LEGAL EAGLE

July 2024

Shooting Family Dog

Sylvan Plowright, a resident of Miami-Dade County, called 911 to report someone trespassing in the vacant property near his home. Police officers Rondon and Cordova responded to the call, approaching Plowright's front door "through a dimly lit driveway." As Plowright came out to greet the officers, they drew their guns and "immediately began shouting" at Plowright to show them his hands. When Plowright's dog, "Niles," weighing less than 40 pounds, entered the scene, the officers ordered Plowright to get control of him. Before Plowright did so, Rondon fired his taser at Niles, sending him "into shock." Then, "after the dog was already down from the Taser," Cordova "fired at least two shots from his gun, killing the dog for no reason." The officers then ordered the "emotionally devastated" Plowright to the ground as Niles "lay dying."

Plowright sued in federal court asserting claims for "unreasonable seizure through excessive force" pursuant to 42 U.S.C. § 1983 against Cordova (Count One), intentional infliction of emotional distress against Rondon and Cordova (Counts Two and Three), negligence and negligent training and supervision against the county (Counts Four and Five), and negligent supervision against Miami-Dade Police Chief Alfredo Ramirez (Count Six).

The trial court dismissed Plowright's complaint. Concluding that Cordova was entitled to qualified immunity on the excessive force claim, reasoning that Plowright had failed to cite any "Supreme Court or Eleventh Circuit authority holding that an officer shooting a dog amounts to a constitutional violation." On appeal, the 11th Circuit disagreed and reversed the dismissal order.

Issue:

Is the shooting of the family dog a taking under the Fourth Amendment? **Yes.**

4th Amendment Seizure:

In *Carroll v. County of Monroe*, (2nd Cir. 2013), the Court of Appeals found numerous cases that have held that the unreasonable killing of a "companion animal" constituted an unconstitutional "seizure" of personal property under the Fourth Amendment.

"To determine whether a seizure is unreasonable, a court must 'balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion' and determine whether 'the totality of the circumstances justified [the]

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Dave Aronberg, State Attorney
B. Krischer, Editor

particular sort of ... seizure.' *Tennessee v. Garner*, (S.Ct.1985). We have long held that the plaintiff has the burden to prove that a seizure was unreasonable."

The Court of Appeals went on to find, "There is no dispute that Deputy shooting of the plaintiff's dog was a severe intrusion given the emotional attachment between a dog and an owner. On the other hand, ensuring officer safety and preventing the destruction of evidence are particularly significant governmental interests." Thus, to be constitutionally permissible, an officer's conduct in fatally shooting a pet "must have been reasonable."

As always, in Fourth Amendment cases, a court must be mindful to judge reasonableness "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, (S.Ct.1989) ("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.").

However, "the State's interest in protecting life and property may be implicated when there is reason to believe the pet poses an imminent danger." In such a case, "the State's interest may even justify the extreme intrusion occasioned by the destruction of the pet in the owner's presence." In the present case, the 11th Circuit found no such mitigating factors.

Court's Ruling:

"The Fourth Amendment guarantees 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' A seizure of property 'occurs when there is a meaningful interference with a person's possessory interest' in it. We have never addressed the specific question whether shooting a domestic animal constitutes a seizure under the Fourth Amendment. Now, we join with almost every other Circuit in holding that it does. Two simple steps lead us to this result.

"First, state law defines personal property, and Florida law, like the law of most states, is clear that domestic animals are their owners' personal property. *Barrow v. Holland*, (Fla. 1960). Even as living creatures—and often, beloved members of the family—domestic animals qualify as 'effects' for the purposes of the Fourth Amendment. See *Altman v. City of High Point*, (4th Cir. 2003) (noting that the Supreme Court 'has treated the term 'effects' as being synonymous with personal property').

"Second, shooting a domestic animal undoubtedly interferes with its owner's possessory interests, implicating the same analysis applied to an official's destruction of other forms of property. To be constitutionally permissible, then, Cordova's decision to shoot and kill Niles must have been reasonable."

"Generally, the seizure of personal property without a warrant is *per se* unreasonable. But not all law enforcement scenarios lend themselves to the use of a warrant. As with the practice of brief investigatory stops, 'we deal here with an entire rubric of police conduct ... which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.' *Terry v. Ohio*, (1968). In such circumstances, 'we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' This 'balancing of competing interests' is 'the key principle of the Fourth Amendment,' and it is aimed at one question: 'whether the totality of the circumstances justified a particular sort of ... seizure.' Put differently, *was the seizure more intrusive than necessary*?"

"In the context of pet shootings by police, other Circuits have navigated this question without issue. Balancing pet-owners' strong property interests against the State's own interest in 'protecting [human] life,' most Circuits have acknowledged a 'general principle that a *police officer may justify shooting a dog ... only when it presents an objectively legitimate and imminent threat to him or others*.' Today, we join our sister Circuits in holding that an **officer may not use deadly force against a domestic animal unless that officer reasonably believes that the animal poses an imminent threat to himself or others**. … We conclude that a reasonable officer in Cordova's position would not have believed he was in imminent danger when he shot Niles. Although Niles was barking when the officers approached the residence, and he 'sensed [the officers'] aggressive tone,' he was 'wagging his tail' when Rondon Tased him and was 'incapacitated' by the Taser and 'incapable of harming anyone' when Cordova fired the fatal shots. With these facts, Plowright has plausibly

alleged that Cordova unreasonably seized Niles in violation of the Fourth Amendment."

