LEGAL EAGLE

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Misdemeanant Pursuit into Home

John Tellam drove onto a neighbor's property in violation of the neighbor's no-trespass order and damaged the neighbor's mailbox. After the responding deputy spoke with the neighbor and investigated the matter, the deputy determined he had probable cause to arrest Tellam for criminal mischief and trespassing, both misdemeanors.

When the deputy arrived at Defendant's residence, he was outside. The deputy called to him by name, stated he needed to talk, and told the defendant not to go inside his home. The defendant nonetheless proceeded to enter his home and the deputy pursued him. Just as Defendant crossed the threshold, the responding deputy and backup reached in and grabbed Defendant. *The deputies' arms crossed the threshold into the home.* They pulled Defendant outside and handcuffed him.

On appeal, Defendant argued the trial court erred in denying his judgment for acquittal on his resisting arrest charge because the deputies had improperly entered his home, and therefore were not lawfully executing a legal duty in arresting him. The D.C.A. agreed and reversed the conviction.

Issue:

Was the State's evidence sufficient to establish the essential element of the crime of resisting an officer without violence? **No**.

Open Doorway Arrest:

Simply stated, entering the sanctity of a home without a warrant or exigencies is fatal to the arrest. See, *McClish v. Nugent*, (11th Cir. 2007), ruling that a warrantless open doorway arrest is a prohibited entry into the private confines of the home that violates the Fourth Amendment and the Supreme Court's decision in *Payton* v. New York, (S.Ct.1980).

The United States Supreme Court addressed this issue in *Lange v. California*, (S.Ct.2021): "This Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry. …The 'gravity of the underlying offense,' we reasoned, is 'an important factor to be considered when determining whether any exigency exists.' And we concluded: 'Application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense' is involved."

"Our Fourth Amendment precedents thus point toward assessing case by case the exigencies arising from misdemeanants' flight. That approach will in many, if not

most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself. But *the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry*, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant."

Court's Ruling:

"To establish the offense of resisting an officer without violence, 'the State must prove two elements: 1. the officer was engaged in the *lawful execution* of a legal duty and 2. the defendant's action constituted obstruction or resistance of that lawful duty.' 'It is settled that the State cannot prove that the police are in the lawful execution of a legal duty when they arrest a suspect if the arrest itself is executed unlawfully.' *Nieves v. State*, (2DCA 2019)."

" 'A warrantless home entry, accompanied by a search, seizure, and arrest is not justified by hot pursuit when the underlying conduct for which there is alleged probable cause is a non-violent misdemeanor and the evidence related thereto is outside the home.' *State v. Markus*, (Fla. 2017). Rather, an officer must consider all the circumstances in a pursuit case to determine whether there is a law enforcement emergency. On many occasions, the officer will have good reason to enter—to prevent imminent harms of violence, destruction of evidence, or escape from the home. But when the officer has time to get a warrant, he must do so—even though the misdemeanant fled. *Lange v. California*, (S.Ct. 2021). This is true even where the police otherwise have probable cause to arrest the suspect and could make the arrest without a warrant were he, for example, just out on the street."

"Thus, the fact that the responding deputy had probable cause to arrest the defendant for trespassing or another misdemeanor did not, by itself, excuse the deputies from getting a warrant before entering the defendant's home—a space protected by the Fourth Amendment—to arrest him for that offense. The State does not argue any exigencies were present, nor does the record indicate that any of the permissible exigencies, 'to prevent imminent harms of violence, destruction of evidence, or escape from the home' existed.' The deputies' entry into the defendant's home was therefore unjustified."

"The fact that the deputies were chasing the defendant and only partially entered the home does not change this result. 'The Fourth Amendment has drawn a firm line at the entrance to the house.' *Payton v. New York*, (1980). 'The law is well-settled that without consent, a warrant, or exigent circumstances, law enforcement may not cross the threshold to effect an arrest.' *Herrera-Fernandez v. State*, (4DCA 2008); 'It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' See *Welsh v. Wisconsin*, (S.Ct.1984). In other words, no exception to the threshold rule exists where the officer only reaches an arm inside, even where the officer is already in pursuit of the misdemeanant, or where the officer has announced an intention to detain or arrest the misdemeanant while he or she is outside the residence." [See, *McClish v. Nugent*, (11th Cir. 2007), in accord].

