LEGAL EAGLE

June 2025

Neither Threats nor Promises

Officers White and Calera called Lance Maytubby and asked him to come to the police station to answer some questions. Maytubby agreed and arrived at the station that evening. The interview took place in the break room at the police station, and Officer White left the door wide open. He told Maytubby that he did not have to talk, that he was not under arrest, and that he could leave at any time. Then he told Maytubby that two of his nieces, R.L. and Z.L., had accused him of sexually abusing them about four years ago while they were about eleven or twelve years old. In a *friendly and reasonable* tone, Officer White sought Maytubby's side of the story.

Maytubby denied the accusations, but Officer White continued to ask questions, specifically why the girls would make those detailed allegations if they were untrue. He told Maytubby that the two girls'' stories were "dead-on similar," that neither knew the other had reported the sexual abuse, and that the accusations had "stuff to back it up." Then Officer White offered an "excuse" that might explain what had happened, such as a mental-health issue, drinking, or drug use. Maytubby continued to deny the accusations.

About one minute later, Officer White stated that he needed to deliver an investigation report to the District Attorney. He told Maytubby that he wanted the report to include all mitigating circumstances, that Maytubby was a pastor who had made a mistake, had long been a "working man" and "family man," and had just "acted out of character." Maytubby asked, "So what's the difference? I mean, it's going to be the same [whether it was out of character or not], right?" To which Officer White responded:

"No, no there are people in this world that that is their M.O., that's what they do. That's what turns them on, is little kids, little girls or little boys, or whatever the case is. … But I think it happened, I don't think you're that kind of guy and I think that it's something that you've probably been struggling with. Those girls struggle too. And I don't think that they deserve to struggle. I don't think you deserve to struggle. I think it's something that everybody needs to get past, get into some counseling, and move on with life. …"

Officer White again said that he wanted to report that Maytubby made a mistake and that he was not "any kind of predator" and that the behavior "hasn't happened since. Maytubby continued to deny the accusations. Officer White explained that Maytubby's denials put Officer

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White in a difficult spot in reporting to the District Attorney. He reminded him that didn't need to speak to him, and he reassured Maytubby that he was not going to arrest him that day. But Officer White also stated that his desire to include mitigating information in the investigative report depended on Maytubby's admitting his sexual conduct with his nieces: "I can't help you out if you're not honest to me, I just can't. I can't go in there and say, ... 'Hey, he manned up. This is how it is. The guy acted out of character.' " Maytubby said that he wanted to go home. Officer White said, "Okay." Then Maytubby said, "Okay, I'm going to say 'yes.' " Officer White said, "What do you mean? ... You did do these things?" Maytubby responded, "Yes." Officer White asked if Maytubby was telling the truth, and Maytubby said, "Yeah."

He requested that he not be arrested at his workplace and that he be permitted to go home to talk to his wife and family. As promised, Officer White let Maytubby leave and even commented that he might not be arrested at all, because "it's in the hands of the D.A." Then Officer White said, "You being honest with me is going to go leaps and bounds in your favor."

Maytubby was indicted for three counts of aggravated sexual abuse. Maytubby moved to suppress his interview statements as involuntary, arguing that Officer White's inducement (including the mitigation factors in his investigative report to the District Attorney) combined with the mention of counseling overbore his will. The trial court denied the motion to suppress. On appeal, that ruling was affirmed.

Issue:

Did the Officer make threats or promises to induce Defendant to admit his guilt? **No.** Was the Officer's promise to tell the prosecutor that the Defendant was cooperative by providing a statement improper or coercive? **No**.

Threats and Promises:

Merely advising a suspect of his *Miranda* rights is insufficient to admit a Defendant's statement at trial. The State must also establish that the statement was freely and voluntarily given. Further, there were no threats or promises made to overcome the will of the suspect. "To render a confession voluntary and admissible as evidence, the mind of the accused should at the time be free to act, *uninfluenced by fear or hope*. To exclude it as testimony, it is not necessary that any direct promises or threats be made to the accused. It is sufficient, if the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to his true position and exert an improper and undue influence over his mind." *Simon v. State*, (Fla. 1853).