"Plowright concedes that there is no case in the Supreme Court, this Circuit, or the Supreme Court of Florida with 'indistinguishable facts' establishing that Cordova's actions violated his Fourth Amendment rights. The Supreme Court has made clear, however, that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' …Here, a reasonable officer would have known that it was unlawful to shoot Niles under the circumstances alleged in the complaint—even without caselaw directly on point. Even a cursory reading of [prior cases] reveals that shooting a domestic animal amounts to a seizure, meaning that it is subject to the Fourth Amendment's reasonableness requirement. … Although it is true that a general standard such as 'to act reasonably' will seldom 'put officers on notice that certain conduct will violate federal law' given the 'intensely fact specific' nature of the inquiry, the facts alleged in Plowright's complaint take Cordova's actions 'well beyond the 'hazy border' that sometimes separates lawful conduct from unlawful conduct.' *Evans v. Stephens*, (11th Cir. 2005)."

"Even without these cases, however, Cordova's conduct was 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of [his] conduct' should have been 'readily apparent to [him], notwithstanding the lack of case law.' *Just as 'no reasonable officer could ever believe that it was appropriate" to Tase a compliant, non-threatening bystander at the scene of an arrest, Fils v. City of Aventura, (11th Cir. 2011),* ***no reasonable officer could ever believe that it was appropriate to shoot an incapacitated, non-threatening domestic animal during a 911 investigation***. Although the officers' bodycam footage or other evidence may later introduce facts that take this case outside of the 'narrow' obvious clarity exception, Cordova's conduct as described in Plowright's complaint was 'so bad that case law is not needed to establish that the conduct cannot be lawful.' The constitutional right in question thus was clearly established. Because Plowright's allegations satisfied both requirements of the qualified immunity inquiry, the [trial] court erred in dismissing his § 1983 claim against Cordova. REVERSED."

Lessons Learned:

The key to the court's ruling here can be found in this quote from the Supreme Court: An officer is entitled to qualified immunity, "unless [the] government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." See, *Malley v. Briggs*, (S.Ct.1986).

The unreasonable seizure of a person's property is protected by the Fourth Amendment. Destroying a family dog constitutes a taking and must be reasonable under the totality of the circumstances. A law enforcement operation that is prepared to the point that a no-knock warrant is applied for and granted by the court should include a plan to neutralize known dogs on the premises. If there is no reasonable approach, then the fact that the issue was considered should be recorded in the Ops plan or police report.

In *Carroll v. County of Monroe*, (2nd Cir. 2013), the Court concluded with this admonition, "As a cautionary note, however, we do not mean to endorse the [County's] apparent position that the failure to plan for the known presence of a dog is always acceptable when the police are executing a no-knock warrant. There may very well be circumstances under which a plaintiff could prove that lack of an adequate plan rendered the shooting of his or her dog unreasonable even during execution of a no-knock warrant, and we urge the [County] to consider whether more comprehensive training and planning would better serve the public, as well as its officers, in the future."

A dog owner's protected property interest wanes if her pet escapes. "While we do not denigrate the possessory interest a dog owner has in [her] pet, we do conclude that **dog owners forfeit many of these possessory interests when they allow their dogs to run at large, unleashed, uncontrolled, and unsupervised**, for at that point the dog ceases to become simply a personal effect and takes on the nature of a public nuisance." *Hansen v. Black*, (8th Cir. 2017).

Plowright v. Miami Dade County
U. S. Court of Appeals, 11th Cir.
(June 5, 2024)

Recent Case Law

"Exit the Vehicle, Please"

Officer Diaz, a plain-clothes, undercover officer was surveilling an area known for illegal narcotics activity. While doing so, he observed Joshua Creller commit a traffic infraction, he cut through a parking lot of a gas station to avoid a red light. Diaz followed Creller's truck for several blocks. He radioed for a marked car with sirens and lights to initiate the stop.

After the traffic stop, Officer Diaz and the uniformed officer approached Creller to speak with him. Fairly quickly into their encounter, Officer Diaz asked Creller if he could search the vehicle. Creller said no, at which point Officer Diaz called for a K-9 unit. Officer Diaz also called for another backup officer to write the traffic citation because he did not have the citation software on his computer. Officer Norman responded to the call. He was tasked with preparing Creller's traffic citation.

While Officer Norman was preparing the traffic citation K-9 Officer Simmonds responded to Officer Diaz's call. After identifying himself, Officer Simmonds asked Creller if he had anything illegal in his possession. Creller said no. He then asked Creller for permission to search the vehicle and Creller, again, said no. At that point, he told Creller, "I need you to exit the vehicle for my safety. You're going to stand on the side of the sidewalk while I get my dog to do a narcotic sweep ...."

Creller refused to exit the vehicle. He was warned that continued refusal could result in his arrest for obstruction. After a final warning, Creller, now argumentative and continuing to refuse to come out of the vehicle, was forcefully removed. Officer Norman, who was still in the process of preparing the citation, observed the struggle at Creller's door and left his computer to assist the other officers. Creller was subsequently charged with resisting without violence and possession of methamphetamine, the latter of which was discovered during a search of his person when he was removed from his car.

