

# Legal Advisor

Volume 17, Issue 8

August 2003



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IMPORTANT BARTOW

TELEPHONE NUMBERS:

Switchboard	534-4800
Misdemeanor Intake	534-4928
Misdemeanor	534-4926
Domestic Violence	534-4986
Victim Assistance	534-4989
Felony Intake	534-4987
Felony	534-4964
Investigations	534-4804
Violation of Probation	534-4803
Child Abuse/Neglect	534-4857
Homicide Division	534-4959
On Call Pager	819-1526
Worthless Checks	534-4874
Juvenile Division	534-4905
FAX	534-4945

WITNESS MANAGEMENT:

Misdemeanor/Traffic	534-4021
Felony	534-4020

## D.U.I. INVESTIGATIONS: THE LATEST DEVELOPMENTS

By David E. Stamey Director, Misdemeanor Division

During the last year, between new legislation and appellate court decisions, much has happened that affects the way we investigate and prosecute DUI offenders. This article will discuss two areas in which changes in the law have provided valuable tools to assist in the investigation, apprehension and prosecution of impaired drivers. It will then conclude with an observation and a suggestion aimed at improving our likelihood of success at trial.

### URINE TESTING

In October 2002, an appeals court found that urine test results obtained pursuant to the implied consent rules were not admissible in court. It based this opinion on FDLE's failure to have rules governing the collection, preservation, and analysis of urine samples designed to insure the reliability of the testing procedures. Following this decision, officers from around the state were left with the task of investigating and making cases against drug impaired drivers without the benefit of their most valuable weapon: **urine tests**.

With very few Drug Recognition Experts around, and blood tests being excluded as alternatives to urine tests, things looked hopeless. Then, like the cavalry riding to the rescue, the Florida Legislature passed a law amending the Florida statutes. This amendment to the statutes removed the problem of not having approved FDLE testing requirements. The amendment was signed into law on May 27, 2003, giving back to law enforcement officers their number one weapon in the fight against drug impaired drivers. Once again urine tests are admissible in court.

### SECOND REFUSAL IS A CRIME

On July 1, 2002, a law became effective (F.S. 316.1939) that made it a crime for an arrested DUI offender to refuse to submit to a lawful test of his breath, urine, or blood, if his driving privilege had been previously suspended for a prior refusal to submit to a lawful test of his breath, urine, or blood.

There are certain requirements that have to be met, however, before this crime can be charged. **First**, the person must be under arrest for a DUI, based on probable cause (unless the person is being treated at a hospital, clinic, or other medical facility and is subject to a blood test request because a breath or urine test is impractical or impossible). **Second**, the person must be informed that, if he refuses to submit to such test, his privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months. **Third**, the person must be informed that a refusal to submit to a lawful test of his breath, urine, or blood, if his driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his breath, urine or blood, is a misdemeanor. Once these requirements have been met and the person having been so informed still refuses to submit to any such test when requested to do so by an officer, can be charged with this misdemeanor of the first degree.

As a result of this new law, which includes the requirement of giving additional information as well as changes to the implied consent statute itself, the **warning** now being used by officers **should** be revised. Listed below is a warning that complies with the cur-

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**S.A.O. BIRTHDAYS  
SEPTEMBER 2003**

1st  
Kevin Abdoney, Special Pros

2nd  
Joan Hughes, Highlands Co.

3rd  
Sonya Colson, VOPS  
Cheryl Hooks, F4

4th  
Arley Smith, PTI

9th  
Tammy Bennett, FCIC

10th  
Melissa Hooks

11th  
Rachel Stringer, Mailroom

12th  
John Aguero, Homicide

14th  
Cari Daniels, Special Pros.

17th  
Martin Hodges, Invest.

20th  
Meley Lorren, C.S.E.

25th  
Debbie Colson, Felony  
Annette Campbell,  
Highlands County

27th  
Vanessa Caruthers,  
Domestic Violence

**D.U.I. INVESTIGATIONS: THE  
LATEST DEVELOPMENTS**  
...continued from page 1...

rent statutory requirements and recent appellate decisions:

**IMPLIED CONSENT FOR DUI IN A MOTOR VEHICLE**

Note: Read only the paragraph applicable to the type of test you are requesting.

I am now requesting that you submit to a lawful test of your BREATH for the purpose of determining its alcohol content.

I am now requesting that you submit to a lawful test of your URINE for the purpose of detecting the presence of chemical or controlled substances.

I am now requesting that you submit to a lawful test of your BLOOD for the purpose of determining its alcohol content and the presence of chemical or controlled substances.

Note: Read only if the subject does not comply with your request.  
I am ( your name ) of the ( your agency ).