"To be admissible in evidence, a confession must be voluntary -- the product of a 'free and rational choice.' The court must look at the totality of the circumstances surrounding the confession to determine whether it was the product of a free choice." "Recently, in *Day v. State*, (4DCA 2010), we explained that a confession must not be induced by any threat or promise, however slight: A confession or inculpatory statement is not freely and voluntarily given if it has been elicited by direct or implied promises, however slight.' 'If the interrogator induces the accused to confess by using language which amounts to a threat or promise of benefit, then the confession may be untrustworthy and should be excluded.' We further noted that there must be a 'causal nexus' between the promises and the confession." *Squire v. State*, (4DCA 2016). In *Edwards v. State*, (4DCA 2001), the DCA found it was error to admit that portion of Defendant's statement made after a threat to load up Edwards with added and more serious charges. "Certainly, a threat to charge a suspect with more, and more serious, crimes unless he or she confesses is coercive. Further, it is essentially a promise not to prosecute to the fullest extent allowed by law if that person confesses. Hence, the investigators' threats amounted to an exertion of improper and undue influence, rendering the affected portion of Edwards' statement involuntary. See, *Brown v. State*, (5DCA 1982)."

Voluntariness, or free will, is determined by an examination of the totality of the circumstances surrounding the confession. Moreover, to establish that a statement is involuntary, there must be a finding of coercive police conduct. "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Colorado v. Connelly* , (S.Ct.1986). Moreover, although some promises may require suppression, "an interrogating officer may, without rendering a confession involuntary, promise to make a suspect's cooperation known to the prosecutor or advise the suspect that 'it would be easier on him' if he cooperated." *Blake v. State*, (Fla. 2007).

In *Caraballo v. State*, (Fla.2010), the Florida Supreme Court ruled, "we conclude that comments made by the officers during the interview, which suggested that Caraballo's cooperation with law enforcement would be disclosed to the trial court, did not vitiate the voluntariness of Caraballo's statement. In particular, Caraballo contends that the officers improperly prodded him to 'tell the truth' and promised to help him in court if he provided useful information. This Court has said that 'the fact that a police officer agrees to make one's cooperation known to prosecuting authorities and to the court does not render a confession involuntary.' See, *Maqueira v. State*, (Fla.1991)."

Court's Ruling:

"The Fifth Amendment guarantees that 'no person ... shall be compelled in any criminal case to be a witness against himself.' For an incriminating statement to be voluntary, it must not be 'the product of coercion, either physical or psychological.' *U.S. v. Young*, (10th Cir. 2020). Coercion may take the form of 'acts, threats, or promises which cause the defendant's will to be overborne.' U.S. v. Lopez, (10th Cir. 2006). We consider the totality of the circumstances surrounding the confession and view those circumstances from the Defendant's perspective.

"Some factors that we consider include '1. the age, intelligence, and education of the defendant; 2. the length of detention; 3. the length and nature of the questioning; 4. whether the defendant was advised of his constitutional rights; and 5. whether the defendant was subject to physical punishment.' See, *Lopez*. More generally, we consider 'both the characteristics of the accused and the details of the interrogation.' *United States v. Toles*, (10th Cir. 2002). 'The importance of any given factor can vary in each situation.' *Sharp v. Rohling*, (10th Cir. 2015)."

"Maytubby went to the police station voluntarily, and Officer White told him that he could leave at any time and that he did not have to make a statement. Officer White did not advise Maytubby of his *Miranda* rights, but Maytubby was not in custody, so *Miranda* warnings were not required. The interview lasted less than thirty minutes. The tone of the interview was conversational. The physical environment was not coercive, it occurred in a break room with the door open. The interview included no physical punishment. And nothing about Maytubby's age, intelligence, or education made him particularly susceptible to coercion. All these factors weigh in favor of finding a voluntary confession."

"Maytubby argues that the above factors are outweighed by Officer White's offer to include mitigating facts in his investigative report to the district attorney if he admitted his nieces' accusations. He also says that Officer White suggested that Maytubby might be able to attend counseling in lieu of prison. … During the interrogation, Officer White said, 'I want to be able to [tell the prosecutor] look, Lance is a working man ... he's got a family, he's a family man, he's a pastor and he just acted out of character.' Maytubby does not argue that this statement was false, but says it was coercive because offering a report that downplayed Maytubby's misconduct and portrayed him sympathetically was a powerful inducement that overbore his will. We disagree."

