LEGAL EAGLE

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In this issue:

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Pretext Stop

Deputy Scanlon noticed Tony Hall parked at a convenience store and observed the window tint on Hall's car was excessive. As he watched, a female approached Hall and engaged in what Deputy Scanlon believed was a hand-to-hand drug transaction, although the Deputy did not actually see any objects change hands. Deputy initiated a traffic stop. Upon approaching Hall, Deputy smelled marijuana both on Hall's person and coming from Hall's vehicle. A warrantless search of Hall's car uncovered a firearm and narcotics. Hall was charged with possession of a firearm by a convicted felon, possession of cocaine, and resisting an officer without violence.

Hall moved to suppress the items recovered in the search. The trial court rejected Deputy Scanlon's testimony that he had probable cause for the stop because of the dark window tint. Instead, the trial court concluded that Deputy was impermissibly motivated by his suspicion or "hunch" that he had observed a drug transaction. Hall's motion was granted. On appeal that ruling was reversed.

Issue:

Was the Deputy's assessment that the window tint was excessive subject to challenge as a pretext for the stop? **No**.

Whren v. United States:

The 6th Circuit previously ruled in *State v. Hickman*, (2023), that the trial court erred by relying on the officer's subjective intent in effecting the stop. "The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures. See, *Golphin v. State*, (Fla. 2006). A traffic stop is a seizure. See, *Whren v. United States*, (S.Ct.1996). This type of seizure is considered reasonable, though, under the Fourth Amendment where an officer has probable cause to believe a traffic violation has occurred."

Stated differently, *the officer's subjective motivation* for speaking to [driver] is irrelevant to the determination of whether the stop was reasonable. "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." See *Whren.* "In determining whether the suppression order in the instant case should be reversed, we are constrained to review the record under the objective test of *Whren*. When applying the objective test, generally the only determination to be made is whether probable cause existed for the stop in question." See *Holland v. State*, (Fla.1997).

The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment's prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective. In *Holland v. State*, the Florida Supreme Court found *Whren* binding on Florida courts and overruled *State v. Daniel*, (Fla.1995) that created the "reasonable officer" test.

Court's Ruling:

"A law enforcement officer's subjective intent in stopping a driver is irrelevant to the determination of whether probable cause existed to support the stop. Thus, when addressing the constitutional validity of a traffic stop, Florida courts employ a 'strict objective test which asks only whether any probable cause for the [traffic] stop existed.' See, *Whren v. United States*, (1996) (holding that *constitutional reasonableness of traffic stop is not dependent on officer's motivation, but rather on whether, under strictly objective test, probable cause for stop existed*). The applicable objective test asks only whether probable cause existed at the time of the stop and here, that answer is clearly 'yes.' "

"The apparent window tint violation alone provided probable cause for the stop because excessive window tint is a non-criminal traffic violation, and the violation of a traffic law provides probable cause for a stop. See, *Vaughn v. State*, (1DCA 2015) (holding stop was valid where vehicle window tint appeared too dark); *State v. Sarria*, (4DCA 2012) (holding officer had probable cause to stop the vehicle for the non-criminal traffic violation of excessive window tint). The fact that *Deputy Scanlon also believed he had seen an illegal narcotics transaction is irrelevant* at this stage, given that the window tint provided probable cause for the stop."

[See, Sec. 316.2953 -.2954, restrict window tinting on the windshield, side windows, and windows behind the driver to a specified percent and make violation of the statutes a non-criminal traffic infraction].

"Probable cause to search Hall and his vehicle also existed. Deputy Scanlon, whom the trial court found to be an experienced officer with specialized training in narcotics and, of particular note, highly trained in narcotics surveillance, testified that he had observed a female walk up to Hall, as Hall sat in his vehicle, and exchange something with him. The trial court found Deputy Scanlon's testimony of what he had witnessed detailed and credible. Deputy Scanlon testified that, upon stopping and approaching Hall, he smelled marijuana coming from Hall's person and vehicle. That fact was not challenged. Given the totality of the facts available to Deputy Scanlon, including his prior observation of what he believed was a hand-to-hand narcotics transaction and the smell of marijuana emanating from Hall and Hall's vehicle, Deputy Scanlon had probable cause to conduct the search. See, *State v. Betz*, (Fla.2002) ('Based upon the totality of the circumstances within the perception of the law enforcement officers in the instant case, probable cause to search ... the respondent's vehicle existed.'). Because the search was supported by probable cause, the resulting contraband was properly seized. REVERSED."

