LEGAL EAGLE

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Vehicular Homicide

Gregory Andriotis was driving north on the Interstate when his vehicle rear-ended the vehicle carrying the four members of the Scherer family. Tragically, one of the children was killed, and both parents and the second child were seriously injured.

In the minutes leading up to the accident and while driving his car, Andriotis used his cellular phone to perform the following tasks: access the internet, receive and place a total of five phone calls, download Microsoft Excel, and use the program to review spreadsheets until just seconds before the crash. Evidence indicates that he was on the phone during the crash. Importantly, at no time did Andriotis activate his brake lights or take evasive action to avoid the accident. There were no skid marks on the roadway indicating that he attempted to slow or stop before the collision. The event data recorder in his vehicle indicated that the brake pedal was not depressed until the moment of the crash.

At the time of the crash, Andriotis was traveling 79 MPH (the posted speed limit was 70 MPH). As a result, he would have had 14 to 16 seconds to react to the stopped traffic in front of him. He failed to do so. The force exerted by the impact was so great that a total of six vehicles were involved in the crash, three of which were stuck together in the mangling of the automobiles. The vehicles were pushed more than 70 feet as a result of the accident.

Andriotis was charged with one count of vehicular homicide, and three counts of reckless driving causing serious bodily injury. He argued on appeal that the facts surrounding the car accident did not establish a *prima facie* case for vehicular homicide or reckless driving. More specifically, he argued that his conduct did not rise to the level of recklessness required for conviction on each of the charges against him. The trial court denied his pretrial motion to dismiss, as well as his motion for judgment of acquittal. On appeal, those rulings were affirmed.

Issue:

Did the charged conduct and evidence presented at trial merely establish careless driving, and was insufficient to sustain a conviction for either vehicular homicide or reckless driving causing serious bodily injury? **No**.

Vehicular Homicide:

Florida law defines vehicular homicide as "the killing of a human being, or the killing of an unborn child by any injury to the mother, caused by the operation of a motor vehicle by another in a *reckless manner* likely to cause the death of, or great bodily

harm to, another." See, § 782.071(1), F.S. Thus, vehicular homicide cannot be proved absent proof of the elements of reckless driving. *See State v. Lebron*, (5DCA 2007). The State was required to prove that Andriotis drove recklessly to convict him of either vehicular homicide or reckless driving causing serious bodily injury.

One is guilty of reckless driving when he "drives any vehicle in willful or wanton disregard for the safety of persons or property ...." See, § 316.192(1)(a), F.S. "Willful" is defined as "intentional, knowing, and purposeful." See, *D.E. v. State*, (5DCA 2005)). "Wanton" means that which is done "with a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property." "The degree of culpability required to find reckless driving is less than that required for culpable negligence (the standard for manslaughter), but more than a mere failure to use ordinary care." *McCreary v. State,* (Fla. 1979).

Reckless driving is defined as driving with a willful or wanton disregard for the safety of others, or a willful disregard of the potential consequences of one's actions. It arises not from mere negligence but often from a *conscious decision to expose others to the risk of harm*. Wanton disregard is a legal term that denotes an individual's extreme lack of care for the well-being or rights of another individual. It is most commonly used in the context involving negligence to describe reckless behavior that has led to damages or injury.

Court's Ruling:

"Thus, in resolving this case, we consider: 1. the totality of the circumstances surrounding the manner in which Andriotis operated his vehicle, and 2. whether it was reasonably foreseeable in light of his conduct that death or great bodily harm could result."

"The circumstances presented in the record before us are sufficient to demonstrate the reckless manner in which Andriotis drove his vehicle in causing the underlying crash. While traveling on an interstate highway at a high rate of speed at least 9 MPH in excess of the posted 70 MPH speed limit, Andriotis was *fully immersed in the use of his cell phone*. Beyond simply making or receiving phone calls, he used his cell phone in the manner in which such devices are designed to be used today—as a small, handheld computer. Andriotis was accessing the internet, downloading Microsoft Excel software, and reading spreadsheets, in addition to performing other personal or business-related communications. So involved was he, that he never applied the brakes of his car before causing the fatal accident. This, despite the fact that at one point Andriotis would have had approximately 1,906 feet of clear visibility to observe the stopped traffic and 14–16 seconds to stop and avoid the accident. Yet he never did so, as confirmed by eyewitness testimony and the event data recorder. Such conduct is plainly both willful and wanton."