"Officer White's interview statements were proper. Nothing suggests that Officer White lied, and we see nothing unusual about an investigating officer advising a prosecutor of mitigating facts and circumstances related to an investigation. Cooperating with the investigation had the potential to benefit Maytubby. In this way, Officer White's statements were a limited assurance—a general statement about the benefit of cooperating—which we have repeatedly held to be a permissible interrogation tactic. See, *United States v. Lewis*, (10th Cir. 1994) (concluding that the agent's promise to make the defendant's cooperation known to the prosecutor was a limited assurance that did not taint the confession). Though Maytubby is correct that Officer White provided specifics about what he would tell the prosecutor, *Officer White also acknowledged that leniency was in the prosecutor's control*. See, *United States v. Lux*, (10th Cir. 1990) ('Because [the defendant] was properly informed that the United States Attorney was the only official with control over [the case], [the agent's] remarks did not constitute an implied promise.')."

"Nothing in Officer White's interview improperly induced a confession. Almost twenty-four minutes into the interview, Maytubby abruptly admitted Officer White's accusations. Maytubby argues that he did so only after Officer White made it clear that including mitigation facts in the investigative report (and therefore any benefits accompanying such a report) depended on Maytubby's doing so. Maytubby notes that only thirty seconds passed between

Officer White's saying that 'I can't help you out if you're not honest to me' and Maytubby's admission. But those thirty seconds were not silent. During them, Maytubby sought assurance that he would not be arrested if he chose to leave the police station. Right after Officer White stated that he could not help Maytubby unless Maytubby was honest with him, Maytubby said, 'Well, then I can go home right now, right?' Officer White said, 'Okay.' Less than five seconds later, Maytubby summarily acknowledged the truth of his nieces' accusations. This assures us that Maytubby's fear of immediate arrest played a large part in his earlier denials of wrongdoing. We conclude that Officer White did not overbear Maytubby's free will or 'critically impair' Maytubby's 'capacity for self-determination. Considering all the above factors, we conclude the interview was not coercive."

"In context, none of Officer White's statements were coercive, and Maytubby's will was not overborne. Maytubby's confession was voluntary. We affirm."

Lessons Learned:

Teachman v State, (1DCA 2019), offers a helpful insight. In a concurring opinion one of the D.C.A. Justices wrote, "While I agree with the majority that we should affirm the conviction below, I write to expand upon the effect that 'promises' from police to a suspect during an interrogation have on a confession's admissibility. I believe we should emphasize that a promise only renders a confession involuntary and inadmissible when the promise overbears the free will of a suspect to choose whether to confess. 'The test to determine whether a confession is voluntary—in other words, not coerced—is whether it was the product of free will and rational choice.' *Martin v. State*, (Fla. 2012) (deciding whether officers' interrogation tactics 'overbore [the suspect's] free will such that he was unable to make a rationale choice with regard to confessing'). The mere existence of a promise by the officer or a '*quid pro quo*' agreement between the officer and suspect does not, in itself, render the confession involuntary. I question the continuing viability of cases suggesting that it does."

"The standard to determine whether a confession is voluntary is well-settled: 'In order for a confession to be voluntary, the totality of the circumstances must indicate that such confession is the result of free and rational choice.' This standard focuses on the suspect's state of mind, specifically on the effect that any particular police tactic during interrogation has upon the suspect. In other words, the mere existence of a promise alone, even a *quid pro quo* agreement, should not render any confession involuntary. See, *Miller v. Fenton*, (3DCA 1986) (holding that 'it does not matter that the accused confessed because of the promise, so long as the promise did not overbear his will.')."

"A promise to a suspect unaccompanied by a showing that the promise overbore the suspect's will does not render a confession involuntary. The suggestion that any promise that induces a confession automatically renders a confession involuntary, no matter how inconsequential and no matter whether it deprived the defendant of the ability to make a rational choice, should be finally and explicitly rejected."

"This observation applies equally to the oft-stated rule that any '*quid pro quo*' agreement between the police and the suspect automatically renders a confession involuntary. …The 'express *quid pro quo*' rule directly contradicts the proper voluntariness rule, which looks at the totality of the circumstances to determine whether police misconduct overbore the suspect's free will and made it *impossible* for the defendant to make a rational choice as to whether to confess."