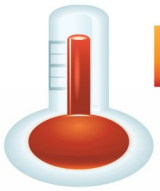
Lessons Learned:

Defendants have claimed that because the police may be tempted to use commonly occurring traffic violations as a means of investigating violations of other laws, the Fourth Amendment test for traffic stops should be whether a "reasonable officer" would have stopped the car for the purpose of enforcing the traffic violation at issue. However, the Florida Supreme Court in *Holland v. State* (1997), foreclosed the argument that ulterior motives can invalidate police conduct justified based on probable cause. In short, if there is a legitimate violation of traffic laws there cannot be a charge that it was a "pretext stop" by law enforcement.

Thus, the "reasonable officer" test is dead! The constitutionality of a traffic stop is not dependent on the motivations or alleged bias of the individual officer involved, but only on whether probable cause for the stop existed. "Since an actual traffic violation occurred, the ensuing search and seizure of the offending vehicle was reasonable."

Importantly, regardless of any felony charges emanating from the stop, write the traffic ticket for the underlying offense that justified the stop!! At the inevitable motion to suppress the drugs or firearm seized from the vehicle, the lawful basis for the stop will be supported, evidenced, and documented by the traffic ticket issued.

State v. Hall
6th D.C.A.
(April 19, 2024)



BEAT THE HEAT:
Extreme Heat

Heat-related deaths are preventable

WHAT:

Extreme heat or heat waves occur when the temperature reaches extremely high levels or when the combination of heat and humidity causes the air to become oppressive.

WHO:


Children

More males than females are affected


Older adults


Outside workers


People with disablities

WHERE:


Houses with little to no AC


Construction worksites


Cars

HOW to AVOID:


Stay hydrated with water, avoid sugary beverages


Stay cool in an air conditioned area


Wear lightweight, light-colored, loose-fitting clothes

During extreme heat the temperature in your car could be deadly!

Outside Temperature 80°

Time Elapsed: 20 minutes

Time Elapsed: 40 minutes

Time Elapsed: 60 minutes

HEAT ALERTS: Know the difference.

HEAT OUTLOOK	HEAT WATCHES	HEAT WARNING/ADVISORY
Minor		Major
Excessive heat event in 3 to 7 days	Excessive heat event in 12 to 48 hours	Excessive heat event in next 36 hours

DID YOU KNOW?

Those living in **urban areas** may be at a greater risk from the effects of a prolonged heat wave than those living in rural areas.

Most **heat-related illnesses** occur because of overexposure to heat or over-exercising.

Sunburn can significantly slow the skin's ability to release excess heat.

During 1999–2009, an average of **658** people died each year from heat in the United States.

$30 BILLION estimated total cost of the 2012 US drought and heatwave.

For more information on ways to beat the heat please visit:
http://www.cdc.gov/disasters/extremeheat

280609-B

Centers for Disease Control and Prevention
Office of Public Health Preparedness and Response

Recent Case Law

Automobile Exception

Utilizing a paid FBI informant agents set up a controlled buy between the C.I., "Fred", and Derrick Morley's associate and co-defendant, Valentino Edgecombe. With law enforcement officers surveilling, Fred bought half a kilogram of cocaine from Edgecombe for $14,000. Following the first cocaine deal, Fred tried to negotiate a bigger deal for six kilograms of cocaine. Edgecombe agreed but said they had to go directly to his source to pick up the drugs. After a false start, another meeting was arranged at a Home Depot parking lot. Fred met with law enforcement to prepare for a "controlled evidence purchase - arrest operation." Law enforcement gave Fred a hat equipped with a covert video recording device and a backpack containing money for the deal.

Morley arrived in his maroon BMW, and walked away from his car, but keeping it in sight. Edgecombe instructed Fred to "go get it" from Morley's passenger seat. Fred retrieved a "small briefcase" from Morley's car and brought it to his car, confirming that it contained three kilograms of cocaine. After Fred gave Edgecombe $84,000 for the cocaine, law enforcement arrested Edgecombe and then arrested Morley across the street.

