LEGAL EAGLE

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Miranda Violation?

Jimmie Bowen and his gang were angry with Pierre Roche, for selling drugs on their turf. The dispute escalated, resulting in sixteen-year-old Bowen shooting Roche from close range. However, Roche was not the only victim. Bowen also wounded Christopher Smith, and shot and killed Derrick Days, an infant, sitting in his father's lap across the table from Roche.

The police had no leads until an associate of Bowen's identified him as the shooter. That same person also told the police that Bernard Jones, a member of the same gang, was the getaway driver. Bowen and Jones were soon arrested.

The detectives questioned Bowen and Jones separately. After they advised Bowen of his *Miranda* rights, both he and his mother invoked his right to counsel. The detectives then ceased their questioning. Jones, by contrast, waived his *Miranda* rights and spoke with Detective Jean Solis that same day, providing an uncorroborated co-defendant statement.

After Bowen invoked his rights, Solis moved him to a second interview room. Shortly thereafter, Jones was placed there too. Solis informed the two suspects that they would remain there until transportation to the Juvenile Assessment Center could be arranged. He activated audio and video recording in the room. *No officer asked either suspect to speak with the other about the murders. Nor did anyone promise any benefit to one suspect in return for seeking information from the other.*

Even so, the two began talking almost immediately. The recording revealed several incriminating statements from Bowen, who implicitly acknowledged that he was the shooter (and that Jones was the driver), accurately described the scene of the crime, and incredulously wondered how the police had "the two right motherf***ers."

After indictment, Bowen moved to suppress his statements. He testified that he talked with Jones because he "wanted to," and knew he could have refused. Still, he argued that Detective Solis, by placing Jones in the interview room with him after he had invoked his *Miranda* rights, effectively "interrogated" him in violation of the Fifth Amendment. The trial court denied the motion. On appeal, his conviction was affirmed.

Bowen then filed a civil rights violation in federal court arguing that the Florida trial court clearly violated *Miranda* by refusing to suppress incriminating statements he made to a fellow suspect when police

placed the two in an interrogation room after he had invoked his right to counsel. The case made its way to the United States Court of Appeals, 11th Circuit. The court explained State criminal defendants can receive federal habeas corpus relief only in limited circumstances. One of those is when the State court whose decision is under review decided an issue in a way that involved an "unreasonable application" of clearly established federal law. Bowen argued the Florida courts did just that in his case. After an analysis of *Miranda* and its progeny the 11th Circuit denied his application.

Issue:

Did Detective Solis violate *Miranda* principles when he placed the two suspects in an interrogation room after the Defendant had invoked his right to counsel? **No**.

Miranda at Department:

The safeguards provided by *Miranda* apply only if an individual is in custody and subject to interrogation. *State v. Weiss*, (4DCA 2006). Where either the custody or interrogation prong is absent, *Miranda* does not require warnings. In determining whether a suspect is in custody for *Miranda* purposes, the ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

The Supreme Court explained in *Rhode Island v. Innis*, (S.Ct.1980), that *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its *functional equivalent*. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. Thus, in a case where the detectives, without providing *Miranda* warnings, showed the Defendant a picture of the victim, played a recorded statement by his brother indicating the Defendant admitted to the crime, and displayed a recovered firearm, the Defendant's statement was suppressed. The Court found, "Although [Defendant] was not subjected to express questioning before he was given *Miranda* warnings, we conclude that the detectives' course of action amounted to the functional equivalent of questioning. The detectives should have known that their actions of showing [Defendant] the victim's picture, playing the recorded statement by [his] brother, and showing [Defendant] the recovered firearm, were reasonably likely to elicit an incriminating response from [Defendant]. And because [Defendant] was not given *Miranda* warnings before this course of action, we conclude the trial court erred in denying [Defendant's] motion to suppress." See, *Horne v. State*, (2DCA 2011).

In *Lowe v. State*, (Fla. 1994), officers investigating a homicide proceeded to a police station where Lowe and his girlfriend had gone to discuss an unrelated matter. Lowe's girlfriend asked to speak to Lowe and agreed to have the conversation recorded. That conversation was not prompted by the police. The Florida Supreme Court agreed with the trial court that the conversation with the girlfriend did not constitute an interrogation because *the police did not employ the girlfriend as an agent to coerce a confession from Lowe.*

And in *Riley v. State*, (5DCA 2013), the court discussed the privacy issue, "Generally, voluntary jailhouse conversations are not entitled to a reasonable expectation of privacy. See *Allen v. State*, (Fla.1994). However, … such an expectation of privacy may be reasonable 'when law enforcement deliberately fosters an expectation of privacy, especially for the purpose of circumventing a defendant's right to counsel....' In the instant case, it appears there was no attempt by law enforcement to foster an expectation of privacy. No law enforcement officer suggested the meeting would be private, nor did the conduct of Riley and Thomas reflect an expectation of privacy. Accordingly, we affirm."