The Defendant's motion to suppress evidence was denied by the trial court, finding that the K-9 officer lawfully ordered him from the vehicle. His conviction, however, was reversed by the 2nd D.C.A. That ruling was in conflict with *State v. Benjamin*, (5DCA 2017). The conflict was certified to the Florida Supreme Court which reversed the 2nd D.C.A.'s ruling.

Issue:

The issue here is whether the well-settled rule, that once a driver has been lawfully stopped for a traffic violation, police officers may order the driver out of the vehicle for officer safety reasons, applies to a K-9 officer who arrives midway through a lawful traffic stop to perform a dog sniff sweep of a vehicle's exterior. The Florida Supreme Court ruled that the K-9 officer's order to the Defendant to exit the vehicle was lawful and not in violation of the Fourth Amendment.

Pennsylvania v. Mimms:

In Pennsylvania v. *Mimms*, (S.Ct.1977), the United States Supreme Court held that an exit command given by an officer *during a lawful traffic stop* is not unusually harmful to an individual's privacy; it is, instead, a "mere inconvenience" because the driver is lawfully detained whether inside the car or out. *Mimms* involved a traffic officer who had no particular suspicion about the driver's behavior but had a practice of asking drivers to exit their vehicles as a "precautionary measure to afford a degree of protection to the officer." Balancing the officer's safety against the driver's privacy interests, the Supreme Court found it "too plain for argument" that officer safety "is both legitimate and weighty." The Supreme Court explained that "we have specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile," including the risk of being assaulted or shot, as well as the "hazard of accidental injury from passing traffic." On the other hand, any intrusion into the driver's privacy is *de minimis* and a "mere inconvenience" given that the driver is already lawfully detained whether inside the car or out.

Maryland v. Wilson, (S.Ct.1997), later established that *Mimms*' holding was a "bright line" rule. *Mimms* was extended by *Wilson*, to permit officers to also

command vehicle **passengers** to exit during a lawful traffic stop. The Supreme Court reasoned in *Wilson* that "the motivation of a passenger to employ violence to prevent apprehension of [a more serious] crime is every bit as great as that of the driver."

Dog Sniff Sweeps Under *Caballes* and *Rodriguez*:

In *Illinois v. Caballes*, (2005), the Supreme Court held that a dog sniff sweep could be conducted *during* a lawful traffic stop without offending the Fourth Amendment. The Supreme Court explained that a dog sniff sweep's potential to sniff out drugs in the vehicle is not even a search under the Fourth Amendment because it affects no constitutionally protected interest in the driver's privacy. However, the Court limited its ruling in *Rodriguez v. United States*, (2015), where they held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez* characterized the dog sniff sweep performed *after* the issuance of the traffic citation as a separate investigation unrelated to the primary "mission" of the traffic stop.

For these reasons, "a seizure justified only by a police-observed traffic violation ... 'becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission' of issuing a ticket for the violation."

Court's Ruling:

"We first examine the specific United States Supreme Court precedent at issue here: the officer safety rule under *Mimms* and *Wilson*, followed by the dog sweep rule under *Rodriguez*'s predecessor, *Illinois v. Caballes*, (2005), and *Rodriguez*. From our examination of these cases, we conclude that *Creller* misreads *Rodriguez*—which does not modify, much less address the officer safety rule in *Mimms*—to hold that the officer safety rule only applies to officers completing the mission of the traffic stop. We also conclude that *Rodriguez* does not apply **because the K-9 officer here attempted a sweep *during* a lawful traffic stop, not after.** We therefore agree with *Benjamin* that *Mimms* applies, and we conclude that **a K-9 officer may order a driver to exit a vehicle *during* a lawful traffic stop for officer safety reasons.** Accordingly, we quash *Creller* and approve *Benjamin*."

"*Rodriguez* centered on a traffic stop that was prolonged for a dog sniff sweep *after* the citation had been issued. This observation leads us to two conclusions for purposes of our analysis here. First, *Rodriguez* does not apply to this case. In this case, the attempted sweep occurred *during* a lawful traffic stop, not *after* a traffic citation was issued. … Second, *Mimms* does apply, and it permits a K-9 officer attempting a sweep *during* a lawful traffic stop to issue an exit command for officer safety. The exit command still only causes a *de minimis* intrusion to the driver during a stop, while the K-9 officer's safety far outweighs the driver's interest in his location during a lawful traffic stop: in his car or out.

"Further, the potential for detecting criminal activity places a K-9 officer at an even greater risk of danger. *See Wilson*, ('It would seem that the possibility of a violent encounter stems not from the ordinary reaction of a motorist stopped for a speeding violation, but from the fact that evidence of a more serious crime might be uncovered during the stop.'). And as a practical matter, it makes little sense why *Mimms* would not apply to a K-9 officer, because a K-9 officer may be the officer initiating the stop."