Morley was indicted for numerous drug offenses. He moved to suppress the cocaine that Fred, at Edgecombe's direction, took from his vehicle without a warrant. The Government opposed Morley's suppression motion arguing that the automobile exception to the Fourth Amendment's warrant requirement applied. The trial court denied the motion finding that there was probable cause to believe Morley's car contained contraband or evidence of a crime because Edgecombe and Fred "picked specific remote locations" for their drug deals, and "it's really hard to believe that [Morley] pulled up in close proximity" by happenstance. And second, the court found that apparent authority existed under the circumstances because "the drugs were retrieved exactly where Mr. Edgecombe said that they would be." On appeal, the 11th Circuit affirmed that ruling.

Issue:

Does the automobile exception to the warrant requirement permit an agent of the police to enter a suspect's vehicle to conclude a drug deal that involved the vehicle's owner? **Yes**.

Vehicle Search:

"The Fourth Amendment provides in relevant part that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' " Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *California v. Acevedo*, (S.Ct.1991). The protections of the Fourth Amendment "extend to vehicle stops and temporary detainment of a vehicle's occupant."

Because vehicles are mobile the U.S. Supreme Court has been exceedingly liberal in permitting law enforcement to stop, search, and seize vehicles, without the need for profiling. *Carroll v. United States*, (S.Ct.1925).

"In light of the 'automobile exception' to the usual search warrant requirement, it is difficult to pick a worse place to conceal evidence of a crime than an automobile. The Supreme Court has interpreted—and reinterpreted—the automobile exception so expansively that the Court essentially has obviated the requirement that the Government obtain a warrant to search a vehicle provided it has *probable cause* to believe that the vehicle contains evidence of a crime." *U.S. v. Donahue*, (3rd Cir. 2014).

Even when there is no exigency in the case, and the police have ample time to secure a search warrant, a stop and search is valid under the motor vehicle exception. There is no separate exigency requirement to justify the vehicle search. The automobile exception to the warrant requirement is based on its mobility. It has no separate exigency requirement. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more." *Maryland v. Dyson,* (S.Ct.1999). See also, *Pennsylvania v. Labron*, (S.Ct.1996), the ready mobility of a vehicle is viewed by the Supreme Court as an inherent exigency that is

always present when conducting a motor vehicle search.

Court's Ruling:

"Morley argues that Fred's retrieval of the briefcase from the passenger seat of Morley's car was an unconstitutional search in violation of the Fourth Amendment. It is undisputed that Fred's actions amounted to a warrantless search that implicated the Fourth Amendment's protections. We must determine, however, whether any exception to the Fourth Amendment's warrant requirement rendered the search constitutionally permissible. The [trial] court specifically found that two exceptions applied: the automobile exception and the consent exception by way of apparent authority."

"The automobile exception allows law enforcement to conduct a warrantless search of a vehicle if: 1. the vehicle is readily mobile and 2. law enforcement has probable cause to search it. … That requirement is met here because Morley drove the car to the scene, nor does Morley challenge that his vehicle was readily mobile."

"Turning to the second element, probable cause exists when, 'under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in the vehicle." *United States v. Tamari*, (11th Cir. 2006). For example, in *United States v. Lanzon*, (11th Cir. 2011), we held that the [trial] court did not err in denying Lanzon's motion to suppress because officers had probable cause to search Lanzon's truck pursuant to the automobile exception.

"The facts and circumstances known to law enforcement here are similar to those in *Lanzon*. As in *Lanzon*, law enforcement here, via a confidential informant, engaged in conversations with Edgecombe that led to an agreement to meet at a specific time and place for an illicit act. The only significant difference here is the involvement of a third party, Morley. But Morley arrived at the designated meeting place at the agreed-upon time, minutes after Edgecombe had texted him to come, and after Edgecombe told Fred that the cocaine was on its way. When Morley arrived, it was clear that Edgecombe recognized him. Indeed, Edgecombe explicitly directed Fred to retrieve the cocaine from Morley's car. There was more than a reasonable probability that Fred would find contraband in the exact place that Edgecombe told him to look."