"Additionally, it was entirely foreseeable that death or great bodily harm could result from such reckless conduct. Although a person does not have to foresee the specific circumstances causing the death of a victim in order to be guilty of vehicular homicide, the person must have reasonably foreseen that the same general type of harm might occur if he or she knowingly drove a vehicle under circumstances that would likely cause death or great bodily harm to another."

"Here, a serious car accident causing injury or death is precisely the 'type of harm' that is reasonably foreseeable because of the extreme inattentiveness such as was present in this case. When Andriotis *willfully diverted his attention from his surroundings*, and the responsibility of driving at highway speeds (even while exceeding the posted speed limit), to the extent that he failed to stop or even slow for stopped traffic—even though having 14 to 16 seconds to do so—the profound impact and resulting serious injury and death that occurred in this case were not only reasonably foreseeable but fairly certain to occur."

"Since the record demonstrates that Andriotis' operation of his vehicle at material times surrounding the crash constitutes recklessness, and that the car accident causing injury or death was reasonably foreseeable, there is sufficient evidence to sustain his convictions. Accordingly, we AFFIRM Andriotis's convictions and the 30-year sentence imposed by the trial court."

Lessons Learned:

The Defendant's willful and purposeful distracted driving was overwhelming obvious in the present case, making his conviction "bulletproof." In essence, the D.C.A. ruled that the record demonstrated that Andriotis' operation of his vehicle at material times surrounding the crash constituted recklessness, and the car accident causing the injury

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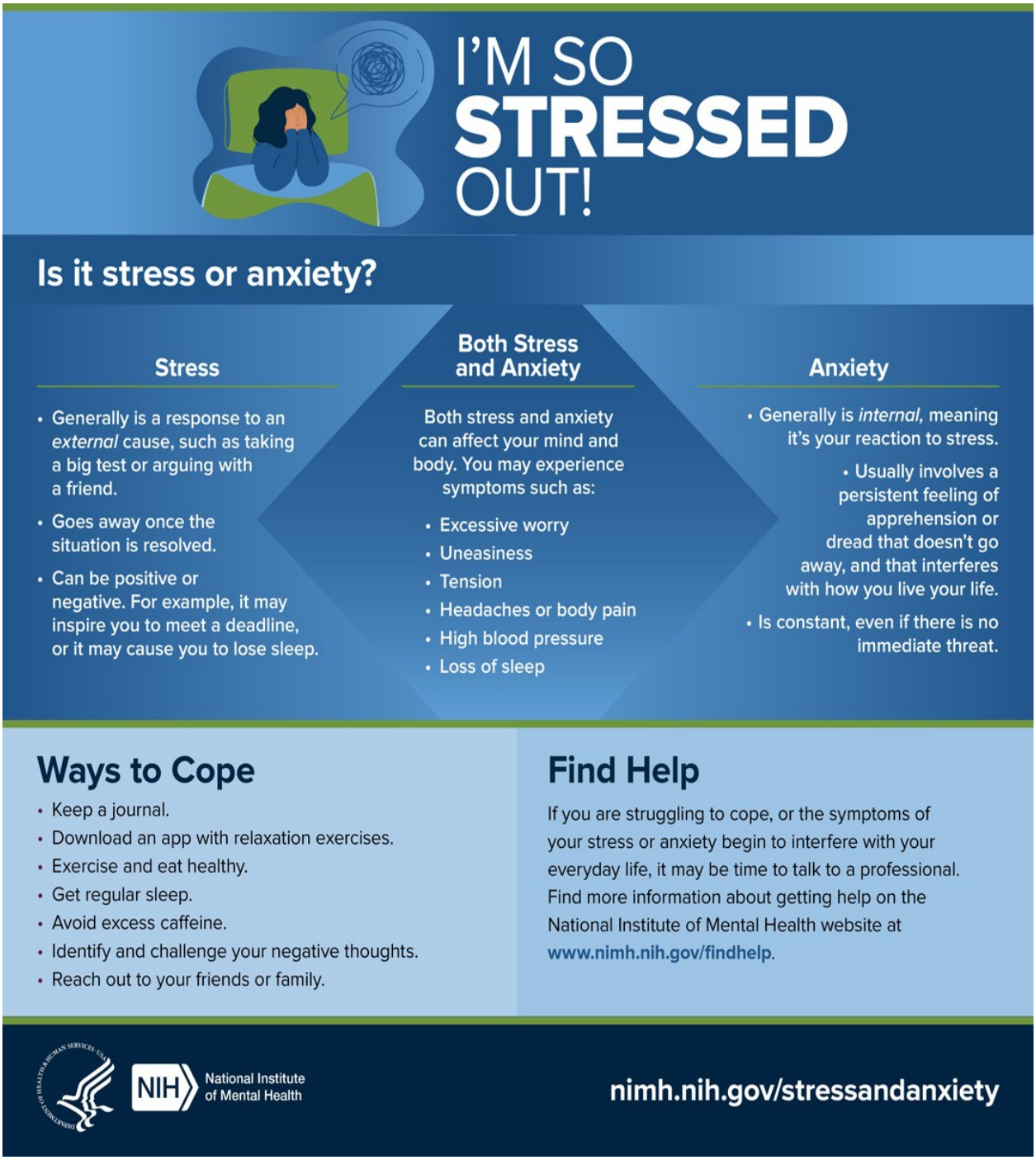
Officer Mental Health



