# The Rap Sheet

**Legal News for Law Enforcement in Brevard and Seminole Counties**

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Message from
State Attorney
Norm Wolfinger

In this month's Rap Sheet, in addition to several other topics, we take a look at the "accident report privilege" and at "Miranda rights" applicable to roadside sobriety exercises following a DUI stop.

May is an appropriate month to be talking about "rights and privileges." Memorial Day, May 31st, is the day when all Americans pause to reflect on the sacrifice of those in the armed forces who have given their all for our rights and liberties. It is also a day to reflect on our obligation to preserve that liberty in the future.

Everyday members of our law enforcement team are doing just that- Protecting and preserving the rights of all citizens. I salute you. To those members of the team who are currently assigned overseas protecting our nation, we express our thanks and wish you a safe and speedy return home. God Bless.

Norm Wolfinger

Field Sobriety Exercises
& the Need for Miranda
By Assistant State Attorney
Mary Ann Klein

The reading of Miranda is required prior to custodial interrogation. As a general rule, a person is not in "custody" during the detention at roadside for brief questioning and performing roadside sobriety tasks. "Custody" is a more restrictive form of "detention" that requires a reasonable person to believe that his freedom is curtailed to the degree normally associated with "formal arrest" under the U.S. Supreme Court interpretations or Florida courts' interpretations. See, *Berkermer v. McCarty*, 468 US 420, 440(1984); *Pennsylvania v. Muniz*, 496 US, 482, 590-600 (1990); *Pennsylvania v. Bruder*, 488 US 9, 11 (1988); *Allred v. State*, 622 So.2d 984, 986-87 (Fla. 1995); *State v. Burns*, 661 So.2d 842, 846-47 (Fla. 5th DCA 1995); and *Taylor v. State*, 648 So.2d 701 (Fla. 1994).

Although Miranda is generally not required before sobriety exercises are administered, there are some situations where Miranda is implicated and should be read in order for the exercises to be admissible. Thus, a review of *Allred v.*

*State*, 622 So.2d 984, 986-87 (Fla. 1995), and *State v. Burns*, 661 So.2d 842, 846-47 (Fla. 5th DCA 1995) is in order.

*Allred* involved a joint appeal by defendants Allred and DiAndrea. Defendant Allred was stopped for a driving infraction. At roadside, but after arrest, in the presence of three officers, he was asked to recite the alphabet from "c" to "w". Allred started at "e" rather than "c". Allred was then taken to the police department where he was asked to count from 1001 to 1030 as part of the one-legged stand exercise. Allred counted as instructed until he got to 1021 where he then dropped the prefix 1000 before each number.

Defendant DiAndrea was also stopped for a traffic infraction. At roadside, but after arrest, he was asked to recite the alphabet. He could not get past the letter "p". He was then taken to the video facility and asked to recite the alphabet from the letter "c" to "w" during the one-leg stand. The defendant recited from "c" to "z". He was also asked to count from 1001 to 1030, which he did correctly.

The county court suppressed Allred's alphabet and counting exercises and DiAndrea's alphabet tasks. The circuit court affirmed the suppressions. The 4th DCA reversed and certified the issue to the Florida Supreme Court.

Although, generally pre-arrest roadside sobriety exercises are not considered custodial, the defendants, Allred and DiAndrea were found to be "in custody" for Miranda purposes when they performed the roadside field sobriety exercises. [1]

The *Allred* case resulted in the following:

1. Routine booking questions such as name, address, height, weight, eye color, date of birth, and current age are generally admissible even after arrest in the absence of Miranda; because these questions are not designed to elicit an incriminating response. Citing *Pennsylvania v. Muniz*, 110 L.Ed. 2d 528 (1990).

2. A defendant's post-arrest incorrect recitation of the alphabet and incorrect recitation of the counting of numbers are inadmissible where Miranda was not read and waived first. In this case, since the court found the defendants under arrest at roadside, suppression of the incorrect roadside recitations was upheld.

Subsequent to *Allred*, the 5th DCA decided *State v. Burns*, 661 So.2d 842 (5th DCA 1995). In *Burns*, the defendant was stopped for making a wide turn and weaving. After the officer noticed the odor of alcohol, bloodshot eyes, and slurred speech, the officer conducted roadside field sobriety tasks: recitation of alphabet from "a" to "z," One-Leg Stand while counting, Walk Heel-to-Toe nine steps, and the Finger-to-Nose. All these tasks were done prior to arrest and prior to Miranda.

[1] The 5th DCA in *Burns* made this distinction more clear. "In Allred the defendant was asked, after his arrest but before being advised of his Miranda rights, to recite the alphabet from "c" to "w" at the roadside, in the presence of three police officers… ." *Burns* at 846.

The defendant "failed" the recitation of alphabet, the One-Leg Stand and the Heel-to-Toe Walk. The defendant refused to perform the Finger-to-Nose. After these tasks, eleven minutes after the stop, the defendant was formally arrested and taken to a breath-testing center. The defendant refused all Field Sobriety Tasks on video and refused the breath test. He did answer typical booking type questions on video and answered them correctly. After all of this, the defendant was then read Miranda. He invoked his right to remain silent but never requested an attorney

The result of *Burns:*

**1. Pre-arrest Roadside Tasks:** The court citing *Berkemer v. McCarty*, 82 L.Ed. 2d 317 (1984) and *Pennsylvania v. Bruder*, 102 L.Ed. 2d 172 (1988) found this case to involve a routine traffic stop and no evidence that the defendant was subjected to restraint comparable to a formal arrest. The stop lasted eleven minutes in duration, occurred in a public area and only one officer was involved. The court recognized that custody, for purposes of Miranda, is defined no differently than the Federal Constitution. Since the defendant was not in custody during the roadside tasks, his incorrect recitation of the alphabet and his counting incorrectly during the one-leg stand was deemed admissible.

**2. Booking Questions on Video:** These types of questions and their answers were ruled admissible if answered correctly to show the defendant's manner of speech; i.e., slurred. If answered incorrectly after arrest without benefit of Miranda then the answers are inadmissible because the answers are incriminating, as they would show faulty cognitive functioning.