"Under the totality of the circumstances, the facts and circumstances that were known to law enforcement at the relevant time supported a fair probability that cocaine would be found in Morley's vehicle. Edgecombe had previously sold Fred half a kilogram of cocaine, and Fred and Edgecombe had no other relationship besides that of customer and drug dealer. Turning to the night of September 28, Fred and Edgecombe had negotiated an $84,000 drug deal, and Edgecombe made it clear to Fred that he was not working alone. Edgecombe consistently asked Fred to go straight to 'the guy who was holding the dope.' And on the night of the deal, Edgecombe asked Fred to drive with him to a different location to get the cocaine from another person. After Fred refused, Edgecombe told Fred that his associate was bringing it to them at the Home Depot. Shortly afterward, Morley arrived and parked his vehicle close to Edgecombe and Fred's cars. Edgecombe then directed Fred to retrieve the drugs from the passenger seat of Morley's car. This was more than enough to establish probable cause under the automobile exception."

"Because both elements of the automobile exception were satisfied, law enforcement was authorized to conduct a warrantless search of Morley's car. We therefore affirm the [trial] court's denial of Morley's motion to suppress."

Lessons Learned:

The 11th Circuit affirmed the trial court's ruling finding probable cause to sustain the reasonable belief that the drugs being offered for sale were in Morley's vehicle. In that regard, a restatement of probable cause case law is provided here:

"Probable cause" is a stronger standard of evidence than a reasonable suspicion, but weaker than "proof beyond a reasonable doubt" required for a criminal conviction. Even hearsay can supply probable cause if it is from a reliable source or supported by other evidence. In *Brinegar v. United States*, (S.Ct.1949), the Court defined probable cause as "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed."

Of importance here to the Court's ruling was the holding in *United States v. Arvizu*, (S.Ct.2002). "In making reasonable-suspicion determinations, reviewing courts must look at the 'totality of the circumstances' of each case to see

whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." This requires the reviewing court to evaluate the "totality of the circumstances," rather than assessing each underlying fact piecemeal. This standard "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the *cumulative information* available to them that 'might well elude an untrained person.' "

"The [lower court] identified innocent explanations for most of these circumstances in isolation, but again, this kind of divide-and-conquer approach is improper. A factor viewed in isolation is often more 'readily susceptible to an innocent explanation' than one viewed as part of a totality." *District of Columbia v. Wesby*, (S.Ct.2018).

United States v. Morley
U.S. Court of Appeals, 11th Cir.
(April 30, 2024)

Officer Trespass

At 9:00 pm, a woman heard a knock on her front door followed by a gunshot. She found her husband near the front door with a fatal wound to his head. Officers were soon on the scene, going door to door to canvass nearby homes and seek witnesses to the shooting. Two of the officers, working as a team, made their way to Scott Rudolph's home, which was next door. At that time, neither officer knew who resided at the home. They had no reason to believe that its owner was a suspect or that probable cause existed to conduct a warrantless search; instead, it was simply another attempt to see if a neighbor had seen or heard anything.

The officers approached and knocked on the front door of the enclosed porch, which was physically attached to the residence, announcing their presence as law enforcement officers. From the front doorstep, the officers were unable to see anything inside the enclosed porch because the porch screens were covered with reflective opaque black vinyl. After receiving no response, the officers knocked a second time. Again, no one answered. At that point, one of the officers decided to use a flashlight to attempt to look inside. The flashlight enabled the officer to see into the interior, which was furnished as a living space.

Assisted by the flashlight, the officer saw a rifle propped up against one of the tables; she also saw that a sliding glass door leading deeper into the residence was open. The officer then entered the home and announced her presence. Once inside, she went through the sliding glass door into the next room where she saw Rudolph sitting in a chair with a handgun on the floor. Rudolph did not resist and was handcuffed and secured in a patrol car without incident. He was later charged with first-degree murder of his neighbor. His motion to suppress the firearm was denied. On appeal, that ruling was reversed.

Issue:

Was the front porch a constitutionally protected area of the home for which a warrant (or warrant exception) was required to enter? **Yes**.
Was the use of a flashlight to look inside the enclosed porch an impermissible privacy intrusion under the circumstances? **Yes.**

Fourth Amendment Protection:

The constitutional "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is bedrock constitutional law. As the Supreme Court has repeatedly ruled, "When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' " *Florida v. Jardines*, (S.Ct.2013).

The Fourth Amendment's protection against unreasonable searches and seizures includes a home and its curtilage—the area "immediately surrounding and associated with the home ... [which is regarded to be] part of the home itself for Fourth Amendment purposes." See, *Oliver v. United States*, (S.Ct.1984).