"There is no question here that Creller was lawfully stopped, or that Officer Simmonds' attempted sweep did not prolong the stop. When Officer Simmonds arrived on scene, Officer Norman was still writing the ticket. Officer Simmonds issued an exit command to Creller several times, repeatedly explaining that it was for the safety of himself and his dog. The fact that Creller was still in control of his vehicle made the situation more dangerous to Officer Simmonds and his dog. Because the weighty interests in protecting the K-9 unit during this lawful traffic stop outweighed the *de minimis* temporary interference with Creller's interest in remaining inside his vehicle, Officer Simmonds' exit command to Creller was reasonable under *Mimms*. Officer Simmonds gave that command midway through the lawful traffic stop, and his doing so did not convert the stop into a narcotics investigation, even though narcotics were discovered."

"Based on the foregoing, we quash the Second District's decision in *Creller* and approve the Fifth District's decision in *Benjamin*. We hold that binding Fourth Amendment precedent permits a K-9 officer arriving midway through a lawful traffic stop to command the driver to exit the vehicle for officer safety before conducting a lawful vehicle sweep."

Lessons Learned:

When the driver refuses to exit his vehicle case law permits reasonable force to achieve that end. "In this case, the videotape shows that Clark was told to step out of his car no fewer than 21 times, giving him more than ample opportunity in which to do so. His continued refusal to comply with the police officer's lawful order necessitated the breaking of the car window and his forcible removal from the car. This action by the police officers was not unreasonable under the circumstances. Clark has failed to show a constitutional violation in this regard."

"The videotape shows that even after the window in his car was broken out, Clark continued to resist removal from his vehicle. As noted above, the officers were entitled to use reasonable force to secure compliance with the lawful order to exit the vehicle. Under these circumstances, the threat to use the Taser was not unreasonable, particularly in light of the fact that it was not actually used. See, *Draper v. Reynolds*, (11th Cir.2004) (use of Taser to effect compliance with orders in the course of a traffic stop not unreasonable). Clark has failed to show a constitutional violation in this regard and his claim on this point is without merit." *Clark v. Rusk Police Department*, U.S. District Court – Tyler Texas (2008).

Before a driver is forcibly removed from his vehicle, department policy may require that a Road Sergeant be called to the scene to assess the situation and provide direction.

State v. Creller
Florida Supreme Court,
(May 23, 2024)

Animal Abuse

Candace Moore and her estranged husband, Michael Moore (Michael), lived on property owned by her family. Moore was disabled and lived in the residence, while Michael lived in a trailer on the property. Michael was wanted on an arrest warrant. When officers arrived to execute the warrant, they discovered four dogs in outside enclosures on the property and one in the trailer in a small crate, some with no water or food.

Animal Control was called to assist. The Animal Control officer found that the dogs in the outside enclosures to be in good condition but found their enclosures were either too small for the dogs or did not provide adequate exchange of air and/or room to exercise. Further, most enclosures were without dishes of food or water, or their dishes were empty.

Moore advised the officer that Michael was in charge of the outside dogs, and she was in charge of the inside dogs, which were found to be in good shape and circumstances. Despite being advised, the officer charged both Moore and Michael because she did not know who had custody or responsibility for the dogs. As the animal Control officer testified, it was one or the other. She did not know who had put the dogs in the various outside enclosures which she found objectionable. Because the dogs were in the yard behind the house, the officer thought Moore had access to the dogs and could have removed them if she felt it was unsafe.

At trial, the State argued that Moore was on the property and was aware of the dogs in the cages, even if she did not put them in the cages. Therefore, she could be liable for knowingly confining the dogs. The trial court denied the motion for acquittal. On appeal, that ruling was reversed.

Issue:

Did the State present sufficient evidence that Moore was the person who confined the animals or had responsibility for their care? **No**.

Animal Cruelty:

Interestingly, two statutes are germane here, F.S. 828.12, and 828.13. The former provides: "A person who unnecessarily …, deprives of necessary sustenance or shelter, …or causes the same to be done, … commits animal cruelty, a misdemeanor of the first degree,…"

Section 828.13 reads, "Confinement of animals without sufficient food, water, or exercise; abandonment of animals. 1. As used in this section:

(a) "Abandon" means to forsake an animal entirely or to neglect or refuse to provide or perform the legal obligations for care and support of an animal by its owner.

(b) **"Owner" includes any owner, custodian, or other person in charge of an animal**.

2. *Whoever:*

(a) Impounds or confines any animal in any place and fails to supply the animal during such confinement with a sufficient quantity of good and wholesome food and water,

(b) Keeps any animals in any enclosure without wholesome exercise and change of air, … is guilty of a misdemeanor of the first degree.

3. Any person who is the owner or possessor, or has charge or custody, of any animal who abandons such animal to suffer injury or

malnutrition … without providing for the care, sustenance, protection, and shelter of such animal is guilty of a misdemeanor of the first degree"

Thus, in the present case the person subject to charges for violating the statute is the **owner, custodian, or other person in charge of an animal**. The State charged Moore because she was present and aware of the mistreatment. However, the trial testimony reflected the Defendant's son was living with his mother and taking care of her because of her disabilities. He knew the dogs were on the property, but he did not go into the backyard where they were because Michael was very aggressive. The son testified that Michael was very controlling of his dogs and *neither he nor his mother had any responsibility for taking care of the outside dogs*.