Court's Ruling:

"To justify habeas relief a Supreme Court precedent must 'clearly *require* the State court' to have adopted a different result. *Kernan v. Cuero*, (S.Ct.2017). The bottom line is this: a 'state court's determination that a claim lacks merit precludes federal habeas relief so long as fair-minded jurists could disagree on the correctness of the state court's decision.' We now apply those standards here. Bowen argues that his State conviction should be vacated because his self-incriminating statements were the product of a *Miranda* violation. Specifically, he claims that Officer Solis's decision to place him in a seemingly private space with a fellow suspect amounted to an interrogation—and thus a violation of *Miranda*—under *Rhode Island v. Innis*, (S.Ct.1980). Bowen, however, relies on an *incomplete* account of

the Supreme Court's precedents on interrogation, and the Florida courts *reasonably* concluded that his *Miranda* rights were not violated. Habeas relief is not appropriate because fair-minded jurists, applying clearly established federal law to this record, could (rather straightforwardly) agree with the State court that Solis did not violate Bowen's *Miranda* rights."

"The Fifth Amendment provides that no person 'shall be *compelled* in any criminal case to be a witness against himself.' In service of this privilege, the Supreme Court held in *Miranda v. Arizona*, (S.Ct. 1966), that the government may not use statements offered while a suspect was in 'custodial interrogation' unless that suspect was informed of his rights. This post-arrest catechism is known as the *Miranda* warning. Once that warning is made, if an individual invokes his right to counsel, interrogation cannot resume until counsel is present. See, *Edwards v. Arizona*, (S.Ct.1981)."

"But *Miranda* does not require a warning, or otherwise impose restrictions, anytime police speak with someone—even if that someone is a suspect. Instead, its protections apply only in *custodial interrogation*. Custodial interrogation, in turn, is defined as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' *Rhode Island v. Innis* further clarified that definition (or muddied it, depending on who you ask). There, the Court explained that interrogation includes both 'express questioning' and 'its functional equivalent.' The functional equivalent of express questioning, according to *Innis*, encompasses 'any words or actions' by the police that they 'should know are reasonably likely to elicit an incriminating response from the suspect.' "

"Over time, the Supreme Court has elaborated on *Innis*'s definition of interrogation, emphasizing that whether a given police practice amounts to interrogation must be determined in light of *Miranda*'s purpose: 'preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.' *Arizona v. Mauro*, (S.Ct.1987). In *Mauro*, for example, the Court found no error when the police allowed a suspect's wife to speak to him after he had invoked his *Miranda* rights. The police admitted they knew it was 'possible' that Mauro would incriminate himself, yet refused to allow the conversation unless it was recorded and an officer was present. The State court concluded that an incriminating statement was 'reasonably likely' under *Innis*'s standard. The Supreme Court disagreed. It reversed, emphasizing that Mauro was not subject to any 'compelling influences, psychological ploys or direct questioning.' "

"Allowing someone to be in a position where they may choose to make incriminating statements is not the 'kind of psychological ploy that properly could be treated as the functional equivalent of interrogation.' After all, officers 'do not interrogate a suspect simply by hoping that he will incriminate himself.' So there was no 'interrogation' when law enforcement officers were only witnesses to a conversation between the accused and his spouse—even though they knew about and recorded the conversation. Likewise, schemes to 'mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within *Miranda*'s concerns.' See, *Illinois v. Perkins*, (S.Ct.1990)."

"A fair-minded jurist, applying the *Innis–Mauro–Perkins* trio of cases, could conclude that Solis' decision to place Bowen in an interrogation room with Jones was not a *Miranda* violation. These cases certainly do not 'clearly *require* the State court' to have reached the opposite conclusion. In fact, they show that police actions that lead to a suspect making incriminating statements to a third party are the functional equivalent of interrogation **only if they involve some 'psychological ploy' with sufficient coercive elements**. Here, there was no psychological ploy. Like the wife in *Mauro*, Jones was operating completely independently from the police, as was Bowen, who spoke to Jones only because he 'wanted to.' And just like the suspect in *Perkins*, Bowen did not believe that he was in the presence of law enforcement officers, so it is not at all clear why he would have felt the coercive pressure of police interrogation. A fair-minded jurist could thus conclude that **placing Bowen and Jones in a room together was the *strategic use of a neutral situation* rather than a coercive psychological ploy**."