If you're struggling to cope or the symptoms of your stress or anxiety begin to interfere with your everyday life, it may be time to talk to a professional. Find more information about stress and anxiety and getting help. U.S. Department of Health and Human Services

Recent Case Law

Arrest Search

Robert Turner's brother reported that his handgun, Ruger SR45, had been stolen by Robert. With that information, a magistrate issued a warrant for Turner's arrest at Ofcr. Flores' request

The following night Ofcr. Flores responded to a carjacking report. The victim identified Robert Turner as his assailant, and that he had brandished a Rugar SR45 during the theft. Three days after the firearm theft, and two days after the carjacking Ofcr. Flores responded to a shots -fired call at a Mini Mart. Flores knew the location as a high crime area. Upon his arrival he observed Turner sitting in a black Buick outside the Mini Mart.

Flores had Turner exit the vehicle and placed him under arrest on the open warrant. A frisk did not reveal any guns or drugs. He was then placed in the back of Flores' patrol car. A search of the Buick revealed a firearm in the glove compartment. Ofcr. Flores confirmed the gun in the Buick was the same gun stolen from Turner's brother. Turner was charged with the firearm theft as well as being a convicted felon in possession of a firearm. He filed a motion to suppress arguing the warrantless vehicle search was unlawful. The trial court denied his motion, and that ruling was affirmed on appeal.

Issue:

Was the search of the vehicle Defendant was found sitting in, after his arrest on an arrest warrant, a lawful search incident to his arrest? **Yes**.

Arrest Search:

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." "A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions' to the Fourth Amendment's warrant requirement." *Flippo v. West Virginia*, (S.Ct.1999). "The government bears the burden of proof in justifying a warrantless search or seizure." One exception to the warrant requirement authorizes searches incident to a lawful arrest. *United States v. Robinson*, (S.Ct.1973). The search-incident-to-arrest exception allows arresting officers to search both "the arrestee's person and the area 'within his immediate control.' " *Davis v. United States*, (S.Ct.2011). This exception has its origins in *Weeks v. United States*, a 1914 decision in which the Supreme Court acknowledged the government's "right"—which had "always" been "recognized under English and American law"—to "search the person of the accused when legally arrested to discover and seize the fruits or evidence of crimes."

Fifty years later the Court decided *Chimel v. California* (S.Ct.1969), a case where police officers engaged in a warrantless search of the Defendant's entire home, including his attic and garage incident to his arrest. In setting out the limits of the search-incident-to-arrest exception, the Supreme Court emphasized that it was "reasonable" for arresting officers to search the person being arrested and the area within his reach 1. "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and 2. "in order to prevent [the] concealment or destruction" of evidence. The Court concluded that there was therefore "ample justification ... for a search of 1. the arrestee's person and 2. the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." But because there was "no constitutional justification" for the warrantless search of the defendant's *entire home*, the Court held the search in *Chimel* to be unreasonable.

Four years later, the Supreme Court again considered the boundaries of the exception in *United States v. Robinson*, (S.Ct. 1973). The Court held that the search of the Defendant's person was permissible because "a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment," and "that intrusion being lawful, a search incident to the arrest requires no additional justification."