"***Conclusion*:** Accordingly, the defendant's arrest was unlawful, and the deputies were not lawfully executing a legal duty when they arrested the defendant. The trial court therefore fundamentally erred in denying the defendant's motion for judgment of acquittal on his resisting arrest count."

The fact that the responding deputy had probable cause to arrest the defendant for trespassing … did not, by itself, excuse the ... getting of a warrant before entering the defendant's home—a space protected by the Fourth Amendment—to arrest him for that offense.

Lessons Learned:

Once again, a life lesson that "bad facts make bad law." At a time when *Payton v. New York* is cited multiple times, chasing a man into his home to make an arrest for a minor offense was doomed from the outset. As the Florida Supreme Court observed:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring

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RECOGNIZE THE SIGNS
OF TERRORISM-RELATED SUSPICIOUS ACTIVITY

EXPRESSED OR IMPLIED THREAT
Threatening to commit a crime that could harm or kill people or damage a facility, infrastructure, or secured site

SURVEILLANCE
A prolonged interest in or taking pictures/videos of personnel, facilities, security features, or infrastructure in an unusual or covert manner

THEFT/LOSS/ DIVERSION
Stealing or diverting items—such as equipment, uniforms, or badges—that belong to a facility or secured site

TESTING OR PROBING OF SECURITY
Investigating or testing a facility's security or IT systems to assess the strength or weakness of the target

AVIATION ACTIVITY
Operating or interfering with the operation of an aircraft that poses a threat of harm to people and property

BREACH/ ATTEMPTED INTRUSION
Unauthorized people trying to enter a restricted area or impersonating authorized personnel

ACQUISITION OF EXPERTISE
Gaining skills or knowledge on a specific topic, such as facility security, military tactics, or flying an aircraft

ELICITING INFORMATION
Questioning personnel beyond mere curiosity about an event, facility, or operations

MISREPRESENTATION
Presenting false information or misusing documents to conceal possible illegal activity

CYBERATTACK
Disrupting or compromising an organization's information technology systems

RECRUITING/ FINANCING
Funding suspicious or criminal activity or recruiting people to participate in criminal or terrorist activity

SABOTAGE/ TAMPERING/ VANDALISM
Damaging or destroying part of a facility, infrastructure, or secured site

MATERIALS ACQUISITION/ STORAGE
Acquisition and/or storage of unusual materials such as cell phones, radio controllers, or toxic materials

WEAPONS COLLECTION/ STORAGE
Collection or discovery of unusual amounts of weapons including explosives, chemicals, or other destructive materials

SECTOR-SPECIFIC INCIDENT
Actions which raise concern to specific sectors, (e.g., power plant) with regard to their personnel, facilities, systems, or functions

If you **see** something, **say** something®

REPORT SUSPICIOUS ACTIVITY TO LOCAL AUTHORITIES OR CALL 9-1-1 IN CASE OF EMERGENCY

Recent Case Law

Force and Non-Violent Protestors

Protestors, including Tasha Williamson, performed a "die-in" at a City Council meeting related to a black man who died in police custody. The protestors disrupted the meeting by chanting, and several of them made their way toward the public speaking podium and City Council members. After showing the City Council members their "bloody hands," six protesters lay down on the ground near the podium, keeping their red-painted hands raised and chanting "I am Earl McNeil," and "you have blood on your hands." The mayor called for order, but the protesters refused to stop their demonstration. The protest prevented the meeting from continuing, and police officers warned the protesters that they had to leave the meeting room, or they would be arrested. The protesters refused to leave and passively resisted being removed by going limp. Officers handcuffed the protesters and carried or pulled them by their arms from the meeting room.

In the hallway outside the meeting room, Williamson told the Officers that they had hurt her shoulder, and they called an ambulance. Paramedics arrived, evaluated Williamson, and offered to take her to the hospital, but she refused to go with them. The Officers then arrested Williamson and took her to a detention facility. After she was released the next morning, Williamson drove herself to the hospital. She suffered a sprained wrist, mild swelling, and a torn rotator cuff.

Williamson sued under 42 U.S.C. § 1983, alleging that she suffered wrist and shoulder injuries when she was forcibly removed. The trial court denied the officers' summary judgment motion. On appeal, that ruling was reversed.