"What's more, it is not obvious that all jurists would agree that it was reasonably likely that Bowen would incriminate himself if Jones was placed in the same room. The Supreme Court has not provided much guidance on *Innis*'

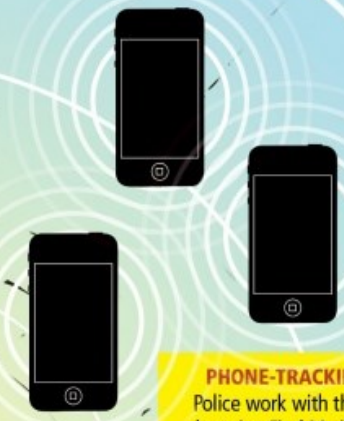
(Continued on page 12)

THE FUTURE OF PUBLIC SAFETY

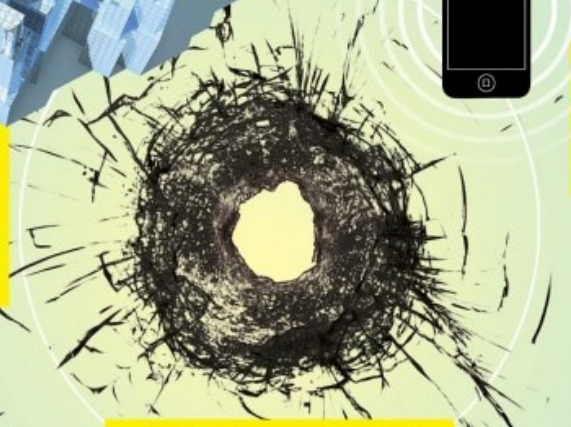
SMART POLICING

Technology has long served as a force multiplier for improving police operations. The new focus is on finding proactive ways to fight crime, says Joanna Salini, a research analyst for justice/public safety and homeland security at Deltek. These emerging technologies are helping support law enforcement efforts:

PREDICTIVE ANALYTICS
Cities have begun using business intelligence software to crunch data to identify patterns of criminal activity and deploy resources appropriately.



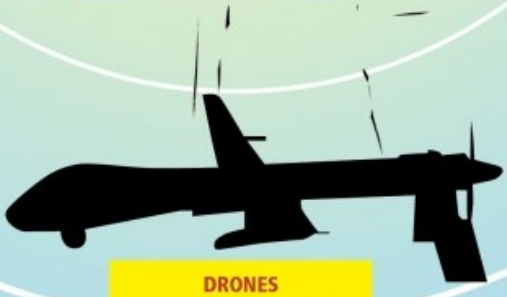
PHONE-TRACKING APPS
Police work with theft victims by using Find My iPhone and similar apps to track down stolen mobile devices.



GUNSHOT DETECTION SYSTEMS
Gunshot detection technology pinpoints the precise location of gunfire by triangulating sounds picked up by acoustic sensors placed on utility poles or rooftops.

DIGITAL EVIDENCE MANAGEMENT
Evidence management software streamlines the handling of digital and physical evidence through the use of a single electronic repository.

NEXT-GENERATION 911
NG911 will enhance traditional 911 emergency communications to support text, data, video and images from all types of networked devices.



DRONES
Unmanned aerial vehicles can serve as an eye in the sky for public safety agencies.

STATETECH

Recent Case Law

Associating with Known Criminals

Jose Orta was placed on 7 years of probation following a trial. While he was on probation, Orta's probation officer filed an affidavit alleging that he violated a condition of his probation by associating with a person engaged in criminal activity.

The testimony established that officers walked down an alley alongside an apartment building. Behind the building, in its parking lot, they encountered Orta and a man named Daniel Machado sitting in a group, "shoulder to shoulder," with only one person between Orta and Machado. As the officers approached, they heard the group chatting and observed Machado holding a glass pipe while using a pushrod on that pipe. One of the officers testified that based on his training and experience, Machado was using the pushrod to prepare it for another rock. As the officers approached, Orta spotted them and yelled out, "Yo, la policia." The officers then saw Machado look at them and move the hand that held the pipe.

Based on the testimonial evidence, the trial court found Orta willfully violated a condition of his probation by associating with Machado while Machado was engaging in a crime, to wit, drug possession.

Issue:

Was the evidence presented sufficient to prove that Orta willfully violated a condition of his probation by associating with a person engaging in criminal activity? **Yes**.

Knowingly Associating with Persons Engaged in Criminal Activity:

Simply observing criminal activity and being aware criminal activity is occurring nearby does not establish that a defendant was knowingly associating with persons engaged in such activity. "Associate" is defined as follows: "to join as a partner, friend or companion; to keep company with; to join or connect together; to bring together in any of various ways."

Thus, in *Bland v. State,* (1DCA 2005), the court held that the evidence that the probationer willfully associated with persons engaged in criminal activity was sufficient to support revocation of his probation. The evidence in *Bland* reflected that the defendant had rented a hotel room in which he and three other people were found together with rolling papers, marijuana, a container with cocaine residue, and a scale with cocaine residue. A crack pipe was found in the bathroom which was occupied by the defendant when the officer first arrived at the room. The court ruled that this evidence established that the defendant was keeping company with or had joined with persons engaged in criminal activity.

Conversely, in *Holmes v. State*, (5DCA 2008), the court found the evidence clearly failed to establish the defendant's connection to persons or illegal activity. An officer engaged in surveillance at a gas station saw Holmes walk into the store and observed other men engaged in drug use. The defendant testified that he walked to the CITGO to get a snack. The only contact he had with the men at the gas station was to ask for a light for his cigarette. He was outside the CITGO for "about two minutes."