**3. Field Sobriety Tasks on Video:** Although this was not an issue in *Burns*, it was discussed by the court in light of *Allred.* The 5th DCA stated that field sobriety exercises done after arrest, without benefit of Miranda, are admissible in their entirety if the testimonial portions are done correctly, because the testimony (reciting alphabet or counting) is not incriminating if done correctly. The evidence is offered to show the defendant's manner of speech; i.e., slurred. However, if the testimonial portions are done incorrectly after arrest without benefit of Miranda then they are inadmissible.

**4. Right to Counsel:** The Court ruled that the administering of a Breath Test and Field Sobriety Exercises on video are an evidence-gathering process. The police are essentially collecting and preserving physical evidence. This does not constitute a critical confrontation requiring the presence of an attorney.

**5. Refusal to Submit to the Breath Test:** Citing *Edwards v. State*, 603 So.2d 89 (Fla. 5th DCA 1992), the court found the refusal admissible.

**6. Refusal to Perform Field Sobriety Tasks on Video:** The court ruled that a defendant's refusal to perform non-testimonial Field Sobriety Tasks after arrest without benefit of Miranda is admissible. Please keep in mind that if a defendant is asked to walk the line nine steps and is asked to count out loud, and the defendant counts incorrectly, this will be deemed testimonial and the

audio portion of the video will be excluded from the jury's consideration. If he counts correctly then the counting should be admissible. If however, the defendant is not asked to count or is told to count silently to himself but the defendant counts out loud anyway and does so incorrectly, the state can argue that the statements were spontaneous and it may come into evidence.

Although not related to the *Burns* and *Alred* cases, it is important to mention here that the law does not require Field Sobriety Exercises. There is no law that requires a defendant to perform the tasks nor laws, which impose criminal or administrative penalties for refusal to perform - such as that which exist with DUI breath tests. Thus, a defendant cannot be threatened or required to perform. So too, admissibility of a defendant's refusal to perform will be dependant upon whether the defendant believed his refusal was a "safe-harbor." This issue was discussed in a previous Rap Sheet article entitled, *Admission of Defendant's Refusal to Submit to Testing*, which can be accessed at http://sa18.state.fl.us/rapsheets/rs_09_03.pdf

## Field Sobriety Exercises & the Need for Miranda in Light of an Accident

By Assistant State Attorney Mary Ann Klein

In *State v. Whelan*, 24 FLW D640 (3rd DCA 1999), the defendant was involved in a car accident. He was initially handcuffed then released from handcuffs. He was then asked to perform roadside sobriety tests, which he failed. He was not advised of Miranda before performing the Field Sobriety Tasks. The 3rd DCA addressed the effect of the accident report privilege and the failure to read Miranda on the admissibility of field sobriety exercises with the following outcome:

If a person is **not in custody** for Miranda purposes, roadside tests of both a physical nature and ones that require testimonial responses such as, ABC's and counting are admissible. (Citing to *Burns).* In *Whelan*, however, the State conceded that the defendant **was in custody** for roadside tests. Thus, the defendant's incorrect recitation of ABC's was suppressed. His physical performance of the one-leg stand, Horizontal Gaze Nystagmus (HGN), finger-to-nose and walk-and-turn were however, deemed admissible.

Although the defendant sought suppression of all roadside tasks for failure to read Miranda after completion of the accident investigation, the Court ruled that the accident report privilege in *Marshall,* protected a motorist's Fifth Amendment right regarding testimony. Purely physical roadside tasks such as the One-Leg Stand, Walk-and-Turn, Finger-to-Nose and HGN invoke non-testimonial conduct.

## Accident Report Privilege

By Assistant State Attorney Mary Ann Klein

Florida Statute 316.066(4) provides that:

*(4) Except as specified in this subsection, each crash report made by a person involved in a crash and any statement made by such person to a law enforcement officer for the purpose of completing a crash report required by this section shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil or criminal.* ***However, subject to the applicable rules of evidence, a law enforcement***

***officer at a criminal trial may testify as to any statement made to the officer by the person involved in the crash if that person's privilege against self-incrimination is not violated.[2] The results of breath, urine, and blood tests administered as provided in s. 316.1932 or s. 316.1933 are not confidential and shall be admissible into evidence in accordance with the provisions of s. 316.1934(2).***[3] *Crash reports made by persons involved in crashes shall not be used for commercial solicitation purposes; however, the use of a crash report for purposes of publication in a newspaper or other news periodical or a radio or television broadcast shall not be construed as "commercial purpose."*

Florida Statute 316.062, which addresses a motorist's duty to give information and render aid, also provides in paragraph (3) that *the statutory duty of a person to make a report or give information to a law enforcement officer making a written report relating to an accident shall not be construed as extending to information, which would violate the privilege of such person against self-incrimination.*

"The purpose of the accident report privilege contained in section 316.066(4) is to encourage people to make a true report of the accident in order to facilitate the ascertainment of the cause of accidents, thus furthering the state's ultimate goal of making the highways safer for all of society." *Department of Highway Safety and Motor Vehicles v. Corbin*, 527 So.2d 868 (1st DCA 1988).

Historically, Florida Statute 316.066 has been understood to prohibit the use of a defendant's statements given during an accident investigation if no Miranda is given first or even if Miranda is given and waived, if the defendant is advised that he must respond to questions concerning the accident. Thus, the Accident Report Privilege applies if no Miranda is given first. Additionally, if law enforcement advises a defendant that he must respond to the questions pursuant to his obligations as a driver involved in an accident, these statements will also be inadmissible. *State v. Marshall*, 695 So.2d 686 (Fl. 1997).

The Accident Report Privilege applies to prohibit the person's statements from being admitted in any civil or criminal trial and in administrative hearings such as license suspension hearings conducted under section 322.2615 Florida Statute. *Department of Highway Safety and Motor Vehicles v. Perry*, 702 So. 2d 294 (5th DCA, 1997).

The *Whelan* case, discussed earlier, made clear that a failure by law enforcement to read Miranda after completing his accident investigation would not render roadside physical field sobriety tests nor post-arrest physical field sobriety tests inadmissible. However, field sobriety tests of a testimonial nature may be subject to exclusion at trial.