United States v. Maytubby
U.S. Court of Appeals, 10th Cir.
(March 18, 2025)

CRITICAL ISSUES IN POLICING SERIES

An Occupational Risk:

What Every Police Agency Should Do To Prevent Suicide Among Its Officers

https://www.policeforum.org/assets/PreventOfficerSuicide.pdf

Police Executive Research Forum

Recent Case Law

Auto Stop: Officer Safety

The court's opinion does not recite any of the underlying facts of the case; rather, just its ruling. However, based on the case law cited in its opinion the legality of ordering a driver and passenger from the vehicle during a lawful traffic stop appears at issue.

Issue:

May a police officer order the driver and passenger to exit the vehicle without violating the Fourth Amendment's proscription of unreasonable seizures? **Yes**.

Auto Stop Inquiries:

The United States Supreme Court has stated that ordering the driver (and passengers) from the vehicle is reasonable and within the Fourth Amendment parameters for officer safety reasons. The request is incident to the stop. *No separate exigency is required nor needs to be articulated*. *Pennsylvania v. Mimms*, (S.Ct.1977).

"Temporary detention of individuals during the stop of an automobile by the police ... constitutes a 'seizure' of 'persons' within the meaning of the Fourth Amendment." *Whren v. United States*, (S.Ct.1996). "Therefore, traffic stops must satisfy the Fourth Amendment's reasonableness limitation, which requires that an officer making a traffic stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." The Supreme Court has held that an officer may not unreasonably prolong a traffic stop to conduct an investigation unrelated to the reason for the stop. *Rodriguez v. United States*, (S.Ct.2015).

However, where an officer develops "reasonable suspicion of criminal activity" during the course of the stop, the Fourth Amendment permits that officer to detain the suspect even "beyond completion of the traffic investigation." Generally, a traffic stop is reasonable only insofar as "it is 1. justified at its inception and 2. reasonably related in scope to the circumstances which justified the interference in the first place."

Court's Ruling:

"See, *Pennsylvania v. Mimms*, (S.Ct.1977) (holding that 'once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches'); *Maryland v. Wilson*, (S.Ct.1997) (holding '**the rule of *Mimms* applies to passengers as well as to drivers**,' and explaining that the rationale for allowing passengers to be ordered out of the vehicle 'is in one sense stronger than that for the driver.... The passengers are already stopped by virtue of the stop of the vehicle. The only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car. Outside the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment. 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 the motivation of a passenger to employ violence to prevent apprehension of such a crime is every bit as great as that of the driver.').

"See also, *Brendlin v. California*, (S.Ct.2007) ('It is also reasonable for passengers to expect that a police officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. In *Maryland v. Wilson*, (S.Ct.1997) we held that during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. In fashioning this rule, we invoked our earlier statement that 'the risk of harm to both the police and the occupants is minimized if the *officers routinely exercise unquestioned command of the situation*.') (quoting *Michigan v. Summers*, (S.Ct.1981)).

"See also, *Billips v. State*, (3DCA 2001) (affirming conviction for resisting officer without violence, and finding police were engaged in lawful execution of legal duty when they asked Defendant to exit vehicle based on a BOLO: 'The officers were legally justified in ordering

Billips to exit the vehicle in order to conduct a limited investigation, and her refusal to do so clearly obstructed their investigation.'); *D.N. v. State*, (3DCA 2002) ('To protect officer safety, a law enforcement officer conducting a traffic stop may order any passenger, as well as the driver, to exit the vehicle during the traffic stop.' (citing *Maryland v. Wilson*) ('While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal. We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.'))); *Aguiar v. State*, (5DCA 2016) (observing that the 'societal expectation of unquestioned police command' would be 'at odds with any notion that a passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission' (quoting *Brendlin v. California,* (S.Ct.2007))."

Lessons Learned:

The U.S. Supreme Court had the occasion to rule on passenger searches in *Wyoming v. Houghton*, (S.Ct.1999). In that case, after the arrest of the driver, the passenger's purse was searched. The Court held that "even if the historical perspective of the 4th Amendment was not enough, a balancing of the relative interests weigh decidedly in favor of allowing searches of passenger's belongings because of the *reduced expectation of privacy in and the mobility of automobiles*. Also, passengers in cars are more likely engaged in a common enterprise with the driver and have the same interest in concealing the fruits or the evidence of their wrongdoing. Also, their proximity enables them to hide contraband in [each other's] belongings as readily as in other containers in the car ... perhaps even surreptitiously, without the passenger's knowledge or permission. While these factors will not always be present, the balancing of interests must be conducted with an eye to the generality of cases. Thus, specific probable cause to the container was not required."