In 1981, the Supreme Court issued its opinion in *New York v. Belton*. Recognizing that "courts have found no workable definition of 'the area within the immediate

control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant," the Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

Over time, the Court's opinion in *Belton* resulted in lower-court decisions that treated the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by *Chimel v. California*. The Court revisited the search-incident-to-arrest exception in a new case, *Arizona v. Gant*, (S.Ct.2009).

In *Gant*, officers arrested the Defendant for driving with a suspended license, handcuffed him, and locked him in the back seat of a patrol car. Two police officers then searched the Defendant's vehicle and found drugs and a firearm. On review, the Supreme Court held that the officers' search was not a valid search incident to arrest.

First, the Court noted that "to read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would ... untether the rule from the justifications underlying the *Chimel* exception." Relying on the rationales articulated in *Chimel*—specifically, officer safety and the preservation of evidence—the Court concluded that police can "search a vehicle incident to a recent occupant's arrest *only* when the arrestee is **unsecured** and within **reaching** distance of the passenger compartment at the time of the search."

Second, the Court concluded that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is *reasonable to believe* **evidence relevant to the crime of arrest might be found in the vehicle**." Gant had been secured and out of reach of the passenger compartment, and it was not reasonable to believe the vehicle contained evidence relevant to the crime of arrest, i.e. driving with a suspended license, the Court concluded that the search was unlawful.

Court's Ruling:

"Having undertaken the review, we agree with the [trial] court that the warrantless search of the black Buick was justified by the search-incident-to-arrest exception as set out in *Gant* and did not violate the Fourth Amendment. The [trial] court correctly denied Turner's suppression motion, and we therefore affirm Turner's conviction."

"Warrantless searches – like the search of the vehicle in which Turner was sitting when he was arrested – are '*per se* unreasonable under the Fourth Amendment,' subject to 'only a few specifically and well-delineated exceptions.' *Katz v. United States*, (S.Ct.1967)). Among those exceptions is one for searches incident to arrest. As relevant here, that exception authorizes a warrantless vehicle search 'when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.' "

"Neither the Supreme Court nor this court has articulated the precise quantum of proof necessary to satisfy *Gant*'s 'reasonable to believe' standard. But as the [trial] court observed, our cases 'indicate that [reasonable to believe'] is a less demanding standard than probable cause.' We made that point most clearly in *United States v. Baker*, (4th Cir. 2013), contrasting the *Gant* search-incident-to-arrest exception most clearly in *United States v. Baker*, (4th Cir. 2013), contrasting the *Gant* search-incident-to-arrest exception with the automobile exception. The automobile exception, we explained, is in some ways the broader of the two, allowing police officers to 'search a vehicle for evidence of any crime, not just the crime of arrest' as permitted by *Gant.* But there is a catch: Under the automobile exception, police may search only 'on a showing of probable cause,' rather than the '*mere reasonable belief*' that will justify a search incident to arrest under *Gant.* Our precedent may not conclusively define *Gant*'s 'reasonable to believe' standard, in other words, but it does treat that standard as requiring something less than probable cause."

"Like the [trial] court, we think that is the most sensible reading of *Gant.* Most obviously, if the Supreme Court in *Gant* had intended to set the bar at probable cause, then it could have just said so; 'probable cause' is an often used and well-understood Fourth Amendment term of art, and its absence from *Gant*'s search-incident-to-arrest analysis is conspicuous. Moreover, *Gant* permits a vehicular search incident to arrest when it is 'reasonable to believe evidence relevant to the crime of arrest *might* be found in the vehicle.' While that formulation is not used consistently throughout the opinion, its prominence further suggests that the *Gant* Court had in mind a level of suspicion lower than probable cause. *Illinois v. Gates*, (S.Ct. 1983) (defining probable cause as 'a

fair probability that contraband or evidence of a crime *will* be found in a particular place.' "

"As the [trial] court emphasized, at the time of Turner's arrest at the EZ Mini Mart for theft of a firearm, Officer Flores was very familiar with Turner's activities and circumstances over the past two and a half days. In investigating the original theft on June 1, Flores personally took the report of Turner's brother, learning that Turner was involved in a street gang that was potentially engaged in a gang conflict. The next night, Flores responded to a carjacking call and discovered that Turner had apparently stolen his brother's gun for personal use, rather than for a quick sale or trade, and was already putting it to work. And then the night after that, Flores came upon Turner moments after a shots-fired call, in an area known for gang activity – again, during a period when Turner's gang was reportedly at odds with another gang."