Where a driver makes a spontaneous statement, immediately following an accident, the statement is admissible since the driver did not make the statement

[2] Laws 1991, c. 91-255, § 14, eff. July 1, 1991, in subsec. (4), inserted the third sentence.

[3] Florida Statute 316.066(4) was amended in 1982 by Laws of Florida 82-155 to add this sentence.

for the purpose of complying with the duty to furnish an accident report. See *State v. Marshall*, 695 So.2d 719 (3rd DCA 1996); *Perez v. State*, 630 So.2d 1231 (2nd DCA 1994); *State v. Derek Walker*, 03-07-AP (Circuit Court, 18th Judicial Circuit, Seminole County February 2, 2004).

Additionally, driver's who have an accident and then leave the scene, are generally not entitled to the confidentiality privilege of section 316.066(4). See *Cummings v. State*, 780 So.2d 149 (2nd DCA 2000); *State v. Hepburn*, 460 So.2d 422 (Fla. 5th DCA 1984).

The accident report does not extend to non-communicative evidence. Although, earlier cases included non-communicative evidence under the accident report privilege, this was changed by an amendment to the statute in 1982. The cases of *Brackin v. Boles*, 452 So.2d 540 (Fla.1984) and *State v. Edwards*, 463 So.2d 551 (Fla. 1985) made clear that non-communicative evidence is not made confidential by 316.066(4). The accident report privilege applies only to statements or communications as the driver, owner, or occupant of a vehicle is compelled to make in order to comply with the duty to report the accident. The accident report does not extend to tangible evidence collected or observed by the investigating officer. Tangible evidence not immunized by the accident report privilege includes the location of the accident, location of the vehicles, skid marks, damage to the vehicles, observations of the defendant's impairment, the odor of alcohol detected, the defendant's appearance such as bloodshot eyes, his appearance on field sobriety tests, and the results of physical tests. This is true, even if the evidence was observed and obtained during the accident investigation. See *Brackin v. Boles*, 452 So.2d 540 (Fla. 1984) and *State v. Edwards*, 463 So.2d 551 (5th DCA 1985).

In summary, after a driver gives information about the accident (when no Miranda is read first) the law enforcement officer must then advise the defendant that a criminal investigation is now taking place, and he must also advise the defendant of Miranda in order for the statements given during the criminal investigation to be admissible. The officer's simply telling the defendant he is changing hats is not sufficient. *State v. Norstrom*, 613 So. 2d 4371 (Fla. 1993); *State v. Marshall*, 695 So. 2d 686 (Fla. 1997).

Recently, in *Vedner v. State*, 849 So.2d 1207 (5th DCA 2003) rev. denied 861 So.2d 433, the 5th DCA ruled on the admissibility of three interviews a defendant gave to police. The first interview took place the day after the accident. The officers immediately read the defendant Miranda and he waived. It does not appear that they told the defendant they were doing an accident investigation. The 5th DCA ruled that the statements given by Mr. Vedner at this initial interview were voluntarily made after he was advised of his Miranda rights and were, therefore, admissible against him.

The second interview was five days later when the defendant and his mother went to the Lake Mary Police Department to retrieve some personal property. While there, he was told that he was not under arrest, there was no intention of arresting him at that time and that he was free to leave. The officers told him

that as long as he was there, they did want to ask him about a pipe found in his pants and whether any marijuana was in the car. The defendant agreed to talk to the officers. He was not, again, warned of his Miranda rights prior to being questioned. Although at a suppression hearing the officer testified that at the time of the second interview, he was "still investigating the accident" this was apparently not conveyed to the defendant.

The 5th DCA upheld the trial court's admission of the second interview statements at trial. The court found that the interview was non-custodial and voluntary even though Miranda was not read to the defendant. The court was troubled that the interview was conducted, at least in part, in connection with the accident investigation. However, the court ruled that this fact alone did not automatically require suppression of the statements where there was no indication that Vedner was advised or believed that he was required to provide the information sought by the law enforcement officers.

The third interview took place approximately six months later. During this interview the officer told Vedner that he was not under arrest and that he was free to go at any time. He was, once again, not re-advised of Miranda. At this third interview, the defendant specifically inquired about the reasons for the additional questions, and he was told that it was for the accident investigation, not a criminal investigation. At the suppression hearing, the officer testified that during this interview the accident investigation was still ongoing. The 5th DCA ruled that the statements made by the defendant at the third interview should be excluded because there was an "indication" made to the defendant that he was required to answer the questions. The "indication" amounted to police responding to Vedner's inquiry about the purpose for the questions and the police advising that they needed some information about the accident.

*Vedner* does not change the long-standing procedures used by officers responding to accident—DUI scenes. It does, however; give the state some room to argue for admission of statements made if the officer fails to read Miranda. The State's reliance on *Vedner* will fail; however, if the defendant was told that the questions are for the officer's accident investigation, or if the defendant testifies at the pre-trial motion hearing or trial that he thought he had to comply because the statute requires him to give accident information.

What follows is a summary of recent issues that have been addressed in accident cases involving the accident report privilege. The first issue being the applicability of the accident report privilege to exclude the officer from testifying at a pretrial motion hearing, regarding statements made by non-defendant persons during the accident investigation.

The plain wording of the statute makes the statements given to the officer during the accident investigation inadmissible at **trial**, whether made by the defendant or the other driver. Defendants have raised the accident report privilege to exclude statements made by persons other than himself; the defendant-driver, from admission at **pre-trial hearings**. For example, exclusion at a pretrial Motion to Suppress for lack of probable cause to arrest, can

severely hamper the state's case. If the police respond to an accident and the occupants of the defendant's vehicle and/or occupants or driver of the other involved vehicle place the defendant behind the wheel and give indications of impairment, exclusion of their statements can leave the state without record proof to establish probable cause for arrest. Essentially, exclusion requires the state to have these persons actually present to testify.

The State has argued that this result is contrary to public policy and the statute itself, as the statute prevents admission of the statements against the speaker if admission would violate the speaker's 5th Amendment Rights.

Florida Statute 316.066(4) provides that an "accident report made by a person involved in an accident and any statement made by such person to a law enforcement officer for the purpose of completing an accident report required by this section (Florida Statute 316.066) shall be without prejudice to the individual so reporting. No such report or statement shall be used as evidence in any trial, civil or criminal. However, subject to the applicable rules of evidence, a law enforcement officer, at a criminal trial, may testify as to any statement made to the officer by the person involved in the accident, if that person's privilege against self-incrimination is not violated".

