed that reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and that 'the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.' *Graham v. Connor*, (S.Ct.1989). …"

Tousis v. Billiot
7th Cir.
(Oct. 18, 2023)