Montgomery v. State
3rd D.C.A.
(April 30, 2025)

Delayed Search Warrant Execution

While investigating James Moschella, Detectives seized his electronic devices—two mobile phones, a tablet, and a laptop. He later applied for several search warrants, one for a forensic search of the devices. A magistrate issued the search warrant on July 27th, but the detective who obtained the warrant admitted that it was not executed until "sometime in September." Defendant filed a motion to suppress all evidence derived from the delayed search. The trial court denied the motion finding that the delay had not prejudiced him. On appeal, that ruling was reversed.

Issue:

Did the detective's blunder, require suppression of the evidence recovered from the seized devices as a matter of law, thereby reversing Defendant's conviction? **Yes.**

Staleness:

To establish probable cause for the issuance of a search warrant, a supporting affidavit must set forth facts establishing two elements: 1. the commission element—that a particular person has committed a crime, and 2. the nexus element—that evidence relevant to the probable criminality is likely to be located in the place to be searched. *State v. Felix*, (5DCA 2006). To satisfy the nexus element, the affidavit must establish the particular time when the illegal activity that is the subject of the warrant was observed.

Thus, the "magistrate is required to know this specific time because the length of time between the activity and the date of issuance bears on whether there is probable cause to believe that the items to be seized will still be found at the place to be searched. The longer the time period, the less likely it is that the items sought to be seized will be found at the place listed in the affidavit. As the time period increases, it is said that the evidence becomes stale. A rule of thumb that seems to be recognized by courts as the standard for staleness is thirty days. There is nothing particularly magical about thirty days, however...

"Whether information is too stale to establish probable cause to support a search warrant is not to be determined solely by the rigid application of a pre-determined time period. Depending on the particularized circumstances as evaluated by an impartial magistrate, an acceptable elapsed time may certainly be more or less than thirty days. A specific lapse of time does not control the issue of staleness and does not invariably render a search warrant stale. We have judges making this determination because it requires an exercise of judgment." *State v. Felix*, (5DCA 2006).

The present case involves a second time period, the time between

the issuance of the search warrant and the execution of said warrant. F.S. 933.05 is specific in that regard: "Issuance in blank prohibited**.**—A search warrant cannot be issued except upon probable cause supported by affidavit or affidavits, naming or describing the person, place, or thing to be searched and particularly describing the property or thing to be seized; no search warrant shall be issued in blank, and **any such warrant shall be returned within 10 days after issuance** thereof."

Spera v. State, (2DCA 1985), makes it quite clear, "In a case of first impression in Florida, we hold that a stale search warrant vitiates a search pursuant to that warrant and requires suppression of any evidence seized as a consequence of the search. Further, in accordance with the ten-day limitation specified in section 933.05, F.S. *we hold that a search warrant in Florida becomes stale ten days after its issuance*."

Court's Ruling:

The D.C.A. noted that Moschella's motion to suppress raised the delay argument. They ruled, "The Circuit Court rejected it, finding that he had not been prejudiced by the delay. But as we said in *Spera*, 'the legislature has decided that *ten days is a reasonable time.*' The relevant language in this short, plain statute has been in place for over a century. We will not second-guess lawmakers' plain language by appending a prejudice requirement to the firmly established statutory time limit."

"Consequently, the Circuit Court should have granted Moschella's motion to suppress the evidence obtained during the search of his devices. We reverse Moschella's judgment and sentences and remand for dismissal of the charges."

Lessons Learned:

In an interesting variation of these facts, a suspect made two controlled drug sales with a CI and UC. After the second sale, the Detective applied for, and obtained, a search warrant for the Defendant's home, where he had seen large quantities of drugs. However, rather than executing the warrant the next day, the UC went back to the Defendant and made a third, trafficking weight, drugs buy. The trial court suppressed the third sale as a constitutional violation of the Defendant's right to be protected against multiple punishments for the same offense. The 2nd D.C.A. decided that case as well and reversed the trial court.