The Supreme Court has identified four factors that relate to curtilage: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. *United States v. Dunn*, (1987). Under these guideposts, a "property's front porch and door area generally fall within the constitutionally protected curtilage of the home." *State v. Crowley*, (1DCA 2017). Consistent with *Dunn*, courts consider steps taken to enclose and make an area private, such as adding physical or visual barriers that reflect an owner's subjective expectation of privacy.

See *Nieminski v. State*, (2DCA 2011). Putting up fences, or as in the present case putting up a visually impenetrable vinyl barrier and an external lock, are affirmative steps to exclude the public and others from peering into or gaining access to the space. *Bainter v. State*, (5DCA 2014).

As a general matter, anything that can plainly be seen with the naked eye from a lawful vantage point is not recognized as private or deserving of constitutional protection. *Powell v. State*, (1DCA 2013) "However, knock-and-talk activity by law enforcement that diverts from the customary path to a home's front door, or that exceeds other objectively reasonable bounds, can present Fourth Amendment problems requiring the suppression of evidence." For example, police officers may approach a home and its curtilage to do a "knock and talk" but not with a drug-sniffing canine. Likewise, the implied and limited license to approach a home's front entryway and curtilage is not an invitation to reveal and explore its otherwise private interior with a flashlight. It's one thing to have a visitor knock on the front door; it's quite another for that same visitor to use invasive means to invade the privacy of the interior.

Court's Ruling:

"The first constitutional question is whether Rudolph's enclosed porch—encased with opaque black vinyl and furnished and used like an interior room—is a constitutionally protected area of the home for which a warrant (or warrant exception) is required to enter. We find that it is."

"A front porch permanently attached to a home—whether enclosed or open air—is normally within the home's curtilage. Indeed, each of the *Dunn* factors is present, demonstrating that Rudolph's *enclosed* porch is a constitutionally protected area. It was a permanent part of his residence and was entirely covered with an opaque black vinyl that made it impossible to see into the room with the naked eye. The porch was furnished as if an interior room. The porch door had a doorbell, a welcome mat, and a lock, serving as the front door to the home. These details collectively make clear that Rudolph's enclosed and visually impenetrable porch was a private space, like the other interior portions of the home in which Rudolph had a reasonable expectation of privacy; it is objectively reasonable in a State that has popularized the concept of 'Florida Rooms,' i.e., enclosed sunrooms, which are ubiquitous and oftentimes made private by the use of blinds, shades, and, in this case, an opaque black vinyl covering. *The defendant exhibited an actual, subjective expectation of privacy that society is prepared to recognize as reasonable*."

"The second constitutional question is whether the use of a flashlight to look inside the enclosed porch, after no one responded to the officers' knocks, was an impermissible intrusion under the circumstances. We find that it was."

"There is an implied license for law enforcement to approach a home's front door to conduct a 'knock and talk' without needing reasonable suspicion or probable cause to do so. See, *Florida v. Jardines*, (S.Ct.2013) ('This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.'). A 'knock and talk' is 'only justified as a consensual encounter during which officers are authorized to 'approach a dwelling on a defined path, knock on the front door, briefly await an answer, and either engage in a consensual encounter with the resident or immediately depart.' *Calloway v. State*, (5DCA 2013)."

"Here, the officers' testimony makes clear that the rifle inside the enclosed porch was *not* plainly viewed from the front step; indeed, it could not be seen at all because the impenetrable vinyl porch screen made it impossible to see what was inside without external illumination. See, *Koehler v. State*, (1DCA 1984) (no expectation of privacy on unenclosed front porch which was exposed to public view); *State v. Detlefson*, (1DCA 1976) (no reasonable expectation of privacy on front porch of home where delivery men and others could observe the plants). It was only when a flashlight was used to peer into the private space that the rifle and the open sliding glass door into the next room were seen. Because the rifle was not plainly viewed from the officers' vantage point outside of the enclosed porch, the officers' use of a flashlight to look past the screen constituted an unlawful intrusion into a constitutionally protected area. Police officers are often called upon to use flashlights in nighttime situations, such as illuminating a public pathway, structure or space, which is permissible; what occurred here, however, was quite different—*the flashlight was being used to peer into an otherwise impenetrable private space*."