The D.C.A. ruled that simply observing criminal activity and being aware criminal activity is occurring nearby does not establish that a defendant was knowingly associating with persons engaged in such activity. "In the present case, other than the defendant's awareness of and proximity to the criminal activity for what the deputy labeled as a short period of time, the only evidence tying the defendant to the wrongdoers was the defendant 'having conversation' with them. The deputy offered no specifics as to the nature or content of this conversation and the defendant 'wasn't there very long.' The evidence reflected that the defendant did not arrive at the CITGO with the wrongdoers and no evidence was presented that he knew them. Even assuming that the defendant asked for a light for his cigarette, such *incidental contact with a person or persons who are engaged in criminal conduct does not establish an association with such person or persons*."

Court's Ruling:

"Association is akin to companionship. Although the type of conduct that establishes association is varied, generally association exists if a

defendant spends a reasonably long time with someone and the defendant is comfortable around the other person. For an association to be *willful*, a defendant needs to be 'aware' that the individual he is associating with is engaged in criminal activity during the association."

"The evidence presented here was competent and substantial enough to show that Orta associated with Machado and that he was aware of Machado's criminal activity while they were associating. First, Orta and Machado were seen sitting together, chatting, in a parking lot behind an apartment building. This fact lends itself to the inference that Orta planned to meet Machado there. This is because people do not typically just stroll into an apartment building's parking lot and then sit around there, particularly if the lot is behind the building. … Additionally, the fact that Orta was sitting supports a reasonable inference that Orta's presence was not momentary or fleeting."

"Also, importantly, Orta yelling out that police officers were approaching shows that Orta was concerned about those in earshot and wanted to protect them from the police because *he knew they were engaging in criminal activity*. Plus, Orta was sitting 'shoulder to shoulder' along with Machado who was openly displaying a crack pipe – showing not only an awareness of what Machado was doing, but also a level of comfort with someone holding drug paraphernalia that one would not normally have with a stranger."

"We further note that the facts before us are distinguishable from *Holmes v. State*. … Here, to the contrary, the evidence shows that Orta intended to be where he was, that he was there for more than a fleeting period of time, and that he knew Machado."

"So, although the evidence of Orta's willful association with Machado is circumstantial, drawing all reasonable inferences from this evidence and reviewing it under the preponderance of the evidence standard, it makes for competent substantial evidence supporting the trial court's finding of Orta's willful association with Machado. Affirmed."

Lessons Learned:

It is important to recognize that the present case deals with a condition of probation. It is not a substantive crime of its own. However, some police agencies have an S.O.P. prohibiting officers from associating with known felons. The IACP published the following suggested rule:

§1.27 Associations:

"Officers shall avoid regular or continuous associations or dealings with persons who they know, or should know, are persons under criminal investigation or indictment, or who have a reputation in the community or the Department for present involvement in felonious or criminal behavior, except as necessary to the performance of official duties, or where unavoidable because of other personal relationships of the officers."

See, "Prototype Rules of Conduct," in Managing for Effective Police Discipline, International Assn. of Chiefs of Police, Inc., (1976).

The Supreme Court has long held that the First Amendment's protection of free speech, assembly, and petition logically extends to include a "freedom of association.' Generally, this means people are free to associate with others with similar political, religious, or cultural beliefs. In 1984 the Supreme Court recognized a right to intimate association. Family relationships and marriage should be afforded greater protection from government interference than merely social ones.

"Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life." *Roberts v. U.S. Jaycees*, (1984).

Thus, in one case, the court ruled that an officer was wrongly terminated for dating the daughter of a crime figure. The officer did not conceal the relationship but said he would discontinue seeing the woman. He broke that promise and was fired. The appellate court said: "We … align ourselves with recent cases holding that the First Amendment freedom of association applies not only to situations where an advancing of common beliefs occurs, but also to purely social and personal associations. … we conclude that the relationship between Wilson and Susan Blackburn was protected under the First Amend-ment freedom of association. .... Here, the agency went too far and punished an officer for his association with the daughter of a crime figure. There was no proof that he had cultivated a relationship with the father, other than dating his daughter." See, *Wilson v. Taylor*, (11th Cir. 1984).

Orta v. State
3rd D.C.A.
(Feb. 21, 2024)

Reasonable Suspicion

At 8:00 a.m. U.S. Postal Inspector Charles Gerhart stepped out the front door of his house. He saw a man, later identified as Daniel Critchfield, walking onto Fifth Street out of the alley that connects Fifth Street to the employee parking lot behind a restaurant. Adjacent to the alley was a house that Gerhart believed was unoccupied at the time. The men made eye contact, and Gerhart thought Critchfield had an "Oh, no, I'm caught" look on his face. Critchfield walked away from Gerhart. As Gerhart walked to his car, he watched Critchfield, who repeatedly looked over his shoulder toward Gerhart. Finding this suspicious, Gerhart drove his vehicle and followed Critchfield. He observed Critchfield doubling back toward Fifth Street. Gerhart also noticed that the front pocket of Critchfield's hooded sweatshirt "had what appeared to be something very heavy in it, so heavy that it was falling down below his crotch."