"Section 933.05, F.S., [only] requires that an executed warrant be returned within ten days of issuance. This provision suggests that police officers normally have some temporal leeway in making their cases against potential criminals and a minimal delay [of 10 days] will not generally intrude into the defendant's due process rights."

A.S.A. Patrick Quinlan, (15th J.C.). hypothesized that there was no indication that law enforcement made any effort to access Defendant's devices during the 10-day period. However, "I believe that, if law enforcement first tries to get into a device within 10 days, its subsequent efforts extend beyond the 10 -day deadline, law enforcement is acting in good faith the whole time, and PC has existed throughout, then *there is an argument* that, at the very least, suppression of evidence should not be the remedy. … But you need to be aware of the strict wording of section 933.05 and the strict holding of the 2d DCA [herein]."

A similar reasoning was applied in *U.S. v. Nicholson*, (11th Cir. 2022). "This Court cannot conclude that the off-site examination of Defendant's hard drives after the expiration of the warrant was an unreasonable search amounting to a constitutional violation requiring suppression. First, the search warrant allowing the search of Defendant's residence and the seizure of computer hardware and software was properly and timely executed. Agents seized Defendant's computer and hard drives during the ten-day period prescribed in the warrant. *United States v. Cameron*, (D.Me.2009) (concluding that the search warrant was timely executed when computer equipment was seized within the period the warrant stipulated and that continued forensic inspection of the computer and discs did not violate the Fourth Amendment); *United States v. Gorrell*, (D.D.C.2004) (concluding that the ten-day period in the search warrant only refers to the search of the defendant's home and does not limit the amount of time in which the government is required to complete off-site forensic analysis of seized items); *United States v. Habershaw*, (D.Mass. May 13, 2002) (holding that off-site forensic analysis of seized hard drive image does not constitute a second execution of the warrant).

"Moreover, in this case, completion of the analysis of the hard drives after the expiration of the search warrant could not rise to the level of a constitutional violation and cannot be the basis for suppressing evidence seized because probable cause continues to exist, the government did not act in bad faith,

and there was no prejudice to the Defendant. Probable cause did not dissipate during the nearly two-month delay in completing the off-site analysis of the hard drives. Because the computers were in possession of law enforcement, there was little chance that any incriminating evidence might be removed from the computers. Additionally, probable cause was actually enhanced by the delay because prior to the expiration of the search warrant, Special Agent Richardson began looking at the hard drives and found hundreds of images which contained erotica of young boys and child pornography."

"Furthermore, Special Agent Richardson did not act in bad faith in order to avoid any requirements imposed by the search warrant. The nearly two-month delay *was not unreasonable given that Special Agent Richardson had to clone the hard drives, load the images into his forensic analysis program, ran out of disc space, competed with other agents for time to use the imaging machine, and had difficulty accessing the information on the hard drives due to Defendant's encryption efforts.* Finally, Defendant does not identify any prejudice resulting from the delay in completion of the forensic analysis. Therefore, Defendant's Motion to Suppress Evidence Obtained Pursuant to Warrantless Search of Computer Storage Equipment should be DENIED."

Moschella v. State
2nd D.C.A.
(April 9, 2025)

Disorderly Conduct

Duckens Oxyde's ex-wife called the police to report he was at her home and harassing her. He belligerently insisted that he had a right to be at her residence because she owed him money. Ultimately, law enforcement informed Defendant that he needed to leave the premises, after which law enforcement left the scene. Unfortunately, Defendant gained entry into the building by following another resident inside. He then banged on and tried to forcibly open his ex-wife's door while demanding money. As established by doorbell camera footage, Defendant's ex-wife refused to answer the door and told him to leave several times. Unpersuaded, Defendant continued to shout obscenities while trying to open the door. As established on the camera footage, Defendant used the word "n*****" several times and repeatedly called her a "b****" and a "h*." Defendant also paced up and down the hallway, at one point, he stopped in front of the door of the resident who would not grant him access earlier and yelled insults at that resident.

Defendant's conduct was so disruptive that it woke up at least three other residents, each of whom opened their doors. One of the residents was awakened from a deep sleep despite being severely hearing impaired. All in all, the witnesses testified that Defendant's behavior inside the building went on for about thirty minutes and was "out of control" and "completely unhinged." Eventually, law enforcement came back to the building and arrested Defendant. A jury found Defendant guilty as charged.