Moore also testified that Michael was a very controlling and aggressive person, both with his dogs and with her, and Michael was the one who put the dogs in their enclosures. She tried to get Michael to put the dogs in larger cages, but he refused. Thus, the charged statute was inapplicable to the Defendant. The D.C.A. so ruled on appeal.

In a prosecution for the mistreatment of or cruelty to an animal, the State has the burden of proving all facts essential to conviction. The State must prove that the accused had the intent to commit the crime of animal cruelty and had performed some act towards the commission of that crime beyond mere preparation. The statute does not require that intent nor malice be proven as they are not elements of the offense.
In a cruelty to animals prosecution, the State is not required to present evidence about the cause of the dog's death, and the defendant can be found guilty of cruelty to animals even absent expert testimony from a veterinarian. Moreover, whether an animal has suffered unjustifiably due to dehydration or starvation is a matter of ordinary experience that the jury can determine without the aid of expert testimony in an animal cruelty case. See, *Hamilton v. State*, (4DCA 2013).

Court's Ruling:

"The statute punishes 'whoever' 'confines,' 'impounds,' or 'keeps' the animals. 'Whoever' is defined as 'whatever person.' Thus, one who 'impounds' or 'confines' any animal and 'fails to supply the animal during such confinement with a sufficient quantity of good and wholesome food and water,' or 'keeps' any animal 'in any enclosure without wholesome exercise and change of air,' is guilty of a misdemeanor. The statutory language does not support the State's theory that *simply knowing* that an animal is so confined or kept violates the statute. *The statute requires one's participation in the confining or keeping of an animal in an enclosure in violation of the statute, and the State showed neither in this case*.

Moreover, there is no evidence that the outside dogs were even owned by [Defendant] or that she had any possessory interest or power over them such that she could have had any participation in the manner in which they were confined or kept. The evidence was undisputed that Michael was responsible for their care. The evidence showed that [Defendant] did not participate in confining or keeping the dogs in the enclosures in violation of the statute."

"The State conflated *her knowledge that they were kept in the crates to knowingly confining them* there. In fact, the prosecutor argued in closing, 'Ms. Moore did say she knew it was wrong for these dogs to be in these cages, but she did nothing about it.' When defense counsel objected that this was a misstatement of the law, which the court overruled, the prosecutor continued: 'Correct, *she wasn't legally obligated to do so, except she was because this was not okay*.... Ms. Moore should have done something about it.' This misstatement of the law would punish [Defendant] **not for confining the dogs but for failing to rescue them,** when the State failed to prove that she had any participation in the manner in which they were confined or kept. The mere fact that they were on her property is insufficient to show that it was *she* who confined or kept them in the enclosures in violation of the statute."

"This is not to say that the State could not charge a person as a principal in violating the statute, if it could show that the person 'abets, counsels, hires, or otherwise procures such offense to be committed.' *See* § 777.011, F.S. Here, the State did not charge [Defendant] as a principal or prove that she acted as a principal to the crime. To the contrary, the [Defendant] stated that she had asked Michael, who was in charge of the dogs, to treat the dogs better, and he refused."

"Consequently, the court should have granted a judgment of acquittal, as the State failed to prove that [Defendant] confined or impounded the dogs in violation of the statute. We reverse, and vacate the

convictions."

Lessons Learned:

The D.C.A. suggested the State may have charged the Defendant as a principal. That probably would not have worked here. Florida Statute 777.011 Principal in first degree provides: "Whoever commits any criminal offense against the State, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense."

Thus, a defendant can be held liable for acts performed by another if the proof at trial sustains the fact finder's view that the **Defendant intended the criminal act to be done, coupled with some act or work to incite, cause, encourage, assist or advise the other to commit the crime helped another person or persons commit a crime.** In that instance, the defendant is considered a principal and must be treated as if he had done all the things the other person or persons did. The present case evidence was to the contrary.

"In order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed and do some act to assist the other person in actually committing the crime." Moreover, "one who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime." *Lovette v. State*, (Fla.1994).

"Importantly, this court has stressed that 'mere knowledge that an offense is being committed, mere presence at the scene, and even a display of questionable behavior after the fact, are not, alone, sufficient to establish participation.'" *T.W. v. State*, (4DCA 2012).

A person cannot be convicted under the principal theory where the evidence does not exclude the reasonable inference that the Defendant had no knowledge of the crime until it actually occurred, and thus that he did not intend to assist in its commission.

The case law is clear that the guilt of an aider or abettor can be established by circumstantial evidence; however, that evidence must be both consistent with guilt and inconsistent with any reasonable hypothesis of innocence. *Williams v. State*, (4DCA 1968); *Davis v. State*, (Fla.1956).

Moore v. State
4th D.C.A.
(June 5, 2024)

Criminal Mischief

Eighty-six-year-old Alvaro Silva abruptly changed lanes, cutting off Jose Martin, a seventy-year-old, in traffic. Martin pursued Silva. Silva arrived at his destination and parked on the roadway. He then obscenely gestured Martin's female passenger. Martin exited his vehicle, rebuked Silva, and indicated he would defile Silva's mother. This prompted Silva to remove a golf club from his vehicle's trunk and swing the club at Martin. Martin attempted to retreat, but his efforts were hampered by an old leg injury. Silva continued to swing the club and struck the hood of Martin's car several times, only stopping when bystanders restrained him. He was subsequently charged with one count of misdemeanor criminal mischief. The case proceeded to a non-jury trial.