Florida Statute 316.062, which addresses a motorist's duty to give information and render aid, also provides in paragraph (3) that "the statutory duty of a person to make a report or give information to a law enforcement officer making a written report relating to an accident shall not be construed as extending to information which would violate the privilege of such person against self-incrimination."

The State has also argued that pursuant to Florida Statutes 316.064[4] duty to report. If one's vehicle is involved in an accident resulting in bodily injury or death or severe property damage, only the following are required to make a report: the driver, the owner, or an occupant (if the driver is incapacitated).

The State has also argued that the accident privilege be limited to trial testimony and not extended to apply in pretrial probable cause determinations. Although the court in *State v. Johnson*, 695 So.2d 771 at 775 (5th DCA 1997)

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[4] Florida Statute 316.064. When driver unable to report provides:

*(1) A crash report is not required under this chapter from any person who is physically incapable of making a report during the period of such incapacity.*
*(2) Whenever the driver of a vehicle is physically incapable of making an immediate or a written report of a crash, as required in ss. 316.065 and 316.066, and there was another occupant in the vehicle at the time of the crash capable of making a report, such occupant shall make or cause to be made the report not made by the driver.*
*(3) Whenever the driver is physically incapable of making a written report of a crash as required in this chapter, then the owner of the vehicle involved in the crash shall, within 10 days after the crash, make such report not made by the driver.*
*(4) A violation of this section is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.*

raised the question of the applicability of the Accident Report Privilege to pre-trial probable cause determinations, it did not address the issue. In *State v. Wilkins*, 6 Fla. Law Weekly Supp. 663a (Brevard County Court, 18th Judicial Circuit, February 1, 1999), the County Court addressed two separate issues: (1) the use of pre-Miranda statements made by a defendant during the accident investigation phase and (2) The use of accident report privileged statements as the basis for probable cause for arrest. With regard to the first issue, the **and** 316.065[5], the Accident Report Privilege does not apply to persons who have no statements would be inadmissible at trial. With regard to the second issue, the court ruled that the privileged statements could be considered by the officer in assessing sobriety and, together with the officer's observations, were sufficient to establish probable cause for arrest. The court reasoned that the accident report privilege was evidentiary and thus precluded their use at trial but did not preclude their use by the officer in making conclusions regarding probable cause.

In *State v. Lawson*, 10 Fla. L. Weekly Supp. 400c (Circuit Court for the 17th Judicial Circuit, Broward County) the first officer on the scene of a car crash relayed his observations of the defendant, gathered during his accident investigation, to another officer who arrived on the scene to conduct the criminal investigation. The Circuit Court ruled that the accident report privilege did not prevent the use of the statements, even of a defendant driver, during a probable cause determination in a motion to suppress hearing.

Unfortunately, *Wilkins* and *Lawson* are not binding precedent, and this issue continues to pervade the county court cases in Seminole County. Recently, this

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[5] Florida Statute 316.065. Crashes; reports; penalties provides:

*(1) The driver of a vehicle involved in a crash resulting in injury to or death of any persons or damage to any vehicle or other property in an apparent amount of at least $500 shall immediately by the quickest means of communication give notice of the crash to the local police department, if such crash occurs within a municipality; otherwise, to the office of the county sheriff or the nearest office or station of the Florida Highway Patrol. A violation of this subsection is a noncriminal traffic infraction, punishable as a nonmoving violation as provided in chapter 318.*

*(2) Every coroner or other official performing like functions, upon learning of the death of a person in his or her jurisdiction as the result of a traffic crash, shall immediately notify the nearest office or station of the department.*

*(3) Any person in charge of any garage or repair shop to which is brought any motor vehicle which shows evidence of having been struck by a bullet, or any other person to whom is brought for the purpose of repair a motor vehicle showing such evidence, shall make a report, or cause a report to be made, to the nearest local police station or Florida Highway Patrol office within 24 hours after the motor vehicle is received and before any repairs are made to the vehicle. The report shall contain the year, license number, make, model, and color of the vehicle and the name and address of the owner or person in possession of the vehicle.*

*(4) Any person who knowingly repairs a motor vehicle without having made a report as required by subsection (3) is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. The owner and driver of a vehicle involved in a crash who makes a report thereof in accordance with subsection (1) or s. 316.066(1) is not liable under this section.*

issue was raised in a County Court appeal to the Seminole Circuit Court in *State v. Cino*, County Court Case Number 02-11080MMA, appeal number is 03-24AP. We will advise further after a decision in *Cino* is made.

Another argument being raised by the defense in DUI accident cases is the applicability of the case of *Kastigar v. United States*, 406 U.S. 441 (1972) to Florida's Accident Report Privilege statute. *Kastigar* was a case interpreting 18 U.S.C. §6002, a federal witness immunity statute.

In *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court held that when the government compels testimony it must provide the witness with immunity such that the witness is left in substantially the same position as if the witness had claimed the Fifth Amendment.

*We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted.*

Providing use and derivative-use immunity is all that is required. The Constitution does not require the government to give the witness transactional immunity.

Use immunity forbids the testimony given under the immunity grant to be used against the witness in any criminal prosecution of him. Transactional immunity provides the witness with immunity from prosecution for the matter concerning his testimony.

The *Kastigar* decision not only prohibits the government from using the compelled testimony, it also precludes the use of evidence derived from the compelled testimony as an investigatory lead. Immunity from use and derivative-use leaves the witness and the government in substantially the same position as if the witness had claimed the Fifth.

The *Kastigar* case went on to provide that once the witness demonstrates that testimony was given under a grant of immunity, the government then has the burden to prove that the evidence it proposes to use is derived from a legitimate source, wholly independent of the compelled testimony.

Some defendants have argued that the *Kastigar* decision requires the exclusion of the following types of evidence in a DUI trial as well as in pre-trial motion hearings:

1. Observations the officer made of the defendant and the accident scene during the compelled testimony (accident investigation).

2. Observations made during the criminal investigation phase because they argue that **but for** the knowledge gained during the accident investigation, there would not have been a criminal investigation even conducted.