Issue:

Did the officers use excessive force in violation of the Fourth Amendment to remove the protestors from council chambers? **No**. Did the City's interest in maintaining order at a public meeting justify using force to remove the protestors? **Yes**.

Reasonable Force:

The Fourth Amendment protects against unreasonable seizures. *Torres v. Madrid*, (S.Ct.2021). An arrest is the "quintessential seizure of the person." Qualified immunity shields a police officer from liability for civil damages under Section 1983 "unless the officer violated a *clearly established* constitutional right." Thus, the qualified immunity analysis involves two prongs: 1. whether the officer's conduct violated a constitutional right, and 2. whether that right "was clearly established at the time of the events at issue."

In evaluating a Fourth Amendment claim of excessive force, a reviewing court will ask whether the officers actions were "objectively reasonable" in light of the facts and circumstances confronting them. *Graham v. Connor*, (S.Ct. 1989). To determine whether an officer's actions were objectively reasonable, courts consider: "1. the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted, 2. the government's interest in the use of force, and 3. the balance between the gravity of the intrusion on the individual and the government's need for that intrusion."

Where, as here, the excessive force claim arises in the context of an arrest it is analyzed by the Supreme Court as one invoking the protections of the Fourth Amendment, which guarantees citizens the right "to be secure in their persons ... against unreasonable ... seizures" of the person. Clearly, arresting someone is a seizure.

"Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. The question is whether the totality of the circumstances justified a particular sort of ... seizure."

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation."

"An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham v. Connor*, (S.Ct.1989).

Court's Ruling:

"We consider the 'specific factual circumstances' of the case in classifying the force used. The nature and degree of physical contact are relevant to this analysis, as are the 'risk of harm and the actual harm experienced.' "

"Even viewing the evidence in Williamson's favor, the type and amount of force used by the Officers in this case was minimal. The Officers did not strike Williamson, throw her to the ground, or use any compliance techniques or weapons for the purpose of inflicting pain on her. Rather, they held her by her arms and lifted her so they could pull her out of the meeting room *after she went limp and refused to leave on her own or cooperate in being removed*."

"Moreover, the inherent risk of two officers pulling someone who has gone limp and refuses to move by her own power is not significant. It cannot reasonably be disputed that the force the Officers used in this case was less significant than 'yanking, pulling, jerking, and twisting' a person whose legs are pinned underneath a car seat—which we have deemed a minimal intrusion. Indeed, the officers' removing Williamson in the manner that they did also was a lesser degree of force than what was used in [earlier cases], where officers used techniques and weapons to intentionally inflict physical pain on the protesters. In fact, the protesters … even argued that 'dragging and carrying' them would have been a more reasonable use of force than the pain compliance techniques that the officers used."

"Finally, Williamson's injuries—a sprained wrist, mild swelling, and a torn rotator cuff—though not trivial, are roughly equivalent to those in [prior case] (bruises, pinched nerve, broken wrist) and much less severe than those in [prior case] (rendered a paraplegic). And in both of those cases, we concluded that the intrusion at issue was minimal despite the injuries that occurred. We conclude the same here."

"In reaching a contrary conclusion, the [trial] court focused exclusively on Williamson's injuries. But that is not the only factor relevant to this analysis; the type and amount of force used and the *risk* of harm it created must also be considered. Consideration of both the actual harm and the risk of harm is important as the Fourth Amendment is concerned with reasonableness. There can be situations in which the risk of harm presented is objectively less significant than the actual harm that results. And if a person reacts more adversely to a use of force than would be expected objectively, that does not *itself* establish that 'a reasonable officer on the scene' failed to appreciate the risks presented and act accordingly. For these reasons, we conclude that the totality of circumstances in this case establishes that the type and amount of force that the Officers used was minimal."

Governmental Interest:

"Next, we 'evaluate the State's interests at stake by considering '1. how severe the crime at issue was, 2. whether the suspect posed an immediate threat to the safety of the officers or others, and 3. whether the suspect was actively resisting arrest or attempting to evade arrest by flight.' 'Among these considerations, the 'most important' is the second factor—whether the suspect posed an immediate threat to others.' 'These factors are non-exhaustive, and we examine the totality of the circumstances, including the availability of less intrusive alternatives to the force employed and whether proper warnings were given.' Where an arrestee's conduct risks the lives or safety of innocent bystanders, the court also considers her relative culpability under the second factor."