The State presented two eyewitnesses. The first, Martin, testified that Silva "pulled out a golf club and started swinging at me." Silva struck the vehicle because "he didn't have good aim." The second witness, Martin's passenger, recounted similar events. When asked whether "Mr. Silva was swinging at any particular object," she stated he struck the vehicle when "he was trying to hit Martin." She then confirmed that *Silva struck the vehicle multiple times*.

Lastly, Silva testified in his own defense. He contended that the altercation began because Martin punched him. Silva explained he then ran after Martin, swung the club, and "missed and ... hit his car." When pressed for further details, he stated: "I swung my club. I did not hit Martin, but I hit his car."

The trial court found Silva guilty, as charged. On appeal, the conviction was affirmed.

Issue:

Did the Defendant's actions demonstrate a willful and malicious intent to cause damage to the vehicle? **Yes**.

Elements of Criminal Mischief:

Sec. 806.13, F.S., criminal mischief is defined as the willful and malicious causing of injury or damage, by any means, to any real or personal property belonging to another person. The Florida Jury Instructions make clear that to prove the crime the State must establish the following three elements beyond a reasonable doubt:

1. The defendant injured or damaged property (real or personal);

2. the property injured or damaged by the defendant belonged to the named victim; 3. the injury or damage was done *willfully and maliciously*.

The term "willfully" means intentionally, knowingly, and purposely. "Maliciously" means wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage may be caused to another person or the property of another person.

Of critical importance is whether the crime requires a specific intent to cause injury, or merely a "general intent." Under the latter, there is no requirement that the act in question be done with the specific objective of injuring or damaging property. However, in the Second, Fourth, and Fifth, District Courts of Appeals, criminal mischief is considered a "specific intent" crime, requiring that the State prove that the Defendant acted purposefully to damage or destroy the property of another. See, *In the Interest of J.G.*, (4DCA 1995) (ruling that the offense of criminal mischief requires that the actor possess the specific intent to damage the property of another). Thus, *regardless of the intent required, the willful and malicious acts of the Defendant must nevertheless be directed to the person's property, as opposed to the person of the victim*.

Lastly, injury or damage to property is a required element of criminal mischief. The charge will be dismissed where there is no evidence of damage to the property at issue. *C.B. v. State*, (3DCA 1998). See also, *J.R.S. v. State*, (1DCA 1990) ("Damage to the property of another is an essential element of the offense of criminal mischief"); *Valdes v. State*, (3DCA 1987) (same).

Though not an issue in the present case, in felony prosecutions for criminal mischief, the State must not only show that the Defendant's acts resulted in property damage but also prove beyond a reasonable doubt that such damage exceeded $1,000. *Marrero v. State*, (Fla.2011).

Court's Ruling:

"This appeal centers around the scienter requirement of the offense of criminal mischief. Silva contends the State failed to prove the essential element of intent. Having carefully reviewed the evidence of record, we are not so persuaded."

"Under Florida law, 'a person commits the offense of criminal mischief if he or she willfully and maliciously injures or damages by any means any real or personal property belonging to another, including, but not limited to, the placement of graffiti thereon or other acts of vandalism thereto."

"§ 806.13(1)(a), F.S. Criminal mischief is a general intent crime. See, *M.H. v. State*, (3DCA 2006); *Walker v. State*, (3DCA 2014). Nonetheless, the State must prove, at a minimum, 'the injury or damage was done willfully and maliciously.' Fla. Std. Jury Instr."

"The term 'willfully' is defined under the Florida Standard Jury Instructions for Criminal Cases as 'intentionally, knowingly, and purposely.' The word 'maliciously,' in turn, is defined as 'wrongfully, intentionally, without legal justification or excuse, and with the knowledge that injury or damage will or may be caused to another person or the property of another person.' "

"Consistent with the definitional common denominator of intentionality, this court and others have refused to apply the doctrine of transferred intent to satisfy scienter in this context. Instead, the courts of this State have uniformly determined that 'an intent to damage the property of another does not arise by operation of law where the defendant's true intention is to cause harm to the person of another.' *Stinnett v. State*, (2DCA 2006) (citing *In re J.G.*, (4DCA 1995)); … see also, *Walker*, ('The criminal mischief statute requires that when a defendant acts with malice toward another person, rather than toward property, that malice does not transfer to the property.')."

"Discerning criminal intent is often fraught with difficulty. In many instances, it 'cannot be ascertained by direct proof, but must be inferred from the surrounding circumstances.' *Mosher v. State*, (3DCA 2000). Consequently, the state of mind of the defendant is most often relegated to the jury for a conclusive factual determination."

"Such fact finding is subject to established guiding principles. For example, intent may be inferred from a volitional act that is substantially certain to result in a particular injury. See, *State v. Oxx*, (5DCA 1982) ('Proof of an act does raise a presumption that it was knowingly and intentionally done.'). Similarly, the Florida Supreme Court has found that intent may be 'presumed from the doing of the prohibited act.' *State v. Medlin*, (Fla. 1973)."