If you fail to submit to the test I have requested of you, your privilege to operate a motor vehicle will be suspended for a period of one (1) year for a first refusal, or eighteen (18) months if your privilege has been previously suspended as a result of a refusal to submit to a lawful test of your breath, urine or blood. Additionally, if you refuse to submit to the test I have requested of you and if your driving privilege has been previously suspended for a prior refusal to submit to a lawful test of your breath, urine or blood, you will be committing a misdemeanor. Refusal to submit to the test I have requested of you is admissible into evidence in any criminal proceeding.

Note: Read only if the arrested is a resident of another state or has a driver license from another state:

This Implied Consent applies to your Florida driving privilege, however, your state may also impose restrictions, suspensions, etc. based on this arrest.

Note: Read only if the arrested is a driver of a Commercial Motor Vehicle (in addition to the above appropriate Implied Consent Warning):

Additionally, failure to submit to such a breath or urine test, or both, will



David Stamey is an Assistant State Attorney in our Bartow Office. He is also the Director of the Misdemeanor Division and has been with our office for approximately 7 years.

result in the disqualification of your privilege to operate a commercial motor vehicle for a period of one (1) year for a first refusal, and shall result in the permanent disqualification of such privilege for a second refusal, arising from separate incidents.

\* \* \* \* \*

Despite our best efforts to prevent them, there will always be issues raised by defense attorneys concerning the way we investigate, test, and prove DUI cases. The implied consent warning continues to be a favorite target of defense attorneys. Use of the implied consent warning listed above should resolve many of the issues that have been raised.

**AVOIDING ONE OFFICER DUI CASES**

There's an old saying that "two heads are better than one," and with DUI cases, this statement couldn't be more true. In County Court, more DUI cases are decided by jury trial than any other type of misdemeanor. One of the reasons for this is that defense attorneys are choosing more and more to take **one** officer DUI cases to trial, especially ones involving REFUSALS to submit to a breath, blood, or urine test. The reason for this is simple. In these cases the officer, who is both the arresting officer and the breath test operator, testifies that the defendant was impaired. Then the defendant and his \_\_\_\_\_ (fill in the blank: wife, girlfriend, mom, co-worker, drinking buddy) will testify that he wasn't drinking and wasn't impaired, and while doing so will attempt to explain why the test was refused. If the excuse for not taking the test is plausible and the witnesses are consistent in their stories, we often have trouble obtaining a conviction in these type of cases. The primary reason for this problem is the state's extremely high burden of proof: **beyond every reasonable doubt.**

## D.U.I. INVESTIGATIONS: THE LATEST DEVELOPMENTS

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In an effort to strengthen our cases and improve the likelihood of success at trial, we should avoid one officer DUI cases. (Sometimes, I know it is unavoidable.) The use of other officers as both roadside backup and breath test operators is **encouraged**. These other officers should take the time to evaluate the person arrested. They should observe the person for signs of

impairment. The law allows officers to give their **opinions** on this issue (impairment). We should take advantage of this opportunity. With additional witnesses, resulting in stronger cases, defense attorneys will be more reluctant to take these cases to trial. And when they do, our likelihood of success will be greater.

### PLEASE INCLUDE THE HOME ADDRESS OF THE VICTIM OR WITNESS IN YOUR REPORT

By Mike Cusick

Often when a crime occurs at a business, the only address listed in the report for the victim or witness is the address of the business. In the future, please make sure to include the home address of the person. We need to be able to locate these individuals months, sometimes years, after the crime occurred. The person may or may not still be at the business when we need him or her. We have found that sometimes the business is not cooperative

when we are attempting to find the person when he or she no longer works there. If you do not include this information, we have to spend time checking public records to obtain it. We know that victims and witnesses are sometimes reluctant to give you this information. Please explain to them that it is required by our office and that it will be obtained one way or another. Do not give the person the option of not supplying this important information.

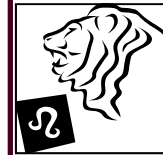
## TOP COPS

Last week, I had a Life Felony case - Robbery with a Deadly Weapon in which **CRIME SCENE TECHNICIAN TRACY GRICE, SERVICE OFFICER RENEE ARLT AND DETECTIVE DENNY PHILLIPS** provided exceptional support. Through the use of their video/photo technology, **SO RENEE ARLT** was able to capture still photos from the Hotel security video of the defendant placing his left hand on the hotel's customer counter. This was where she obtained a left hand latent palm print matching the defendant's as she processed the crime scene.

The hotel security video showed the defendant jumping over the counter in the course of committing the robbery. The still photos provided an exceptional view of the defendant placing his left hand on top of the counter as he jumped over it. Because the defendant wore a bandana which covered his head and face, the palm print was crucial evidence in the trial.