3. Statements obtained from the defendant during the criminal investigation even after the reading and waiver of Miranda.

4. The use of statements made by non-defendant drivers and vehicle occupants during the accident investigation phase from being considered by the officer in establishing reasonable suspicion or probable cause.

In effect, the defense argues that *Kastigar* provides immunity beyond that provided by 316.066 as interpreted by the case of *State v. Marshall*, 695 So.2d 686 (Fla. 1997).

The State has argued that *Kastigar* is inapplicable because F.S. 316.066 is an evidentiary privilege rather than an immunity statute. Further, that *Kastigar* does not immunize observations made by the officer of the defendant's impairment, regardless of whether those observations are made during the accident or criminal investigation. The Fifth Amendment applies to compelled **testimony**, not observations made of a person standing in a public place where anyone could make the same observations. Furthermore, it is the State's position that the reading and waiver of Miranda constitutes a legitimate source, wholly independent of the "compelled testimony" given during the accident investigation phase.

The State believes that the Accident Report Privilege codified in Florida Statute 316.066 as explained in *State v. Marshall*, 695 So.2d 686 (Fl. 1987) nevertheless, meets the constitutional mandates of *Kastigar v. United States*, 406 U.S. 441 (1972). It fears that the effect of extending immunity to non-testimonial evidence observed by the police, statements given by non-defendants and to statements given by defendants subsequent to the reading and waiver of Miranda, will effectively provide a defendant with transactional immunity. A result contrary to public policy and not constitutionally required.

Currently on appeal to the Seminole Circuit Court is the case of *State v. Cino*, County Court Case Number 02-11080MMA, appeal number 03-24AP wherein the trial court held that *Kastigar* required exclusion of the types of evidence discussed above. The briefs of the parties have been filed, and the State has requested oral argument. Until a decision is reached, the State feels it necessary to make the recommendations listed below regarding the handling of DUI accident cases.

***Investigating DUI Accident Cases:***

1. The first officer on the scene should speak to all third-party witnesses **first**; i.e., persons who witnessed the accident but were not a driver or passenger in the accidental vehicle(s).

2. Next, the officer should speak to the person who appears to be the

"victim driver" of the accident.

3. The officer should get as much crash information as possible from the third-party witnesses and "victim driver." For example, how the accident occurred: can they identify the at-fault driver, signs or indications of impairment that were observed by them of the at-fault driver. The officer should get written sworn statements from all third-party witnesses and the "victim driver."

4. **Only after** the above has been completed should the officer attempt to contact the person who appears to be the "defendant driver." The officer should **first** request accident investigation information from the "defendant driver." **After** the accident investigation is complete, the officer must advise the "defendant driver" that he/she is changing hats from the accident investigation to a criminal investigation and then advise the "defendant driver" of the Miranda warnings. If Miranda is waived, it is **essential** for the officer to ask the crash investigation questions all over again. Most importantly, the defendant should be re-asked whether he was the driver of the vehicle and whether he had consumed alcohol or controlled substances before driving. Remember, none of defendant's statements made during the accident investigation phase are admissible into evidence at trial and may not even be admissible at the pre-trial hearing, so you must repeat the accident investigation questions during the post-Miranda crash investigation.

5. If one officer conducts the criminal investigation and another officer conducts the accident investigation, it is **imperative** that the accident investigation officer conveys everything he was told by the third-party witnesses and "victim driver," **before** revealing his own observations of the defendant and the defendant's accident statements. The reason for this is that, in cases where *Kastigar* is raised, the State will need to question the criminal investigation officer as to whether he would have conducted the criminal investigation absent the observations of and statements made by the defendant which were gathered during the accident investigation phase. In other words based upon the information learned from the "victim driver" and third party witnesses, would the officer have conducted a criminal investigation?

6. Lastly, the officer should question the non-defendant drivers, vehicle occupants and witnesses regarding whether they have any objection to the officer providing testimony in a criminal case involving the at-fault defendant driver, about what they have told the officer during the accident investigation.

In a single car accident where no witnesses are involved the suggestions made above cannot be followed, which is exactly why the extension of *Kastigar* to this extreme is unworkable. We are hopeful the Appellate Court in *Cino* will recognize the Accident Report Privilege in F.S.

316.066 as an evidentiary privilege only and not applicable to pretrial determinations. Furthermore, that in any event F.S. 316.066 as interpreted by *State v. Marshall*, 695 So.2d 686 *(Fl. 1987)*, meets the constitutional mandates of *Kastigar.*

***Summary of Miranda*** Requirements
By Assistant State Attorney Mary Ann Klein

***Booking Questions***

- Responses to post-arrest routine booking questions **are** admissible **without** Miranda if the questions are answered correctly and are used ONLY to show manner of speech; i.e., slurred.
- Responses to post-arrest routine booking question are **not** admissible **without** Miranda if the questions are answered incorrectly and are used to show faulty cognitive functioning.

***Field Sobriety Exercises requiring recitation of alphabet or counting***

- Miranda is not required for PRE-arrest alphabet and counting exercises, regardless of whether they are done correctly or incorrectly. Since pre-arrest roadside exercises are non-custodial, then Miranda is not implicated.
- POST-arrest alphabet and counting exercises are inadmissible if done incorrectly when no Miranda is read and waived first.
- POST-arrest alphabet and counting exercises are admissible if done correctly even when no Miranda is read and waived first.

***Crash Investigations***

- Miranda must be read and waived before any verbal statements or responses from a defendant after a crash will be admissible at trial. (Note: Officers should **always** read Miranda **after** they have concluded the crash investigation and **before** they begin the criminal investigation. Keep in mind that all responses to the crash investigation will be inadmissible, so important responses regarding driving and consumption of alcohol or controlled substances should be repeated post-Miranda so that those responses will be admissible.)