"Under those circumstances, we agree with the [trial] court that it was eminently reasonable for Flores to believe that Turner was likely armed – if only for self-defense – while he was sitting in the black Buick at the EZ Mini Mart just after reported gunfire. It was also reasonable for Flores to believe that Turner was armed with the same stolen gun he had reportedly used just the night before in an apparent carjacking. And because Turner was not carrying a gun on his person – Flores's frisk had turned up nothing – the car in which Turner was sitting became *the most likely place* for Turner to have stowed a readily accessible weapon. Under *Gant*, that is enough to permit a search of the passenger compartment of the black Buick incident to Turner's lawful arrest on the outstanding warrant for theft of a gun. Accordingly, the [trial] court correctly denied Turner's motion to suppress. AFFIRMED."

Lessons Learned:

In *United States v. Davis*, (4th Cir. 2021), the Court of Appeals recognized the impact on law enforcement of the *Gant* opinion. "The thicket of nuanced exceptions to the warrant requirement may appear, at times, confusing and unnavigable. Indeed, law enforcement may feel that courts are missing the forest for the trees—focusing myopically on minor details and ignoring the big picture, which in this case involves a man in a vehicle with tinted windows fleeing a routine traffic stop and then transporting a backpack on foot into a swamp. Surely, some may say, the officers were entitled to infer that that man was up to no good, and that, at the very least, his backpack could have evidence of a crime greater than a traffic violation."

"But that is the wrong question. As Justice O'Connor once rightly pointed out, exceptions to the warrant requirement are *not* 'police entitlements' to searches. Rather, they are narrow 'exceptions' which must be 'justified' by specific circumstances. …The warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow weighed against the claims of police efficiency.' *Riley v. California*, (2014). It is the crucial role of courts to ensure that the government conducts searches of property in which individuals have a reasonable expectation of privacy only when permitted by a warrant or when one of a handful of limited exceptions to the warrant requirement applies."

United States v. Turner
U.S. Court of Appeals, 4th Cir.
(Dec. 4, 2024)

Return of Property

Davis Montero was arrested on July 23, 2020. At the time of his arrest certain specifically described items belonging to him, two gold link chains, a gold bracelet, an airplane amulet, a watch, and $9750 in US Currency, were taken from him. His criminal case was disposed of by a guilty plea on February 2, 2024. Montero filed a motion for return of property on May 2, 2024. Attached to the motion were photos of Montero wearing some of the jewelry, which he asserted established his ownership of those items. The trial court summarily denied the motion as untimely. On appeal, that ruling was reversed.

Issue:

Was the motion filed in a timely manner under section 705.105(1), F.S.? **Yes.**

Title to Unclaimed Evidence:

Section 705.105(1), Florida Statutes (2024), provides: "Title to unclaimed evidence or unclaimed tangible personal property lawfully seized pursuant to a lawful investigation in the custody of the court or clerk of the court from a criminal proceeding or seized as evidence by and in the custody of a law enforcement agency shall vest permanently in the law enforcement agency *60 days after the conclusion of the proceeding.*

The 4th D.C.A. had the occasion to analyze this area of the law in *Sanchez v. State*, (4DCA 2015). "The applicable procedure for a

motion for return of personal property is similar to one for postconviction relief. See*, Bolden v. State,* (2DCA 2004). A facially sufficient motion for return of property must: 1. specifically describe the property at issue; 2. allege that the property is the personal property of the movant; 3. allege that the property was not the fruit of criminal activity; and 4. allege that the property is not being held as evidence. *West v. State,* (2DCA 2010)."

"If the motion is facially sufficient, the court 'may order the State to respond' by 'refuting the defendant's argument that the property should be returned.' In an evidentiary hearing, the 'defendant is required to prove the property is exclusively his own, that it was not the fruit of illegal activity, and that it is not being held for evidentiary purposes.' In our prior opinion we also placed the burden on [Defendant] to prove ownership of the property. This is consistent with the procedure for postconviction relief where the burden stays on the Defendant to prove his or her claims at an evidentiary hearing. See*, Pennington v. State,* (1DCA 2010); *Williams v. State,* (2DCA 2007).