**CST TRACY GRICE** was extremely supportive and flexible by coming to court with very little notice to obtain the defendant's palm print for comparison purposes. This was aid in the giving of her testimony so we could side step the possibility of any mistrial. **DETECTIVE DENNY PHILLIPS** altered his scheduled vacation plans to attend the trial. Without him, we could not go forward. This was important to the state seeing how this case occurred on November 8, 2001 (almost two years ago). I just wanted to say thanks to all of them for their efforts.  
—Assistant State Attorney Dave McNeal,  
Felony Division 4 —

This month I would like to recognize **DETECTIVES JASON WHATLEY AND MIKE BURDETTE** of the Polk County Sheriff's Office BSI for their assistance and hard work. Because of their efforts, the state was able to close a case on our terms-in which an individual engaged in a hand-to-hand transaction of 443 grams of methamphetamine. We were able to obtain a 15 year mandatory prison term for him in the process. Well done Jason and Mike.  
—Assistant State Attorney Victoria Avalon,  
Felony Division 5 —



LEO

NEWS...

Art Bodenheimer, who began his law enforcement career as a Lake Alfred police auxiliary officer 17 years ago, is the latest of three new police chiefs appointed in the Tenth Judicial Circuit.

Bodenheimer, 39, was appointed this month to replace Larry Cloud, Lake Alfred's public safety chief, who died in August. Bodenheimer will serve only as police chief. The city manager eliminated the public safety chief position.

A native of Lakeland, Bodenheimer began working for the Lake Alfred Police Department in 1986 as an auxiliary officer. He was hired as a full-time officer a year later.

Bodenheimer worked his way to lieutenant and performed much of the same duties as chief under Cloud. He said his goal was to provide more training for the small agency's officers.

Bodenheimer was also voted into the Polk County Police Chief's Association at its Sept. 4 monthly meeting, according to Darrell Kirkland, the association's president and police chief in Winter Haven.

Kirkland said newly hired Haines City Police Chief Morris West and recently appointed Mulberry Police Chief Allen Graham were also voted into the association at the meeting.

By: Sam Cardinale



## ...FROM THE COURTS...

### **LAWYER WAS NOT REQUIRED FOR VIDEOTAPED LINEUP**

The defendant was charged with robbery and filed a motion to suppress an identification of him which an officer made from a video-taped lineup. The trial court granted the motion, and the state appealed. The defendant defended the trial court's order by arguing, in part, that the identification violated his Sixth Amendment right to counsel because his attorney was not present at the

time the officer viewed the video tape and made the identification. In reversing the trial court's order, the Third District rejected this argument, holding that as with a photographic lineup, a defendant does not have a Sixth Amendment right to have counsel present. *State v. Jones*, 28 FLW D1625 (Fla. 3d DCA July 16, 2003).

### **DRIVING WAS NOT BAD ENOUGH TO SUSTAIN VEHICULAR HOMICIDE CONVICTION**

The defendant was charged with vehicular homicide. At his trial, the evidence established that after turning at a T intersection, the defendant hit a woman who died. Although the evidence was in dispute, a state witness testified that in his opinion, the defendant did not stop at the stop sign at the intersection. Experts also testified that the defendant was driving between 17 and 26 miles per hour in a 25 mile per hour speed zone. There was no

evidence that the defendant was under the influence of alcohol or drugs. The jury found the defendant guilty, but the trial court granted a motion for judgment of acquittal notwithstanding the verdict. On appeal, the Second District affirmed, holding that the evidence was insufficient to establish that the defendant drove in a reckless manner likely to cause the death of another. *State v. Del Rio*, 28 FLW D1731 (Fla. 2d DCA July 25, 2003).

### **COURT MAKES PROSECUTION FOR FORGERY OF A TRAFFIC CITATION DIFFICULT**

The defendant was charged with forgery for signing a false name on a traffic citation. He filed a motion *in limine* to prevent the introduction of the traffic citation into evidence based on 316.650(9), Florida Statutes. The trial court granted the motion, and the state

sought a writ of *certiorari* from the Second District. The Second District denied the state's petition, holding that section 316.650(9) prohibits the introduction of a traffic citation into evidence in any trial. *State v. Veilleux*, 28 FLW D1804 (Fla. 2d DCA July 30, 2003).

### **STATUTE PUNISHING FAILURE TO REGISTER AS A SEXUAL OFFENDER IS CONSTITUTIONAL**

The defendant was charged with and convicted of failure to register as a sexual offender. On appeal, he argued that his conviction should be overturned because the sexual offender registration and notification re-

quirements violate constitutional due process and *ex post facto* provisions. The Second District rejected this argument and affirmed. *Givens v. State*, 28 FLW D1809 (Fla. 2d DCA July 30, 2003).

### **MOPED DRIVER COULD BE CHARGED WITH DRIVING ON A SUSPENDED LICENSE**

The defendant was charged with driving while license suspended. At the time she was charged, she was driving a moped. She filed a motion to dismiss, asserting that section 322.24, Florida Statutes, is unconstitutionally

vague as applied to mopeds. The trial court granted the motion, but on appeal, the Fourth District reversed, holding that section 322.24 is constitutional as applied to mopeds.

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