Use of Arrest Affidavit During DHSMV Administrative Hearing Effect of Dobrin Case
By Assistant State Attorney Mary Ann Klein

In *Dobrin v. Florida Department of Highway Safety and Motor Vehicles*, 29 FLW S80 (Fl. 2-19-04), the defendant was arrested for DUI. The defendant refused the breath test after being read the implied consent warning and DHSMV then suspended his license. The defendant challenged the suspension. At the administrative review hearing, Dobrin challenged the validity of the traffic stop. The evidence presented at the hearing was the officer's arrest paperwork on file in the case. **The officer did not testify at the DHSMV hearing.** The officer's arrest affidavit essentially provided the following: that the officer observed Dobrin driving his truck at a high rate of speed (estimated by the officer at fifty miles per hour) and drifting to the right and correcting

himself in a quick manner on several occasions. The hearing officer rejected Dobrin's argument regarding the initial stop and went on to find that the arrest for DUI was lawful and that Dobrin refused the breath test after being informed that refusal would result in license suspension. Thus, the hearing officer suspended Dobrin's license.

Dobrin sought review in the Circuit Court. The circuit court granted Dobrin's petition and quashed the hearing officer's order of license suspension. The Circuit Court ruled that the facts contained in the officer's arrest report did not provide probable cause to stop the car for failure to maintain a single lane because the arrest affidavit did not specifically allege that Dobrin crossed either line of the traffic lane. It also ruled that a stop for speeding could not be relied upon because the arrest report did not provide that the officer initiated the traffic stop because of speeding, nor did it provide what the speed limit was for that section of road on which Dobrin was traveling. The Circuit Court also rejected the argument that the basis for the stop was to determine whether Dobrin was ill, tired, or driving under the influence, because the arrest report did not indicate this as the reason for the stop.

The 5th DCA quashed the circuit court's decision. The Florida Supreme Court overturned the 5th DCA and reinstated the decision of the Circuit Court. The Florida Supreme Court emphasized that the correct test to be applied in determining whether a stop is justified is whether the particular officer who initiated the traffic stop had an objectively reasonable basis for making the stop. The only evidence in the record was the paperwork filed by the officer. The Florida Supreme Court agreed with the Circuit Court that the officer's paperwork did not competently or substantially support the officer's stop for failure to maintain a single lane, speeding or to determine whether Dobrin was ill, tired, or driving under the influence; because the paperwork did not provide sufficient facts to support these conclusions nor were some of these conclusions even indicated as the reason for the stop.

The *Dobrin* decision makes clear that the court will not speculate as to the reason for the traffic stop but instead will determine whether the facts observed and alleged in the report support the basis, which is given in the report as the reason for the stop. In a criminal prosecution involving pretrial motions the State normally calls the officer as a witness, thus shortcomings in the police report can be rectified with testimony. To the contrary, in a DHSMV hearing, generally the only evidence is the officer's arrest affidavit. Thus, the report must provide all the information the officer would ordinarily testify about, if he were actually at the hearing.

For DHSMV hearing purposes especially **where the officer is not present at the hearing to provide testimony**, this decision requires that all reasons for the stop, and all observations made to support the reasons be alleged in the probable cause affidavit so that the Court can come to the same determinations made by the officer.

The following is an illustration of the degree of report detail, essential in DHSMV report only hearings: *The defendant was speeding. The defendant was traveling on SR 434 in an area with a posted speed limit of 40. I made a visual estimation of the driver's speed and pace-clocked the defendant traveling in this area with my speedometer with the result that he was traveling at approximately 60 mph. I also observed the driver to drift within his lane on three separate occasions during a distance of approximately four-tenths of a mile. Based upon this observation I was concerned for the welfare of the driver and thought he was sick, injured, or impaired. I also saw the defendant fail to maintain his designated lane when I observed him drift over his lane into the opposite lane of travel. When he did this I observed a car approaching his vehicle in the opposite lane, take evasive action by moving more to the shoulder of his lane of traffic. Based upon my observations I stopped the vehicle.*

The Department of Highway Safety and Motor Vehicles filed a motion for rehearing on March 3, 2004, which is still pending before the Florida Supreme Court.

**Off-Limit Areas & Suggestions in DUI Cases**
By Assistant State Attorney
Mary Ann Klein

As a reminder, with regard to trial testimony:

1. The officer is not permitted to refer to the Field Sobriety Exercises as "tests". FST's should be referred to as exercises or tasks.

2. The officer is not permitted to testify that the defendant "passed" or "failed" the FST's, rather the officer should "describe the performance" on them; i.e., "performed poorly."

3. The officer is not permitted to testify that the defendant requested an attorney before deciding whether to take the FST's or the Breath Test.

4. The officer is not permitted to testify about administering the Horizontal Gaze Nystagmus exercise (HGN) without a sufficient predicate being laid by the State. Thus, discuss this issue pretrial with the Assistant State Attorney.

5. The officer is not permitted to refer to evidence, which has been suppressed by the court in pretrial hearings. Thus, review this with the Assistant State Attorney.

The following is suggested with regard to videotape evidence:

1. There should be no question of the defendant on video as to whether he has a prior DUI.

2. There should be no commentary by the officer on video regarding his opinions on how the defendant is performing, what observations he is making of the defendant's appearance, or concerns about how the defendant was driving.

Please keep in mind that the court usually excludes these things from being presented to the jury. Therefore, the State is left with having to turn the volume on the TV up and down when playing the video before the jury. Not only can it appear to the jury that the State is hiding something, mistakes do happen and can result in a mistrial.

## Update: Traffic Citations & the Running of Speedy Trial

By Assistant State Attorney Mary Ann Klein

In the September 2003 issue of the Rap Sheet there was an article entitled *Traffic Citations and the Running of Speedy Trial*. The article was based upon the county court decision in *State v. Daniel Coughlin*, case number 02-7148MMA, discharging the defendant for the running of speedy trial and the Circuit Court's affirmance of the discharge in Appeal No. 02-7148. The article can be accessed at http://sa18.state.fl.us/rapsheet/rs_09_03.pdf

The State sought review of the Circuit Court's affirmance in the 5th District Court of Appeal. The 5th DCA ruled that the decision in *Coughlin* was contrary to *Fothergill v. State*, 754 So.2d 174 (5th DCA 2000). See *State v. Coughlin*, 29 FLW D749 (5th DCA 2003).

In *Fothergill v. State*, 754 So.2d 174 (5th DCA 2000), the 5th District Court of Appeal ruled that a defendant who was not arrested but was given a traffic citation indicating "summons to be set," was not in custody for purposes of the speedy trial rule 3.191. Since there was no indication of a required date, time or place to appear in court to respond to the citation, there was no "custody."