"It is undisputed that Williamson's crime was minor, that she posed no threat to anyone, and that she was not *actively* resisting arrest. Nonetheless, the Officers argue that they had a legitimate interest in removing and arresting her, particularly where proper warnings were given

before they used any physical force. They also argue that we should consider Williamson's 'relative culpability' in refusing to get up."

"We conclude that National City's interest in forcibly removing Williamson from the city council meeting was low, but *it was not nonexistent*. Williamson's nonviolent disruption of the city council meeting was a minor offense. And where Williamson's actions did not pose any physical danger to others, we do not consider her relative culpability. But even if the city's interest was low, given the lack of exigency posed by threat of harm or other factors, this *does not mean that the City was 'required to permit the* **'organized lawlessness' conducted by the protestors**.' 'Even passive resistance may support the use of some degree of governmental force if necessary to attain compliance ... depending on the factual circumstances underlying that resistance.'

"Moreover, the risk posed by the protesters was not zero. While the six who laid down near the podium were docile and merely refused to leave the area when directed, other protesters (or people sympathetic to the protesters' demonstration) who remained in the audience area were yelling at the officers and at times trying to push into the podium area. This is not the same strain of risk posed by the crowds in [prior cases], but it is nonetheless relevant in assessing the totality of circumstances that the officers faced when they decided to remove the protesters participating in the demonstration rather than allow the demonstration to continue."

"Finally, we must weigh the Officers' intrusion onto Williamson's Fourth Amendment rights through their use of physical force against National City's interests in **responding to illegal conduct and restoring order in the city council meeting room**. We conclude that the severity of the Officers' intrusion and the weight of National City's interests are aligned; that is, the city's interests were low, and the Officers' use of force was appropriately minimal."

"Williamson testified that she and the other protesters had decided in advance that they would not willingly leave the meeting room. *The very purpose of their protest was to disrupt the city council meeting and interfere with the city conducting its business*. Thus, they created a situation in which the city had to either succumb to the disruption or use some amount of force to remove the protesters from the meeting room. The city chose the latter, and the 'undisputed evidence shows that the officers used only the force reasonably necessary to remove [Williamson] from the meeting.' Williamson could have avoided or reduced the pain and injury she alleges she suffered from the Officers' conduct by cooperating with them and leaving the room under her own power. She did not. But her choice does not render the Officers' conduct unreasonable. To conclude otherwise would be to **discount entirely the City's legitimate interests in maintaining order and ensuring that the public's business is not circumvented by people engaging in disruptive, albeit nonviolent, conduct.** Because we conclude that the Officers did not use excessive force in violation of Williamson's Fourth Amendment rights, they are entitled to qualified immunity as a matter of law. **Reversed**."

Lessons Learned:

The Court of Appeals, in addition to recognizing the City's right to conduct its business without molestation, also made the following observation:

"It goes without saying that citizens have a right to express their disagreement and dissatisfaction with government at all levels. But **they do not have a right to prevent duly installed government from performing its lawful functions**. To conclude otherwise, would undermine the very idea of ordered society. Officers repeatedly warned the protesters that they had to leave the front of the meeting room, or they would be arrested, and they refused to comply. Their demonstration disrupted the City Council meeting, which was adjourned 'for order to be restored.' National City's choice was to allow the protesters to remain in the City Council's meeting room until they chose to leave on their own—*which the constitution does not require*—or to forcibly remove them. Williamson has not identified any less intrusive means available to the Officers for restoring order in the City Council room so that the City's legitimate business could proceed. Other means of physically removing her when she refused to leave or cooperate with being moved, such as using more officers to carry her or pulling her by her legs instead of her arms, would not have involved an appreciably smaller risk of causing pain or injury. In sum, we conclude that National City had a legitimate interest in 'dispersing and removing lawbreakers,' but the extent of its interest was low because it was not facing a voluminous crowd acting

with a 'concerted effort to invade private property, obstruct business, and hinder law enforcement,' "

In other words, the application of force was justified and reasonable.