Court's Ruling:

"The question is, what marks the 'conclusion of the proceeding' for purposes of determining when the sixty-day period begins to run under the statute? We have held that, where a Defendant has filed a direct appeal, the 'conclusion of the proceeding,' for purposes of determining when section 705.105(1)'s sixty-day period begins to run, is 'when the mandate issues from the appellate court on a direct appeal of a Defendant's judgment and sentence.' *Monestime v. State,* (3CA 2017)."

"However, because Montero did not file a direct appeal following his guilty plea on February 2, 2024, we must determine what marks the 'conclusion of the proceeding' (and the commencement of the sixty-day period within which to file a motion for return of property) in the absence of a direct appeal. The First District, in *Bracht v. State*, (1DCA 2021) held that, in the absence of a direct appeal, the 'conclusion of the proceeding' means the date the judgment and sentence became final."

"We agree with *Bracht* and have held, in analogous procedural circumstances, that in the absence of a direct appeal, a judgment and sentence becomes final thirty days after it is imposed. See, *Pearson v. State*, (3DCA 2014) (holding 'the two-year time limitation for filing motions for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 does not begin to run until appellate proceedings have concluded and the court issues a mandate or thirty days after the judgment and sentence become final if no direct appeal is filed.') (quoting *Saavedra v. State*, (3DCA 2011))."

"In the instant case, the motion alleges the Defendant pleaded guilty, and the trial court imposed its judgment and sentence on February 2, 2024. The sixty-day period within which to file the motion for return of property did not begin to run until the judgment and sentence became final, which was on March 3—thirty days after the judgment and sentence. Montero therefore had until May 2, 2024, to file his motion for return of property. The face of the motion indicates that Montero placed it in the hands of the correctional facility for mailing on May 2, 2024, the last day of the sixty-day period. See, *Thompson v. State*, (Fla. 2000) (holding that under the mailbox rule, the date that a motion is placed into the hands of prison officials for filing is the date that the motion is considered filed). Therefore, the motion is timely on its face and the trial court erred in summarily denying the motion as untimely. **Reversed.**"

Lessons Learned:

In a similar case, *Gaitor v. State*, 3rd D.C.A. (Feb. 12, 2024), Defendant filed a motion for return of property in March 2024, though his conviction became final upon the issuance of the mandate in June 2009. The D.C.A. noted, "There appears to be little doubt, even by Gaitor himself, that he sought relief outside the four-year statute of limitations. See § 95.11(3)(h), F.S. (setting forth a four-year limitation on an action seeking "to recover specific personal property").

The trial court without requiring the State to respond to the pleading or setting a hearing denied the Defendant's motion out-of-hand. The D.C.A. reversed the court's order. "Because the motion to return the property was facially sufficient, the trial court should have 'ordered the State to respond by citing applicable case law and attaching portions of the record to refute the Defendant's contention that the property should be returned, after which the motion may be summarily denied.... In the alternative, the trial court may hold an evidentiary hearing." *Bolden v. State*, (2DCA 2004) (explaining that 'the applicable procedure is similar to the procedure for the consideration of a motion for postconviction

relief')."

The most difficult burden the Defendant must overcome is offering proof of undisputed ownership of the claimed property. "Although Sanchez claims that he owned the personal property found on his person, the trial court specifically found his testimony not credible. Thus, he failed to prove the property was exclusively his own. The State presented the circumstances of his possession. Certainly, the circumstantial evidence of how and when this property was found calls into question his bald statement of ownership, with nothing to back up his claim. Giving the appropriate deference to the trial court's credibility findings, we conclude that the trial court had the discretion to reject his claim of ownership and thus deny the return of property to him." *Sanchez v. State*, (4DCA 2015).

Montero v. State
3rd D.C.A.
(Jan. 15, 2025)

(Continued from page 2)

Vehicular Homicide

and death was reasonably foreseeable, thus there was sufficient evidence to sustain his convictions.

A more common scenario involves extreme speed resulting in death or injuries. The question on appeal is, can speed alone be sufficient to sustain a vehicular homicide charge? The 4th D.C.A. in *Natal v. State*, (4DCA 2019), ruled:

"It is one thing to speed slightly over the posted limit, and it is quite another matter to drive at such an immensely excessive rate that no one could reasonably drive. In our opinion, the rate of speed of a vehicle can be firmly shown by the evidence to be *so* excessive under the circumstances that to travel that fast under the conditions is by itself a reckless disregard for human life or the safety of persons exposed to the speed.