In *Coughlin*, the defendant signed the citation, which said "to be notified" even though there was no date or time for appearance stated on the citation. The 5th DCA found no distinction between a traffic citation indicating "summons to be set," and a traffic citation indicating "to be notified" even though the defendant signed for the citation. In both instances, the 5th DCA found that there was no date or time for appearance and thus no requirement that the defendant respond in any way. Thus, for purposes of Rule of Criminal Procedure 3.191, the speedy trial rule, he was not taken into custody.

The Defendant in *Coughlin* has sought review in the Florida Supreme Court.

## Disorderly Conduct

By Assistant State Attorney Valerie Towery

***Statutory Provision* - § 877.03 *Breach of the peace; disorderly conduct.***

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

Whether or not a person has committed the crime of disorderly conduct is a very fact-specific analysis. The prosecutability of these cases often turns on

small details and may not be possible at all if the conduct involved only constitutes a public annoyance, a mere angry altercation, or involves constitutionally protected speech. With regard to conduct involving speech, the First Amendment of the United States and Florida Constitutions protect certain classes of speech from being used as the sole basis for a charge of disorderly conduct, even where a person's speech is offensive, shocking, or inappropriate to those who hear it.

***Speech Alone Is Not Disorderly Conduct***

The general rule of law stated by the Florida Supreme Court in *State v. Magee*, 259 So.2d 139 (Fla. 1972), is that words alone are protected speech and do not constitute disorderly conduct. However, not all speech is protected by the First Amendment. In *Bradshaw v. State*, 286 So.2d 4 (Fla. 1973), the Florida Supreme Court clarified that the circumstances surrounding speech are always relevant and may convert otherwise protected speech into non-protected conduct. For example, in the *Bradshaw* case the defendant, who was questioning police action, became loud and verbally abusive to an officer yelling, "You people are always picking on us. You won't let us do anything," and "You white motherf---ers ain't going to make us leave!" When officers attempted to arrest him, he yelled, "Don't let the policeman take me to jail!" A gathering crowd of people became loud and attempted to come to defendant's aid. In explaining why these facts established disorderly conduct, the court pointed out that "free speech" alone would not qualify as criminal conduct but speech coupled with other specified acts or circumstances could. The court stated:

*The disorderly conduct statute came into operation only when defendant Bradshaw's interest in expression, judged in light of all the relevant factors, was 'miniscule' compared to a particular public interest in preventing that expression or conduct. The particular public interest was obvious: to prevent the possibility of a riot erupting resulting in injury to innocent bystanders. The atmosphere surrounding the incident is always relevant. It was nighttime at a carnival and over 100 people of mixed race had gathered around the officers. Clearly, the incident could have been explosive. . . [A] crime is committed only when there is no bona fide intention to exercise a constitutional right. . . [T]he defendant Bradshaw passed the bounds of argument and undertook incitement to riot.*
*Id. at 7-8.*

Similarly, in *White v. State*, 330 So.2d 3 (Fla. 1976), the Court agreed that disorderly conduct had been established where the defendant, who arrived at a police substation to bail his recently arrested father out of jail, demanded his father's immediate release and yelled, "I want to get my f---ing father, and I come to get him right now." When his demands were not immediately met, defendant began screaming and cursing at the top of his lungs for several

minutes and called the officers, "mother-f---ing pigs." In explaining its decision, the Court stated,

*"Defendant's conduct passed the bounds of speech and reached the point where it was disorderly." "The defendant cannot excuse his shouting and screaming to the extent that it 'was affecting the entire station' upon the ground that he was using socially impermissible, but constitutionally protected words. The gravamen of his offense was not Words, but the Acts which accompanied his words." "In sum, the words used by the defendant are protected even though they may not be acceptable in certain strata of society. It is the degree of loudness, and the circumstances in which they are uttered, which takes them out of the constitutionally protected area. Indeed, his conduct would have been equally disorderly had he merely recited 'Mary Had a Little Lamb' in the same tone and under similar circumstances."*

In its opinion, the Court clarified four important legal principles to guide our analysis of whether a person's words are protected speech or disorderly conduct:

1. **Words used as a tool of communication are constitutionally protected and cannot by themselves violate this statute.** *"The statute must not be construed to limit the use of socially impermissible word[s]. . . . Such expressions are constitutionally protected." "[M]ore must be shown than that the words were offensive to a part of the general population."*

2. **Whether protected speech is involved must be judged in light of the atmosphere surrounding the incident.** *"In determining the narrow line between constitutionally protected speech and that which is unprotected, it is imperative to consider the circumstances in which the words were uttered."*

3. **When determining whether protected speech is involved, the defendant's interest in expression must be weighed against the public interest in preventing that expression.** In *Bradshaw* the public interest was preventing a riot, in *White*, "*the public interest was in preventing the disruption of the orderly administration of police business."*

4. **"The use of constitutionally protected words, when accompanied by aural, nonverbal acts which infringe upon the rights of others to pursue their normal, lawful activities," can violate the statute.** The constitutional protection of free speech fails when, *"by the manner of their use, the words invade the right of others to pursue their lawful activities."*

***Certain Categories Of Speech Are Never Protected***

Just as protected speech can be converted into unprotected conduct by virtue of use and surrounding circumstances, there are two categories of speech that

garner no constitutional protections whatsoever. Those categories were first announced by the 5th District Court of Appeal in *State v. Saunders*, 339 So.2d 641 (Fla. 5th DCA 1976) and include the following:

**1. "Fighting words," words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.**

a. Calling someone a "Jew," "non-Christian," and "God hater," constitute fighting words. *Chamblee v. State*, 7 FLW Supp. 663a (Cir. App. Ct., 13th Jud. Cir. Hillsborough County, 2000).

b. Shouting, "Is everybody watching this, police brutality ... Rodney King style," "You f---ing cops, what the hell do you think you're doing? You are full of sh-t. This is bullsh-t. This is abuse," while observing a friend being arrested at a supermarket did not constitute fighting words. Although, a number of persons gathered at the scene, the defendant's "words neither themselves urged the crowd to respond nor actually had that effect. Specifically, they did not "disturb" or cause anybody to interfere with the arrest or otherwise to breach the peace." *L.A.T. v. State*, 650 So.2d 214 (Fla. 3d DCA 1995).