Defendant appealed his conviction and sentence for disorderly conduct, arguing: 1. the evidence was insufficient to support his conviction, and 2. the trial court erred in admitting evidence of Defendant's use of offensive slurs during the crime. On appeal, the conviction was affirmed.

Issue:

Is speech alone sufficient to sustain a conviction for disorderly conduct? **Yes**, based on the totality of the circumstances.

Disorderly Conduct:

Section 877.03 defines and proscribes disorderly conduct, as follows:

Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct shall be guilty of a misdemeanor of the second degree....

In *State v. Saunders*, (Fla.1976), the Florida Supreme Court construed this statute narrowly so that it could withstand constitutional challenge. Section 877.03 was limited by the high court so that it applied only to words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. In addition, it applies to words, known to be false, reporting some physical hazard in circumstances where such a report would create a clear and present danger of bodily harm to others. In brief, the statute was read to prohibit "fighting words" or shouting "fire" in a crowded theater. "Fighting words," according to the United States Supreme Court, are those likely to cause an average person to whom they are addressed to fight. More importantly, the courts of Florida have consistently held that unenhanced speech alone

will not support a conviction for disorderly conduct. Neither impairment nor intoxication is contemplated in a disorderly conduct charge.

"A law enforcement officer may arrest a person without a warrant when ... the person has committed a felony or misdemeanor ... in the presence of the officer." § 901.15(1). The court in *Jing v. State*, (4DCA 2021), stated: "To comply with the statute, the 'arresting officer must have a substantial reason at the time of [the] warrantless misdemeanor arrest to believe from [the officer's] observation and evidence at the point of arrest that the person was then and there committing a misdemeanor in [the officer's] presence.' To make a warrantless arrest for a misdemeanor, all elements of the offense must occur in the police officer's presence or have been personally observed by a fellow law enforcement officer. See, *Malone v. Howell*, (Fla.1939) ("An arrest without a warrant for a misdemeanor, to be lawful, can only be made where the offense was committed in the presence of the officer — that is it must have been within the presence or view of the officer in such a manner as to be actually detected by the officer by the use of one of [the officer's] senses."); *State v. Lord*, (1DCA 2014) (explaining the "fellow officer rule" that permits an officer to perform a warrantless arrest for a misdemeanor offense "when the arresting officer has been provided information from a fellow officer sufficient to satisfy" the requirements of section 901.15(1).

Court's Ruling:

"The Florida Supreme Court has instructed that convictions under section 877.03 cannot be based on speech alone unless the speech caused witnesses to react in a manner which threatens to breach the peace. … Thus, the fact that speech draws curiosity or annoyance from onlookers is, standing alone, insufficient to support a conviction for disorderly conduct. See, e.g., *St. Fleury v. State*, (4DCA 2018) (evidence that defendant's altercation with a manager of a pet store disrupted and annoyed other shoppers was insufficient to support a conviction for disorderly conduct); *Smith v. State*, (2DCA 2007) (defendant who cursed and yelled at bank employees could not be convicted of disorderly conduct—even though the defendant's belligerent conduct attracted the attention of other patrons—because 'there was no evidence that witnesses responded to [defendant's] words in any particular manner or that anyone in the area was actually incited to engage in an immediate breach of the peace'); *Barry v. State*, (2DCA 2006) ('The mere fact that other people come outside or stop to watch what is going on is insufficient to support a conviction for disorderly conduct.')."

"Conversely, speech which incites or threatens to incite action by observers may be sufficient to support such a charge. See, *Marsh v. State*, (5DCA 1999) (affirming conviction for disorderly conduct when defendant's 'loud, belligerent, accusatory tirade' targeted at a police officer 'excited' a gathering crowd to the extent that a second officer developed safety concerns); *W.M. v. State*, (3DCA 1986) (defendant's conduct of running around and shouting profanities at police officers supported conviction for disorderly conduct when defendant's conduct drew a 'large hostile crowd')."