"For example, while driving 90 mph at Sebring on a test track might not even be negligent conduct, racing at 90 mph in front of a school where children are entering or leaving would surely be so flagrant as to show a reckless disregard for human life and safety. In *Pozo v. State*, (4DCA 2007), the defendant was driving between sixty-seven to ninety miles per hour in a residential area, which we said alone justified the denial of a motion for judgment of acquittal. In *Copertino v. State*, (4DCA 1999), the defendant was driving ninety miles per hour on a major thoroughfare, although the speed limit was not stated in the opinion.

"While we have stated that speed alone can justify the denial of a judgment of acquittal, each case always turns on its own specific facts. In particular, the area in which the speeding occurs is a significant factor. A vehicle traveling 100 miles per hour on an interstate highway does not pose the same level of wanton conduct as does a vehicle traveling ninety miles an hour on a street with various side streets, driveways entering the street, and overall additional congestion."

Andriotis v. State
5th D.C.A.
(Jan. 3, 2025)

Collective Knowledge

Miracle Letizia Atwell consumed alcoholic drinks at a restaurant bar and then attempted to leave in her car. Two patrons witnessed Defendant "slurring her words" and exhibiting signs of intoxication. As Defendant was leaving, both patrons followed, attempting to stop her from driving away. Eventually, a security guard intervened, however, he was not a law enforcement officer. Despite his plea, Defendant entered her car. The security guard then moved and parked a golf cart behind the Defendant's car to prevent her from leaving.

A police officer arrived shortly thereafter and observed Defendant "screaming" at the two witnesses and the security guard. He noted that Defendant's speech was slurred, she had "bloodshot, watery eyes," and a "very strong odor" of alcohol about her person. *When the officer arrived Defendant's car was turned off, and the officer did not witness Defendant driving or attempting to drive*. The security guard relayed his observations to the officer and told him Defendant had tried to back up, but "did not go any further because [the] golf cart was at a complete stop behind hers."

Defendant refused to take a sobriety test. The officer then placed her under arrest. The State charged the Defendant with DUI. Defendant's motion to suppress was denied. The trial court ruled the officer had probable cause to arrest the Defendant for DUI.

Issue:

Did the arresting officer have probable cause permitting a warrantless misdemeanor arrest? **No**. Did the non-officer's observations and information provide the basis for a lawful arrest? **No.**

DUI Arrest:

An officer can arrest a person for misdemeanor DUI in three circumstances: 1. the officer witnesses each element of a prima facie case, 2. the officer is investigating an 'accident' and develops probable cause to charge DUI, or 3. one officer calls upon another for assistance and the combined observations of the two or more officers are united to establish the probable cause to the arrest. *Wagner v. State*, (4DCA 2023) (quoting *Sawyer v. State*, (2DCA 2005)).

F.S. 901.15, When arrest by officer without warrant is lawful.—A law enforcement officer may arrest a person without a warrant when:
(5) A violation of chapter 316 has been committed in *the presence of the officer.* Such an arrest may be made immediately or in fresh pursuit. Any law enforcement officer, upon receiving information relayed to him or her from *a fellow officer* stationed on the ground or in the air that a driver of a vehicle has violated Chapter 316, may arrest the driver for violation of those laws when reasonable and proper identification of the vehicle and the violation has been communicated to the arresting officer.

Of importance here is that the information gathered by the arresting officer at the scene did not qualify for the Fellow Officer Rule to support the arrest. The fellow officer rule provides a mechanism by which officers can rely on their collective knowledge to act in the field. Under this rule, the collective knowledge of officers investigating a crime is imputed to each officer, and one officer may rely on the knowledge and information possessed by another officer to establish probable cause. See, *Whiteley v. Warden, Wyo. State Penitentiary*, (S.Ct.1971); *State v. Maynard*, (Fla. 2001).

The security guard in the present case, like the community service aide in *Steiner v. State*, (4DCA 1997), was "not a deputized police officer." Therefore, because the security guard was not a law enforcement officer with the power to arrest the Defendant as required by the fellow officer rule for a warrantless arrest, the arresting officer could not rely on his observations or investigation to establish probable cause. *Sawyer v. State*, (2DCA 2005) ("The [fellow officer] rule does not impute the knowledge of citizen informants to officers."); *see also Riehle v. Dep't of High. Saf. & Motor Veh.*, (2DCA 1996) (explaining that if law enforcement support personnel are not vested with arrest powers, they cannot be relied upon to establish probable cause for a warrantless DUI arrest).