"As the First District

explained in *Powell*, 'under certain circumstances, implicit permission may exist to look through an *uncurtained* window while standing *on* a front porch momentarily to see whether the resident is approaching the door, *assuming no unreasonable means or devices are used*.' Here, no un-curtained window existed; instead, the officer used a flashlight to *break the close*, allowing her to peer into a private space. The officers, as they both testified, knocked on Rudolph's porch door solely to find witnesses. When Rudolph didn't answer the door, the officers' license to engage in a 'knock and talk' ended; it was thereby improper to linger and use a flashlight to peer inside in a manner no different than peering through a keyhole."

"Finally, no exigent circumstances or other warrant exception existed that would justify the use of a flashlight to peer into the enclosed porch and enter the home after no one responded to the officers' knocks. The officers had no suspicion that an occupant was a suspect or that probable cause to enter and search the home. No hot or fresh pursuit was afoot; no emergency aid to occupants was necessary nor was destruction of evidence taking place. The officers were simply looking for possible witnesses, which is not an exigent circumstance that makes resort to the warrant process impractical. 'If time to get a warrant exists, the enforcement agency must use that time to obtain the warrant.' See, *Hornblower v. State*, (Fla. 1977)."

"For the foregoing reasons, we agree that an unconstitutional search and seizure occurred and that the trial court erred in denying the motion to suppress. The officers had no authority, after their knocks went unanswered, to use a flashlight or other device to peer into a home's enclosed porch that was heavily masked with impenetrable black vinyl, furnished as an interior, and designed to protect the owner's reasonable privacy interest."

Lessons Learned:

The homeowner/defendant demonstrated an expectation of privacy by surrounding the front porch with opaque black plastic. The same as a tall fence surrounding a house would communicate an expectation of privacy. Law enforcement peering over the fence, or in this instance using a flashlight to circumvent the plastic privacy wrap around the front porch, is a Fourth Amendment violation.

The backyard of a residence is more private because a passerby cannot generally view this area. Any departure from the front walk to the porch, any exploration along the side or the rear of the house, is off-base and any evidence discovered as a result will be suppressed.

This finding is in accord with the Florida Supreme Court's decision in *State v. Morsman*, (Fla. 1981), that the officers were entitled to approach the front door of the residence, but the warrantless entry into the backyard was an unlawful search. The current circumstance allowed the deputy to do no more than knock at the porch door.

"The constitutional protection and expectation of privacy in the side and backyard area of the home does not depend on whether someone might be home, or if visitors may sometimes be received at a location other than at the front door. Indeed, the Florida Supreme Court's *Morsman* opinion clearly establishes that residents have a constitutionally protected privacy interest in the side and backyard area of their home."

Officers are allowed to enter the curtilage, taking the same path to the residence that any other visitor would take, knock on the door, and request to speak to the occupants of the residence. Similarly, when officers are dispatched to a residence, officers can respond. However, if an officer is going to a residence to make an arrest, the officer should obtain a warrant first, if possible. If not, the officer will need to enter the curtilage with consent or based on some exigent circumstance.

Rudolph v. State
5th D.C.A.
(April 12, 2024)

Officer Privacy

The underlying facts of this case arise from a lengthy dispute between Michael Waite and the Sheriff's Office. Waite quarreled over property boundaries with city employees and deputies. Waite would report what he believed to be crimes to various State agencies and the media. As his relationship with the S.O. deteriorated, Waite began recording his conversations with deputies.

Waite called 911 to report what he perceived to be a trespassing incident involving members of the Sheriff's Office. Waite insisted that he wanted to file a complaint with Internal Affairs. Later that day, Sergeant Blair called Waite back. Waite recorded the three-minute phone conversation but *did not inform Sergeant Blair he was doing so*. Waite sent the audio recording of that call via email to the S.O. Records Department and requested an internal

investigation.

In response, Detective Chenoweth sought an arrest warrant based on the recorded conversation attached to Waite's email. The State alleged that Waite violated section 934.03(1)(a), F.S., by recording the conversation with Sergeant Blair without his consent. After obtaining the warrant, deputies went to Waite's home to execute it. An altercation ensued, and it was alleged that Waite elbowed a Deputy in the face. Incident to the arrest, Deputies found an audio recording device containing three additional recorded conversations with S.O. Deputies.