"Additionally, belligerent speech accompanied by disruptive physical acts is also sufficient to support a disorderly conduct conviction. *Wiltzer v. State*, (4DCA 2000) (affirming disorderly conduct conviction where, in addition to disruptive verbal conduct which disturbed observers, defendant threw his wallet at a police officer); *C.L.B. v. State*, (2DCA 1997) (affirming disorderly conduct conviction because the defendant's 'nonverbal acts disturbed or interfered with an arrest and, therefore, breached the peace')."

"In the instant case, Defendant's disorderly conduct conviction was not based on speech alone. In addition to yelling and cursing, Defendant threw rocks at the apartment building and continuously banged on and forcefully tried to open his estranged wife's door. In conjunction with Defendant's loud and disruptive speech, this physical conduct was sufficient to support Defendant's conviction. See, *Williams v. State*, (1DCA 1976) ('Repeated banging on a door in an apartment complex at approximately 11:30 in the nighttime, thus creating a disturbance, is not such freedom of using mere words as a tool of communication that is constitutionally protected.')."

"Alternatively, in addition to Defendant's disruptive physical conduct, the facts … establish that Defendant's speech threatened to breach the peace at one point. The majority of Defendant's conduct took place in a residential building during a time when most residents were asleep or preparing to go to sleep. Defendant's conduct was so loud and 'out of control' that it caused several residents to wake up, get out of bed, and open their doors.

Defendant's conduct also caused one resident to engage in a verbal altercation with Defendant…Thus, Defendant's words and actions nearly incited a fight with the resident in the hallway. *Clanton v. State*, (2DCA 1978) ('Fighting words are those which are likely to cause the average person to whom they are addressed to fight.')."

"Before trial, Defendant sought to exclude reference to his use of the slur directed at another resident, arguing that the admission of such evidence was irrelevant and unfairly prejudicial. The trial court found that because the State was required to prove Defendant outraged 'the sense of public decency or affected the peace and quiet of persons who witnessed the act or acts,' his conduct, including the use of the slur, was directly relevant to the charge. However, even assuming that the challenges to the admissions were preserved, no error occurred."

" 'Ordinarily, racial slurs and ethnic epithets are so prejudicial as to render them inadmissible, unless the probative value outweighs any prejudice that may result from having the jury hear them.' *MCI Exp., Inc. v. Ford Motor Co*., (3DCA 2002). *In a criminal case, evidence that a Defendant used slurs is admissible if the evidence is relevant to an element of the charged crime and is not used as an 'attempt to inject race as an issue in the trial, or an impermissible appeal to bias and prejudice.' Jones v. State*, (Fla. 1999); …"

"Here, Defendant's offensive slurs were directly relevant and material to an element of the underlying charge—namely whether Defendant's conduct affected the peace and quiet of witnesses to the conduct. Indeed, the fact that Defendant used offensive slurs certainly made it more likely to affect the witnesses as opposed to benign, but loud language. Further, Defendant was not unfairly prejudiced by the admission of his offensive slurs. The State did not use Defendant's statements to inject race or an inappropriate appeal to bias in the trial. Rather, the State appropriately focused on the physicality/loudness of Defendant's conduct and the impact which Defendant's conduct had on the peace and quiet of the building's residents. Accordingly, we affirm."

Lessons Learned:

A good example of how far the Florida Supreme Court's *Saunders* decision can go in limiting the application of the Disorderly Conduct statute can be seen in *C.L.B. v. State*, (2DCA 1997), "This court [has] concluded that the evidence was insufficient to support a disorderly conduct conviction [where] the defendant's language ('fuck you, pussy cracker') did not constitute fighting words, and there was no evidence that the public was disturbed or that the defendant's words incited an immediate breach of the peace. We believe that Defendant's language here, referring to the manager as a 'motherfucker,' may be considered essentially the same... language...Furthermore, since a crowd was drawn, the only question is whether the Defendant's additional physical actions rendered his heretofore protected speech unprotected."

While not overtly mentioned in this opinion it should be remembered that even identified citizen informants cannot meet the statutory requirement for a warrantless misdemeanor arrest. An officer may only consider offensive conduct committed in the officer's presence, or a fellow officer's presence, in determining whether probable cause exists to make a warrantless arrest for disorderly conduct. Citizen informants do not qualify under the fellow officer rule.

Oxyde v. State
4th D.C.A.
(May 14, 2025)

Homeland Security

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