"Here, Silva persuasively argues that he first struck the vehicle while unsuccessfully attempting to

hit Martin. Given the collective testimony, we agree that the first blow may well have been purposed to cause bodily injury. But that does not end our analysis. Silva engaged in multiple volitional acts, striking the vehicle three times. Because the first swing made contact, it was reasonable for the trial court to infer that Silva intended to achieve the same result with each successive swing."

"Further supporting this inference is the fact *that Silva continued to strike the same area of the vehicle even though Martin retreated after the first swing*. Given that intent is rarely susceptible to direct proof and, instead, 'almost always shown solely by circumstantial evidence,' we conclude the evidence sufficiently constituted competent, substantial evidence of the disputed element, and we affirm in all respects."

Lessons Learned:

It is clear that the ruling in the present case was founded on the Defendant's willful act of hammering on the hood of the vehicle after he missed striking his intended target, Jose Martin. Thus, the investigation needs to answer the question, did the damage result from the conduct of the accused? And if so, was the act that caused the damage willful, or did it occur in the midst of an altercation, and was accidental? In other words, was the Defendant's malicious act directed at the victim's person or his property?

Lastly, the evidence in preparation for the State's filing of the appropriate charge needs to include the value of the damage and the individual who can testify to that matter. Damage of $200. or less Is a second-degree misdemeanor, punishable by up to 60 days in jail and a $500 fine. More than $200. but less than $1,000. Is a first-degree misdemeanor, punishable by up to 364 days in jail and a $1,000 fine. And $1,000. or more is a third-degree felony, punishable by up to 5 years in prison and a $5,000 fine. Disputes over the value of the property or the cost of repairs can significantly impact the outcome of a case.

Silva v. State
3rd D.C.A.
(May 8, 2024

Baker Act Detention

Lonnie Hollingsworth made a 911 call. Claiming an "emergency," he told the dispatcher to relay a message to Marion County Sheriff Billy Woods that, when "God can put [him] in a position to do it," Hollingsworth was "going to unload a whole fucking clip in his fucking face, in his whole fucking cranium in front of all his employees and his bosses."

Officer Robert Crossman was dispatched to a RaceTrac gas station to address the threatening 911 call. When Crossman arrived, Hollingsworth was outside livestreaming the events on his cell phone and "ranting" about the 2013 incident. Stating that he had unsettled business, he demanded the "sheriff's department to come out in full force" and to "bring all your boys," including "helicopters and everybody," with "them guns drawn." He said he had "already died before" and "didn't care."

Officer Shelby Prather arrived with her field trainee, Officer Branden McCoy and took over primary responsibility. The officers questioned Hollingsworth further about the 911 call and the 2013 incident. Hollingsworth was generally calm, cooperative, and responsive during the encounter, but his "behavior was pretty erratic and obsessive about ... the incident that occurred back in 2013," according to Prather.

When they made these observations, though, the officers had not yet listened to Hollingsworth's 911 call, which Prather believed was relevant to the investigation. As a result, Hollingsworth was detained outside the RaceTrac for approximately 45 minutes while Howie obtained a recording of the call. After listening to the recording, Prather notified Hollingsworth that he would be detained and transported for examination under the Baker Act.

Hollingsworth was handcuffed and searched. He asked the officers to collect his backpack by the RaceTrac. Officer retrieved the backpack and searched it, finding a single 9mm bullet, which Hollingsworth later described as his "lucky bullet." Because he was a convicted felon, he was taken to jail for unlawful possession of ammunition, rather than to a mental-health facility for evaluation. He later filed a motion to suppress the evidence, which was denied. On appeal that ruling was affirmed.

Issue:

Was the search of Defendant's backpack while he was being placed into protective custody pursuant to the Baker Act in violation of his Fourth Amendment rights? **No.**

Baker Act:

The Baker Act, sections 394.451 through 394.4789, F.S., provides for the voluntarily and involuntary commitment of people suffering from mental illness. "Law enforcement

officer shall take a person who appears to meet the criteria for involuntary examination into custody and deliver the person or have him or her delivered to the nearest receiving facility for examination."

The seizure of a person meeting the criteria for the Baker Act is lawful. From a constitutional standpoint a Baker Act seizure would be an exigent circumstance where warrantless seizure is permissible.

"For Plaintiff to be detained lawfully under the Baker Act, probable cause must have existed -- evidenced by Plaintiff's recent behavior -- to believe that a 'substantial likelihood' existed that Plaintiff would cause 'serious bodily harm' to himself or to others in the near future. This standard is a high one: for example, a reasonable belief about 'some likelihood,' 'might cause' 'some kind of bodily harm,' 'at some point in the future' is not good enough for probable cause to deprive a person of their freedom. *Watkins v. Bigwood*, (11th Cir. 2019)."