In total, Waite was charged with five counts of wiretapping, battery on a law enforcement officer, and resisting arrest with violence. Though Waite conceded that he did not inform the Deputies he was recording the conversations, and none of the Deputies gave their consent to be recorded, Waite argued that the recorded conversations did not fall under the definition of "oral communication" as defined by section 934.02(2), because the Deputies did not have an expectation of privacy.

In response, the State admitted that at all times during the recorded conversations, the Deputies were acting in their official capacities and that the Deputies were using department phones and cell phones. However, the State argued that whether someone has a reasonable expectation of privacy is an issue of fact for the jury and therefore Defendant's motion to dismiss should be denied. After a hearing, the trial court agreed with the State and denied Waite's motion to dismiss. On appeal, that ruling was reversed.

Issue:

Did the Defendant violate the Deputy's privacy rights by audio recording their conversation without prior consent? **No**, because they were on duty at the time of the recordings.

First Amendment Right to Record:

The case law is quite clear that the First Amendment at issue here is fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public? The federal courts have ruled, "Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative."

"The filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.' "

Smith v. City of Cumming, (11th Cir. 2000),ruled, "We agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."

The federal court went on to note that the legal principles are the same for news reporters and civilians. "The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is coextensive with that of the press."

"Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status."

Court's Ruling:

"Under Florida's wiretapping statute, it is unlawful for any person to intentionally intercept or endeavor to intercept any wire, oral, or electronic communication. § 934.03(1)(a), F.S. 'Oral communication' means any oral communication uttered by a person *exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation* and **does not mean any public oral communication uttered at a public meeting or any electronic communication**.' *'For* an oral conversation to be protected under section 934.03 the speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable.' *State v. Smith*, (Fla. 1994)."

"The question of whether citizens may record telephone

conversations with police officers acting in their official capacities appears to be an issue of first impression. However, it has previously been established that there is a First Amendment right to record police officers conducting their official duties in public. See *Pickett v. Copeland*, (1DCA 2018) ('Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.' Additionally, it has been recognized that meetings taking place in an office context have 'a quasi-public nature,' *McDonough v. Fernandez-Rundle*, (11th Cir. 2017), and the constitutional protections of the home do not extend to an office or place of business. *Morningstar v. State*, (Fla. 1982). Moreover, individuals conducting business over the phone do not enjoy a reasonable expectation of privacy on business phone calls where the other party to the conversation records said conversation, even when business is conducted from the person's cell phone at home. See *Avrich v. State*, (3DCA 2006)."

"Here, Waite recorded a telephone conversation with Sergeant Blair. He subsequently emailed the audio recording to the S.O. to report what he believed to be police misconduct and requested an internal investigation. It was later discovered that Waite had similarly recorded four other conversations with deputies. Under these circumstances, it cannot be said that any of the *deputies exhibited a reasonable expectation of privacy that society is willing to recognize*."

"Importantly, this is based on the record before us as **there is no dispute that all conversations concerned matters of public business, occurred while the deputies were on duty, and involved phones utilized for work purposes**. As such, Waite did not violate section 934.03 (1)(a) when he recorded the conversations with the deputies, all of whom were acting in their official capacities at the time of the recordings, just as if he had the conversations face-to-face. Accordingly, the denial of the motion to dismiss must be reversed."

Lessons Learned:

The rule of law here is quite clear, "Because the deputies did not have a reasonable expectation of privacy when they spoke with Waite over the phone in their *official capacities* as law enforcement officers regarding public business, the recordings did not fall within the definition of "oral communication" in section 934.02 (2). Thus, the wiretapping statute, section 934.03(1)(a), did not govern their conversations.

As a total aside, the D.C.A. found that the dismissal of the wiretap charges did not impact the resisting charge. "Waite further advances that because the wiretapping charges must be dismissed, so must the charges for battery on a law enforcement officer and resisting arrest with violence. *We adamantly reject this assertion*. Section 776.051(1), 'prohibits the use of force to resist either arrest or the execution of a legal duty by a law enforcement officer unless the defendant can show that the officer was not acting in good faith.' *King v. State*, (4DCA 2013)… see also *Tillman v. State*, (Fla. 2006), (explaining that under section 776.051(1) citizens do not have the 'right to resist an illegal arrest with force'). Here, the deputies were executing an arrest warrant. Waite did not demonstrate a lack of good faith and should have complied without resorting to violence."

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(April 12, 2024)