Gerhart contacted an officer and related all his observations and suspicions. Officers located Critchfield and asked him to step to the side of the road. Critchfield complied with the officers' commands. They discovered Critchfield had been carrying in his sweatshirt pocket a holstered pistol, a flashlight, and a variety of controlled drugs. He was indicted for possessing a firearm while being an unlawful user of a controlled substance.

Critchfield filed a motion to suppress the search arguing the officers lacked founded suspicion to effect the stop and frisk. The trial court denied the motion. On appeal, that ruling was reversed.

Issue:

Did the citizen informant's report provide reasonable suspicion for the stop? **No.**

Reasonable Suspicion:

An arrest must be supported by probable cause, whereas an investigatory stop requires reasonable suspicion of a crime. Reasonable suspicion "is a less demanding standard than probable cause" yet requires "at least a minimal level of objective justification for making the stop." *Illinois v. Wardlow*, (S.Ct.2000). The burden is on the State to prove that reasonable suspicion justified a warrantless seizure. *United States v. Kehoe*, (4th Cir. 2018), "To effect a constitutionally permissible investigatory stop, a law enforcement officer must have a well-founded, articulable suspicion that the person stopped has committed, is committing, or is about to commit a crime" "Mere suspicion is not enough to support a [Terry] stop." *Popple v. State*, (Fla. 1993).

In deciding whether an officer had a well-founded suspicion of criminal activity, the trial court must consider the totality of the circumstances. *D.C. v. Wesby*, (S.Ct. 2018), ruled that the totality of the circumstances test does not allow the viewing of each fact in isolation and "the whole is often greater than the sum of its parts." Factors that may be considered in making that determination include the time of day, the suspect's appearance and behavior, and anything unusual in the situation as interpreted in light of the officer's experience, knowledge, and training.

"Reasonable suspicion ... is dependent upon both the content of information possessed by police and its degree of reliability." *Alabama v. White*, (S.Ct.1990). "In analyzing whether third-party information can provide the requisite reasonable suspicion, courts have looked to the reliability of the informant as well as the reliability of the information provided." "The less reliable the tip, the more independent corroboration will be required to establish reasonable suspicion." On the one end of the spectrum of reliability is an anonymous tip that has relatively low reliability because it rarely demonstrates the informant's basis of knowledge or veracity; thus, it must be sufficiently corroborated by the officer to constitute reasonable suspicion.

Baptiste v. State, (Fla. 2008), ruled that an anonymous tip alone generally does not provide reasonable suspicion for a stop but could do so under a totality of the circumstances analysis, such as when an officer makes subsequent observations of a suspect who matches the description given, as occurred in the present case. On the other end of the spectrum is a tip from a citizen informant that is presumed highly reliable because the informant's motivation is the promotion of justice and public safety and the informant provides their name and can be held accountable; therefore, it is sufficient by itself to provide police with reasonable suspicion. However, where, as here, the tip, though reliable, fails to provide a well-founded, articulable suspicion that the person observed has committed, is committing, or is about to commit a crime," police will need to make further observations and investigation to establish objective reasons for the stop.

Court's Ruling:

"A few features of reasonable suspicion are particularly salient here. The

suspicion must be articulable—that is, 'the officer must be able to articulate' objective reasons for his suspicion. A mere 'hunch' or 'inchoate and unparticularized suspicion' will not do. At the same time, we give 'due weight' to the inferences and 'common sense judgments reached by officers in light of their experience and training' in identifying suspicious circumstances that may appear unremarkable to a layman. 'Facts innocent in themselves may together amount to reasonable suspicion.' *United States v. Sokolow*, (S.Ct.1989)."

"The suspicion also must be particularized; an investigatory stop must be justified by an objective basis to suspect that the particular person stopped is, or is about to be, 'engaged in a particular crime.' *Kansas v. Glover*, (S.Ct.2020); *see United States v. Cortez*, (S.Ct.1981). The Government asserts that the suspected crime here is theft, not the firearm offense for which Critchfield was ultimately indicted. So, we focus on whether the officers had reasonable suspicion to believe Critchfield had committed or was poised to commit a theft."

"In making this assessment, we consider the totality of the circumstances to determine whether the facts known to the officers at the time of the stop objectively gave rise to reasonable suspicion. At the time [Officers] directed Critchfield to the side of Airport Road, [Officers] had not observed anything or acquired any *firsthand knowledge* that contributed to their suspicion. Their ground for stopping Critchfield was based entirely on the information Gerhart had communicated to them. Although Gerhart worked in law enforcement, he did not make the stop or instruct these officers to do so. Rather, as the parties appear to agree, Gerhart acted as a known and credible tipster. We therefore focus on the facts known to [Officers], not Gerhart, at the time they stopped Critchfield." [Not fellow officer rule].