"The Florida Supreme Court held in *Lukehart v. State*, (Fla.2000), that the officers did not need to have probable cause to detain the defendant under the Baker Act because he was not being arrested 'for purposes of the Fourth Amendment.' The court also noted that there was no evidence that the officers had violated 'local policy governing the Baker Act.' However, the court held that, even if there had been evidence of a violation of local policy, suppression of the evidence or statements would not have been warranted because the exclusionary rule does not apply to violations of section 394.463, Florida Statutes, 'unless a constitutional violation has also occurred.' "

"We have found no case where the facts indicate that a person was taken into protective custody pursuant to the Baker Act without the officer first having had a *face-to-face encounter* with the person and then making the decision to take the person into protective custody. Moreover, the facts of the cases supporting protective custody under the Baker Act are all more compelling and egregious than the facts of this case." See, *State v. Garcia*, Fla2022).

The 4th D.C.A. in *Collins v. State*, (4DCA 2013), ruled: "Here, officers decided to take [defendant] into custody under the Baker Act after his family and neighbors expressed concern that he might be a threat because of his unwavering belief that his neighbors had kidnapped and murdered his child. Both officers testified that local policy requires them to conduct a search before transporting a person to a mental health receiving and treatment facility. Under the facts and circumstances of this case, where the officers were concerned for [defendant's] safety and the safety of others, and acted pursuant to a reasonable local police policy, the trial court was entitled to conclude that the officers' actions were reasonable and that the officers were acting in good faith. We therefore affirm the trial court's denial of the motion to suppress."

Court's Ruling:

"The question here is whether there was probable cause to take Hollingsworth into custody under Florida's Baker Act, the only justification offered for the seizure. …Florida's Baker Act permits police officers to take a 'person who appears to meet the criteria for involuntary examination into custody' and deliver the person to a mental-health facility. The criteria provide, as relevant here, that there must be 'reason to believe' the following: 1. the 'person has a mental illness;' 2. he has refused a voluntary examination or is unable to make that decision for himself; and 3. 'there is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.' "

"Relevant recent behavior may include 'causing, attempting, or threatening to do [serious bodily] harm.' That an individual might need treatment for a mental illness alone is insufficient to justify involuntary commitment. *Williams v. State*, (1DCA 1988). So too are 'vague notions about what a person might do—for example, a belief about some likelihood that without treatment a person might cause some type of harm at some point.' "

"Here, the [trial] court did not err in denying Hollingsworth's motion to suppress. The record shows that Hollingsworth made a 911 call threatening 'to unload a whole ... clip in [Sheriff Woods's] ... face, in his whole ... cranium in front of all his employees and his bosses.' Then, once the officers arrived, Hollingsworth was fixated on the alleged injustice he suffered in 2013 and the alleged culpability of the Sheriff's Office. And he repeatedly sought to provoke a confrontation with Sheriff Woods and 'all [his] boys' with 'them guns drawn,' stating that he 'didn't care' about the consequences because he had already died before."

"Given this recent behavior,

which included threatening to do serious bodily harm to Sheriff Woods and then being 'erratic and obsessive' about meeting the sheriff to settle an old score, probable cause existed to believe that Hollingsworth had a mental illness and that there was a 'substantial likelihood that without care or treatment [he] [would] cause serious bodily harm to ... others in the near future.' *Paez v. Mulvey*, (11th Cir. 2019) (explaining that 'probable cause is not a high bar' and does not require 'convincing proof.' Because that recent behavior properly grounded the officers' Baker Act assessment, we need not consider whether it was reasonable for the officers to rely on the criminal history Hollingsworth disclosed."

"Hollingsworth suggests it was unreasonable for the officers to detain him 'outside in the sun without water' for 45 minutes so they could listen to a recording of the 911 call. But he made no distinct claim that he was subject to an unlawful investigatory detention while the officers obtained the recording, nor would he prevail on such a claim if he had. *See e.g.*, *Illinois v. Wardlow*, (S.Ct.2000) ('An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.'). The recording was relevant to the investigation of the 911 call, which the officers believed contained threats against a local public official. And there is no evidence that Hollingsworth, though not free to leave, was detained longer or under more severe conditions than necessary to obtain the 911 call recording. *See United States v. Gil*, (11th Cir. 2000) (investigatory stops must be 'reasonably related in scope to the circumstances which justified the interference in the first place'). For these reasons, we affirm the denial of Hollingsworth's motion to suppress. AFFIRMED."

Lessons Learned:

In a footnote, the 11th Circuit explained, "Hollingsworth also challenges whether there was reason to believe he either had refused a voluntary examination or was unable to make that decision for himself. See Fla. Stat. § 394.463(1)(a). But he does not identify any authority applying this requirement to invalidate a Baker Act seizure. Nor would its absence result in a Fourth Amendment violation in this case. Because we have concluded that Hollingsworth's seizure was supported by probable cause to believe he was *dangerous to others*, it follows that the seizure was reasonable under the Fourth Amendment, notwithstanding that a defect under State law may or may not exist. *Ingram v. Kubik*, (11th Cir. 2022) ('Mental-health seizures are reasonable under the Fourth Amendment when the officer has probable cause to believe that the seized person is a danger to himself or to others.'); see also *Virginia v. Moore*, (S.Ct.2008) (holding that an officer's violation of State law arrest rules did not render an arrest unconstitutional because 'it is not the province of the Fourth Amendment to enforce State law')."

United States v. Hollingsworth
U.S. Court of Appeals, 11th Cir.
(Feb. 4, 2023)