Just as a reminder, citizens have a First Amendment right to protest, stand on the street, and video police officers in action. The United States Court of Appeals, 11th Circuit, ruled accordingly in *Toole v. City of Atlanta*, (11th Cir. 2020): "Toole was engaging in constitutionally protected activities—namely, protesting and filming police conduct—at the time of his unlawful arrest. ... This Court has established that individuals have 'a First Amendment right, *subject to reasonable time, manner and place restrictions,* to photograph or videotape police conduct' and that 'the First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.'

"We've also held that individuals have a clearly established right to protest peacefully and 'engage in expressive activities.' …It is also clearly established law in this Circuit that law enforcement officers cannot punish or retaliate against individuals for expressing their First Amendment rights. *Bennett v. Hendrix*, (11th Cir. 2005). [Officer], therefore, violated Toole's clearly established First Amendment rights and isn't entitled to qualified immunity. AFFIRMED."

Williamson v. City of National City
U.S. Court of Appeals – 9th Cir.
(Jan. 24, 2022)

Breath Test Admissibility

Alexander Chiaravalle was arrested for D.U.I. The officer testified that he stopped Defendant for driving sixteen miles per hour over the speed limit. The officer began investigating Defendant for DUI when the officer noticed Defendant's bloodshot eyes, slow slurred speech, flushed red face, and the odor of an alcoholic beverage on his breath. The officer placed Defendant under arrest at approximately 12:42 a.m. Defendant was then handcuffed and searched. Body camera footage of the incident shows that Defendant's pockets were pulled out to confirm that nothing was inside. Defendant was then placed in the back of the officer's patrol car.

The officer stated he observed Defendant during the 20-minute observation period. The officer confirmed he was in the "immediate area" and "within earshot" of Defendant throughout the entire observation period. The officer did not hear Defendant regurgitate, burp, or hiccup. The officer stated it was impossible for Defendant to have consumed anything during the observation period since Defendant was handcuffed with his hands behind his back and had nothing on him that he could have consumed. The officer also testified that although he and the other officers nearby did not continuously look at Defendant, they were observing Defendant for the full twenty minutes. The officer testified that Defendant was sitting "regular, just facing forward." The vehicle dash camera, which was facing forward, was continuously recording while Defendant was in the vehicle. The backup officer and the certified breath test operator also testified to their observations.

The trial court found the officers' testimony credible and determined that they were in substantial compliance for the twenty-minute observation period as required by the administrative rule. Based on the dash camera footage, the trial court specifically concluded that the officers were within earshot of Defendant and could hear what was happening inside the patrol vehicle. The trial court denied the motion to suppress.

Defendant appealed claiming the officers failed to comply with the administrative rule that requires observation of Defendant for twenty minutes before the breath test is administered. The D.C.A. disagreed and affirmed the trial court's ruling.

Issue:

Were the breathalyzer test results admissible as in substantial compliance with the applicable administrative regulations? **Yes**.

Breath Test Procedure:

The relevant administrative code and statutory provision regulating the breath test procedure are as follows: "… 3. The breath test operator, agency inspector, arresting officer, or person designated by the permit holder shall reasonably ensure that the subject has not taken anything by mouth or has not regurgitated for at least twenty (20) minutes before administering the test. This provision shall not be construed to otherwise require an additional twenty-minute observation period before the administering of a subsequent sample." Fla. Admin. Code R. 11D-8.007.

An analysis of a person's breath, in order to be considered valid under this section, must have been performed *substantially* according to

methods approved by the Department of Law Enforcement. For this purpose, the department may approve satisfactory techniques or methods. *Any insubstantial differences between approved techniques and actual testing procedures in any individual case do not render the test or test results invalid*.
See, § 316.1932(1)(b)(2), F.S.

Thus, for the results of the breath test procedure to be admissible, compliance with the applicable administrative regulations need only be in *substantial conformity*. (5DCA 2001) ("For the results of a defendant's breath test to be admissible, the State must establish that the test was made in substantial conformity with the applicable administrative rules and statutes. Insubstantial differences or variations from approved techniques does not render the test nor the test results invalid.")