"Considering the totality of the circumstances known to [Officers] when they stopped Critchfield, we conclude they did not have objectively reasonable suspicion that he was, or had been, engaged in theft. Gerhart told [Officer] he saw a man he didn't recognize exit an alley onto his street around 8:30 a.m. This portion of the mixed-use neighborhood was largely residential but adjacent to 'dense, higher-traffic, and commercial areas.' A house near the alley was occasionally unoccupied, and the man had something heavy in his sweatshirt pocket. As the man walked up the street, he kept glancing back at Gerhart and, after making a right turn onto another street, he eventually doubled back and retraced his steps. Gerhart lost track of the man, and [Officers] found him walking along the road in an adjacent commercial area.

To summarize, when the officers stopped Critchfield, they knew he was a man with a weighed-down sweatshirt pocket who had walked through a residential neighborhood past an occasionally unoccupied home next to a commercial area in broad daylight and who had behaved evasively when a neighborhood resident watched and followed him. These circumstances, [taken at face value] without more, do not give rise to reasonable suspicion of theft. The Government attempts to bolster its showing by citing other cases where suspicion rested on similar factors. But those cases only highlight the dearth of reasonable, articulated suspicion here."

"For example, the Government notes Critchfield's evasive reaction to Gerhart and observes that we have repeatedly held a defendant's attempt to evade law enforcement can support reasonable suspicion, ('headlong flight' upon noticing the police). But Critchfield's nervous and arguably evasive reaction was not in response to an identifiable member of law enforcement. Nothing in the record suggests Gerhart was in uniform or recognizable as a federal postal inspector when Critchfield saw him. Depending on the circumstances, it may be significantly less indicative of criminal activity for a person to evade a stranger on the street than to evade the police. While headlong flight might provoke suspicion in any context, we think a nervous reaction and evasive route in response to being watched and followed by another civilian contributes less support to a finding of reasonable suspicion than efforts to evade law enforcement."

"To take another example, the Government relies on Critchfield's sagging sweatshirt pocket, suggesting officers could reasonably believe it contained theft implements or stolen goods. However, no officer articulated a reason to think the pocket itself suspicious; there was no testimony, for example, about the shape of any bulge in the pocket, anything protruding from it, any expectation about how thieves typically carry theft implements, or any recent thefts of objects of a particular size or weight. In fact, [Officer] testified

that a hooded sweatshirt with a bulge in these circumstances 'could be any number of things' and he 'didn't know, you know, what it could have been, until [they] were able to locate him.' "

"Apparently seizing on this uncertainty, the Government cites cases about frisking a suspect for officer safety after a stop based on reasonable suspicion. But those authorities miss the mark here, because the Government is relying on the heavy pocket to justify suspicion of criminal activity, not as reason to believe a lawfully stopped suspect was armed and dangerous."

"The only basis for thinking Critchfield's heavy pocket held theft implements or stolen valuables was his temporary proximity to the occasionally unoccupied house by the alley at 8:30 a.m. Gerhart did not tell the officers that Critchfield had been in the house or on the property, that he emerged from behind it, or that he appeared to be casing it. Rather, he walked out of an alley beside the house that connected Fifth Street to a commercial area. In these circumstances, the heavy pocket contributes to the overall picture but does not independently lend much support to an objective basis for reasonable suspicion."

"Of course, we must not discount the officers' experience and training 'to detect the nefarious in the mundane.' But, unlike in many cases, here no officer testified to any specialized basis he had for interpreting these circumstances as indicative of criminal activity, like a common criminal modus operandi or a location with frequent thefts. And while we give due weight to an officer's commonsense judgments and inferences from the facts, we do not defer to an officer's inchoate sense of suspicion. Thus, Gerhart's identification of Critchfield to [Officer] as 'a suspicious subject' does not contribute to the calculus apart from articulable facts to support that suspicion. Nor may we supplement the Government's showing with our own 'imagined ... conceivable justifications' for the officers' actions; unlike rational basis review, reality matters for reasonable suspicion."

"At bottom, the totality of the circumstances does not support a reasonable, articulable suspicion that Critchfield had engaged, or was about to engage, in theft. Although facts 'susceptible of innocent explanation' can, 'taken together,' amount to reasonable suspicion, the facts here do not reveal a particularized and objective basis for suspecting legal wrongdoing. *United States v. Arvizu*, (S.Ct.2002). When the officers stopped Critchfield in a commercial area, they knew he previously had walked through an adjacent residential neighborhood past an occasionally unoccupied home around 8:30 a.m., carried something heavy in his sweatshirt pocket, and had behaved evasively when a neighborhood resident watched and followed him. Without more, these circumstances do not establish reasonable suspicion that Critchfield had committed a theft or was about to do so. REVERSED."