Court's Ruling:

"Absent a warrant, 'an arrest for DUI must be supported by probable cause.' *Skinner v. State*, (1DCA 2010) (citing § 901.151(4), F.S., and (Fla. 1993)). The State is unable to establish [probable cause]. First, the arresting officer did not witness each element of the prima facie DUI case. By the time the officer arrived, Defendant was outside of her car, which was turned off. Though the two patrons and the security guard saw Defendant turn on her car and relayed their observations to police, private citizens are unable to relay their observations to police for

purposes of substituting an officer's knowledge of an essential element of a crime.' *Steiner v. State*, (4DCA 1997) ('If we were to permit the security guard's observations which were relayed to the police as sufficient to constitute the officer's knowledge of an essential element of a crime, then as to misdemeanors there would be no point in the statutory requirement that the misdemeanor be committed in the officer's presence.')."

"Nor was the arresting officer investigating a car accident, as Defendant's car never left its parking spot. Finally, this situation does not fall within the 'fellow officer rule,' which allows an arresting officer to lack sufficient firsthand knowledge to constitute probable cause if the officer initiating the chain of communication witnesses the crime himself. *State v. Adderly*, (4DCA 2002). The security guard was not an 'officer'; thus, the arresting officer could not rely on the security guard's statements to establish probable cause."

"Therefore, we hold that the trial court erred in finding the arresting officer had probable cause to arrest Defendant. To the extent the State argues the trial court's finding may be affirmed because the security guard effectuated a valid citizen's arrest, we determine that argument lacks merit."

"To effectuate a valid citizen's arrest, the private citizen arrestor must deprive the defendant of 'her freedom to leave.' The arrestor's actions determine whether a private citizen has deprived a defendant of her right to leave. ('In order to effectuate a citizen's arrest, a misdemeanor must not only be committed in the presence of the private citizen, but there must be an arrest—that is a deprivation of the suspect's right to leave.'). Here, the security guard did not effectuate a valid citizen's arrest. Though he initially positioned his golf cart to block Defendant from leaving, the security guard moved the cart after Defendant had started her car. And although the security guard conversed with Defendant to keep Defendant from driving away, Defendant's key fob remained within her reach, and she could have left once the security guard had removed the golf cart blocking Defendant's car. The security guard's actions, at most, demonstrated his hope that Defendant would not drive off while inebriated. However, the security guard's actions did not necessarily prevent Defendant from leaving and did not effectuate a citizen's arrest."

"We reverse the trial court's denial of Defendant's motion to suppress the DUI evidence in this case because the arresting officer lacked probable cause to arrest Defendant for DUI and the security guard did not effectuate a valid citizen's arrest. REVERSED."

Lessons Learned:

Though not directly on point, the United States Supreme Court's ruling in *Navarette v. California*, (S.Ct.2014), is still of value to this discussion. The ruling may have altered previously believed well-settled law governing when law enforcement officers may stop someone based on a non-law enforcement tip.

In *Navarette*, a caller told emergency operators that a truck ran her off the roadway. The tipster also described the make, model, color, license plate, and location of the suspect truck. The responding officers pulled the truck over after following it for five minutes, *without observing any unusual driving or traffic infractions*. The officers smelled marijuana as they approached the vehicle. A search of the truck revealed 30 pounds of marijuana.

The California Court of Appeal concluded that the tip gave officers reasonable suspicion to conduct an investigatory stop for possible drunk driving. On review, the United States Supreme Court affirmed, finding that under the totality of the circumstances, there were indicia of reliability sufficient to provide officers with reasonable suspicion that the driver of the suspect vehicle was impaired. By reporting that she had been run off the road by a specific vehicle, the Court found the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving, which significantly supported the tip's reliability. Additionally, the timeline of events suggested that the call was made almost immediately after the incident, and therefore, the caller had little time to concoct a story. The caller's use of the 911 emergency system provided another indicator of her veracity since she could be located and possibly prosecuted if she made a false report through that system. The Court determined that because the tip had these indicators of reliability and created reasonable suspicion of the ongoing crime of drunk driving, the officer *did not need to observe the alleged unlawful behavior or otherwise corroborate it*.

Atwell v. State
4th D.C.A.
(Dec. 18, 2024)