After *State v. Donaldson*, (Fla.1991), holding that there must be evidence that a breathalyzer test machine has been calibrated, tested, and inspected, the Legislature amended section 316.1934, adding subsection (5), which now provides:

"An affidavit containing the results of any test of a person's blood or breath to determine its alcohol content, as authorized by s. 316.1932 or s. 316.1933, is admissible in evidence under the exception to the hearsay rule in s. 90.803(8) for public records and reports. Such affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath if the affidavit discloses:

a) The type of test administered and the procedures followed;

b) The time of the collection of the blood or breath sample analyzed;

c) The numerical results of the test indicating the alcohol content of the blood or breath;

d) The type and status of any permit issued by the Department of Law Enforcement that was held by the person who performed the test; and

e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument."
See also, *State v. Irizarryi,* (4DCA 1997).

Court's Ruling:

"Defendant claims that the officers were not constantly observing him during the observation period. Yet, 'continuous face to face observation for twenty minutes is not required to achieve substantial compliance with the approved HRS methods.' In fact, those officers involved in the administration of the breath test need not 'stare fixedly at the defendant for the entire observation period to achieve substantial compliance.' *Dep't of Highway Safety & Motor Vehicles v. Farley*, (5DCA 1994)."

"Once the trial court determines substantial compliance with the applicable administrative rules, the breath test would be admissible. However, the question of whether the breath test operator was able to make certain that the defendant 'did not ingest any substance or regurgitate during the observation period is an issue going to the *weight of the evidence* presented. *As such, this is a question to be determined by the jury, rather than a matter of law to be decided by the court*.' "

"Just like the present case, the defendant in *Kaiser v. State*, (2DCA 1992), was in custody for twenty minutes or more, and the breath test operator did not stare fixedly at the defendant. 'Whether the technician was able to make certain that Kaiser did not regurgitate or ingest anything goes to the weight of the evidence' and is a 'recognition that the jury may consider the weight to be given to the test if the defense challenges its reliability.' "
"We agree with the court in *Kaiser* that where the breath test operator substantially complies with the administrative rule, any remaining challenge then goes to its weight, which is an issue for the factfinder. Since the instant case involved a hearing on a motion to suppress, 'the judge has the responsibility of weighing the evidence and determining matters of credibility.' "

"We find that there was substantial competent evidence to support the trial court's denial of Defendant's motion to suppress. Thus, any allegations of deficiencies argued by Defendant would go to the weight of the evidence to be decided by the factfinder, and not to its admissibility. In this case, nothing prevented Defendant from arguing against the weight of the evidence had Defendant chosen to argue the case to a jury or to the judge as a factfinder. The trial court did not err by denying the motion to suppress and by finding substantial compliance with the administrative code and determining the breath test results were admissible."

"In summary, we find that there was the required substantial compliance with rule 11D-8.007, and the trial court did not err in finding

the results of the breath test were admissible. We affirm."

Lessons Learned:

Besides the obvious, the important take-away from this case is the significance of report writing and use of all corroborating evidence, i.e., video, fellow officer reports, and documentary evidence. As the D.C.A. emphasized in the present case substantial compliance is legally sufficient, however, it is for the jury/factfinder to determine the weight to be accorded that evidence. Thus, the more factual and substantiating evidence presented, the better.

And while this case focused on breath testing, it is important to remember the Supreme Court's ruling in *Birchfield v. North Dakota*, (S.Ct. 2016): "The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests.'" "Taking a blood sample or administering a breath test is a search governed by the Fourth Amendment. Breath tests do not 'implicate significant privacy concerns.' The physical intrusion is almost negligible. The tests 'do not require piercing the skin' and entail 'a minimum of inconvenience.' Requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale 'deep lung' air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek. Breath tests, unlike DNA samples, also yield only a BAC reading and leave no biological sample in the government's possession. Finally, participation in a breath test is not likely to enhance the embarrassment inherent in any arrest.

"The same cannot be said about blood tests. They 'require piercing the skin' and extract a part of the subject's body, and thus are significantly more intrusive than blowing into a tube. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. That prospect could cause anxiety for the person tested."

"Because breath tests are significantly less intrusive than blood tests and, in most cases, amply serve law enforcement interests, a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving. No warrant is needed in this situation."

Chiaravalle v. State
4th D.C.A.
(Oct. 11, 2023)

(Continued from page 2)

that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often-competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the

Pursuit into Home

privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *State v. Markus* (Fla.2017).

Tellam v. State
4th D.C.A.
(Oct. 11, 2023)