Lessons Learned:

A tip from a citizen informant is presumed highly reliable because the informant's motivation is the promotion of justice and public safety and the informant gives his name and can be held accountable; therefore, it is *sufficient by itself* to provide police with reasonable suspicion. However, the tip must provide sufficient facts from which a reasonable suspicion can be based, which was not the case here. To determine if reasonable suspicion exists, the court must consider the totality of the circumstances based on the viewpoint of an objectively reasonable law enforcement officer.

Prior case law provides some guidance in this area. In *McDavid v. State*, (1DCA 2004), an officer twice saw the defendant drive slowly around the block in a residential neighborhood around 4 a.m. The officer suspected that the defendant was "either casing the neighborhood or seeking to engage in drug activity based on the fact that there had been recent burglaries in the area due to the high narcotic activity there." After following him for ten to twelve blocks, the officer stopped the defendant. The officer admitted that nothing indicated that the defendant had been involved in any burglary or drug activity and that the defendant had not committed any traffic violation. Rather, the officer believed that the defendant "looked out of place." The D.C.A. determined that the facts were insufficient to "demonstrate a well-founded suspicion of criminal activity to justify an investigative detention."

To justify an investigatory stop, an officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the stop. *Terry v. Ohio*, (S.Ct.1968). In assessing the reasonableness of the stop, the courts will look at the facts available to the officer at the moment of the stop and determine whether they "warrant a

man of reasonable caution in the belief that the action taken was appropriate."

Further, in determining whether an officer acted reasonably, "due weight must be given ... to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience," (i.e. experience, knowledge, and training). In the present case, Officers could provide no legal basis for the stop other than the citizen report which itself did not include a description of criminal behavior.

United States v. Critchfield
U.S. Court of Appeals, 4th Cir.
(Aug. 31, 2023)

Disorderly Conduct

Officer working the midnight shift received a high-priority radio call, of a man with a knife threatening people. Within five minutes, the officer arrived and saw what he described as "a small group of people" in the parking lot. The officer was directed to Defendant who was standing next to a woman. The officer did not see a weapon in Defendant's hands. Because he was alone, he did not think it was safe for him to approach Defendant or have the defendant come down the stairs. A few minutes later, backup officers arrived. One officer directed the woman to descend the stairs. She did so without incident.

A Sergeant then arrived and asked Defendant if he had a gun. Defendant responded that he had a gun in his waistband. The Sergeant commanded Defendant to put his hands up and descend the stairs. Defendant did so. When he got to the bottom of the stairs, the Sergeant removed the gun from his waistband. He handcuffed Defendant, took him to a quiet location, and had him sit on a chair. The Sergeant testified that he was only detaining Defendant at that point to get the him secured, make sure the posed no other threat, and find out why the was agitated.

During that conversation, Defendant also said he possessed a concealed carry permit which had allowed him to carry the gun found in his waistband. The Sergeant confirmed the defendant's permit was valid. Nevertheless, he arrested Defendant for disorderly conduct, based on witness statements about Defendant's conduct before officers arrived, and based on his statements after being detained. The senior officer then searched Defendant incident to the arrest, and discovered a bag of cocaine in his pants' pocket. The State did not charge Defendant with disorderly conduct, rather with cocaine possession.

The Defendant filed a motion to suppress arguing that the arrest and search were illegal in that the alleged disorderly conduct was not in the officers' presence. The trial court denied the motion finding that because the callers were citizen informants who indicated that the Defendant "had a gun or knife," the officers who responded were justified in conducting an investigatory stop. As a result, the warrantless arrest was admissible. On appeal, that ruling was reversed.

Issue:

To prove disorderly conduct can the State rely on an eye witness citizen informant as the basis for the arrest? **No**.

Disorderly Conduct:

Section 877.03, F.S., 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.

Here, Defendant correctly argued that the warrantless misdemeanor arrest for disorderly conduct, was illegal and unconstitutional, in violation of the requirements of section 901.15(1). "The officers involved did not witness any actions

and elements constituting disorderly conduct, and made a post-detention decision to execute such arrest based solely upon 'utterances' made while in custody – utterances which clearly did not qualify as 'fighting words' or false alarms such as yelling 'fire' in a crowded theater."

"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."

Court's Ruling:

"Section 901.15(1)'s 'misdemeanor presence' requirement applies to warrantless arrests for disorderly conduct, which was the initial charge in this case and led the senior officer to perform a search incident to arrest and thereby discover the defendant's possession of cocaine. *Baymon v. State*, (2DCA 2006)."

"*Baymon* is virtually on point and favors the Defendant here. Our sister court reasoned: An officer is authorized to make a warrantless arrest for a misdemeanor only when it is committed in the officer's presence. § 901.15(1); *Nickell v. State*, (2DCA 1998).

In this case, [Deputy] did not observe conduct constituting the crime of disorderly conduct. Although the Deputy observed [Defendant] yelling and screaming, there was nothing to suggest that [Defendant] was inciting an immediate breach of the peace or was yelling the equivalent of 'fire' in a crowded movie theatre. ... [Defendant's] arrest was unlawful. Therefore, the law mandated suppression of the evidence seized in any search performed incident to that arrest."

"Although the officers had observed 'a small group of people ... a handful of people' in the apartment complex's parking lot, had observed Defendant acting 'agitated,' and had heard the defendant's 'utterances' explaining why he had become agitated, the *officers did not personally observe the defendant commit any of the foregoing elements constituting the crime of disorderly conduct*. While the defendant may have been acting in such a manner before the officers arrived at the scene, Defendant was no longer acting in such a manner after the police arrived, i.e., in their presence. Thus, none of the elements constituting the crime of disorderly conduct occurred 'in the presence of the officers' to have permitted the officers to have effectuated a warrantless arrest of the defendant for that crime. That illegal arrest, in turn, tainted the officers' search of the defendant's pants' pocket incident to his arrest. Thus, the Circuit Court should have granted Defendant's motion to suppress the cocaine which the officers found in his pants' pocket."

"The [Sergeant] did not testify that the subsequent search of the Defendant's pants' pocket was to locate the alleged knife which had been the subject of the 911 calls, or because he reasonably believed Defendant remained armed or dangerous, or because he had a reasonable fear for his or others' safety. Rather, the [Sergeant] testified that he searched the defendant's pants' pocket merely incident to his arrest of Defendant for disorderly conduct. Thus, the Circuit Court's attempt to have justified the search as a *Terry* stop was not supported by competent, substantial evidence."

"Based on the foregoing, we… reverse the circuit court's order denying the defendant's motion to suppress, and remand for the Circuit Court to enter an order granting Defendant's motion to suppress."

Lessons Learned:

The present case provides an important reminder that even identified citizen informants cannot meet the statutory requirements of section 901.15(1). An officer may only consider offensive conduct committed in his presence, or a fellow officer's presence. The law is quite clear, citizen informants do not qualify under the fellow officer rule.

Carlo v. State
4th D.C.A.
(Jan. 3, 2024)

(Continued from page 3)

Miranda Violation?

'reason-ably likely' language, but *Mauro* instructs us that a mere 'possibility' of incrimination is not enough. Here, Solis did not interrogate Bowen merely by 'hoping' he would incriminate himself. And there is room for disagreement about whether it was 'reasonably likely' that Bowen would do so. After all, he had been arrested and read his rights many times before—and fully understood that he could have refused to speak to anyone. That Bowen *did* incriminate himself is not enough to show with certainty that it was *reasonably likely* that he would do so when Jones was placed in the room. In short, the facts place Bowen's challenge in a gray area that is not unambiguously dictated by Supreme Court precedent. That is the exact type of case where § 2254 relief is *inappropriate*."

"Federal courts have the power to overturn State criminal convictions only in exceptional circumstances. This is not one of them. The Florida court's decision was not so obviously wrong that its error lies 'beyond any possibility for fair-minded disagreement.' "

Lessons Learned:

It is quite obvious from the above discussion that law enforcement is not obliged to protect the defendant from himself and his bad decisions. What law enforcement cannot do is mislead a suspect as to his legal position.

"It has long been held that inmates do not have a reasonable expectation of privacy in jail. Therefore, most conversations and confessions in a police interrogation room are admissible as evidence. However, when law enforcement *deliberately fosters* an expectation of privacy, especially for the purpose of circumventing a defendant's right to counsel, subsequent jailhouse conversations and confessions are inadmissible." *Cox v. State*, (4DCA 2010).

In a comparable circumstance, the courts have ruled that a suspect does not have an expectation of privacy in conversations with an accomplice in the back of a patrol car. In *State v. Smith*, (Fla.1994), the Florida Supreme Court ruled, "The Fourth Amendment right to privacy is measured by a two-part test: 1) the person must have a subjective expectation of privacy; and 2) that expectation must be one that society recognizes as reasonable. *Katz v. United States*, (S.Ct.1967). Had Smith been placed in the police car for custody purposes, our analysis would be quite simple. A prisoner's right of privacy fails both prongs of the *Katz* test. A prisoner's privacy interest is severely limited by the status of being a prisoner and by being in an area of confinement that 'shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room.' *Lanza v. New York*, (S.Ct.1962). Courts have also determined that a person in custody in the back of a police car has no right of privacy because that person is essentially a prisoner."

"We agree with the 11th Circuit Court's reasoning and hold that a person does not have a reasonable expectation of privacy in a police car and that any statements intercepted therein may be admissible as evidence." See, *United States v. McKinnon*, (11th Cir. 1993).

Bowen v. Fla Dept of Corrections
U.S. Court of Appeals – 11th Cir.
(Feb. 15, 2024)

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FLETC OCC Informer Webcast
"Inspections" presented by John Besselman, Attorney Advisor/ Senior Instructor

April 3, 2024, 2:30 – 3:30
FLETC OCC Informer Webcast
"Inventories" presented by John Besselman, Attorney Advisor/ Senior Instructor

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