1. **Words, known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others,** such as shouting "fire" in a crowded theater.

When speech is involved, the investigating officer should carefully consider whether the circumstances indicate disorderly conduct or merely the exercise of free speech. The following are some examples of circumstances where courts have found insufficient facts to establish disorderly conduct, either because the conduct was pure protected speech or the conduct simply did not rise to a criminal level.

- Participating in a protest march, making threatening comments to police officers, and expressing vocal dissatisfaction with the service at an eating establishment by using expletives does not constitute disorderly conduct where there is no physical threat to officers and there is no evidence that people around them were anything more than annoyed. *Gonzales v. Belle Glade* and *Smith and Sweet v. State*, 287 So. 2d 669 (Fla. 1973).
- Refusing to engage in a conversation with a police officer concerning a criminal investigation and saying, "f--k you," to an officer does not amount to disorderly conduct. *Phillips v. State*, 314 So.2d 619 (Fla. 4th DCA 1975).
- Use of profane language to police officers in the presence of others is not disorderly conduct. *State v. Morris*, 335 So.2d 1 (Fla. 1976).
- Verbally challenging an officer's legal authority to conduct a search by using loud and profane language in front of other people is insufficient to sustain a charge of disorderly conduct where defendant's words did not incite

onlookers nor impede the officer's investigation. *Clanton v. State*, 357 So2d 455 (Fla. App. 1978).

- Cursing at an officer in broad daylight in front of defendant's residence and causing a neighbor to open her window is insufficient to constitute disorderly conduct. *Harbin v. State,* 358 So.2d 856 (Fla. App. 1978).
- Yelling "f--k pigs" to police while hanging out of a car window that was stopped in traffic at a busy intersection was insufficient to support disorderly conduct where people who initially turned to see what the commotion was simply continued in traffic without incident when the light turned green and proprietors and customers of nearby businesses did not seem aware of the conduct. *D.C.E. v. State*, 381 So.2d 1097 (Fla. 1st DCA 1979).
- Interrupting a police interview with another person and repeatedly singing "F--k the police," loud enough for adults and children across the street to hear was insufficient. *K.Y.E. v. State*, 557 So.2d 956 (Fla. 1st DCA 1990).
- Refusing to identify oneself to police, saying "F--k you, pussy cracker" and yelling loud enough for people to come out of their motel rooms to see what was going on was insufficient where none of the onlookers filed a complaint. *C.P. v. State*, 644 So.2d 600 (Fla. 2nd DCA 1994).
- Telling an officer "I don't have to tell you a f--king thing," while officer was attempting to ascertain identity in a possible trespass upon an apartment complex was insufficient even though it caused several people to come outside and watch. *B.R. v. State*, 657 So.2d 1184 (Fla. 1st DCA 1995).
- Yelling and cursing at officers was insufficient where conduct occurred in defendant's dwelling. *Miller v. State*, 667 So.2d 325 (Fla. 1st DCA 1995).
- Hooting and hollering, screaming at the police, and making fun of the police while at a street party is insufficient where conduct did not incite the crowd to do anything. *T.S.S. v. State*, 696 So.2d 820 (Fla. 2nd DCA 1997).
- Responding to police inquiry by saying, "F--k this.... I didn't do anything.... This is bullshit," in front of a small crowd of people was insufficient even though members of the crowd were also telling the officer to "let him go." Since defendant's remarks were not directed at the crowd, the fact that the crowd got involved should not be attributable to the defendant. *K.S. v. State* 697 So.2d 1275 (Fla. 3rd DCA 1997).
- Playing music inside home and near a window at 11:00 p.m. while flailing one's arms and yelling obscenities in one's front yard were insufficient even though one neighbor turned on his porch light and two neighbors exited their houses during the incident. *H.K. v. State*, 711 So.2d 173 (Fla. 3rd DCA 1998).
- Yelling profanities at the police in a crowd of people, where the crowd was not incited and did not take any action in response to defendant's conduct was insufficient. *W.L. v. State*, 769 So.2d 1132 (Fla. 3rd DCA 2000).
- Directing an officer to remove her boyfriend from her house in a loud and aggressive manner was insufficient. *Miller v. State*, 780 So.2d 197 (Fla. 2nd DCA 2001).

Conversely, the following factual scenarios were held sufficient to establish disorderly conduct:

- Shouting, cursing, being verbally abusive to officers, and encouraging an angry crowd of onlookers to stop the police from effecting an arrest is disorderly conduct. *Bradshaw v. State*, 286 So.2d 4 (Fla. 1973).
- Becoming loud and abusive to officers when requested to leave a roadway where defendant and several other young females were speaking to the driver of a car was sufficient to establish disorderly conduct where several people came out of their house to watch the incident and some began yelling profanities at the officers along with the defendant. Defendant's conduct seemed to not only gather, but to arouse the crowd. *K.G. v. State*, 338 So.2d 72, 74 (Fla. 3rd DCA 1976).
- Yelling and banging on an apartment door at 11:30 p.m. and refusing to leave when requested to do so by the apartment resident and officers was disorderly conduct when several other apartment residents open their doors to watch the commotion. *Williams v. State*, 340 So.2d 498 (Fla. 1st DCA 1977).
- Continually interrupting a police investigation, refusing to obey lawful requests, becoming loud and abusive to officers, calling an officer a "f--king Yankee," and attracting the attention of those around was disorderly conduct. *Delaney v. State*, 489 So.2d 891 (Fla. 1st DCA 1986).
- Defendant, who was a passenger in a lawfully stopped vehicle, committed disorderly conduct when he ran around the vehicle shouting profanities at the officers and caused a large hostile crowd of 50-75 people to gather. *W.M. v. State*, 491 So.2d 335 (Fla. 3rd DCA 1986).
- It was disorderly conduct for defendant to repeatedly come so close to an officer who was effecting an arrest of another person that the officer repeatedly had to push defendant back and tell him to stay away, in addition to defendant becoming loud and calling a nearby citizen, "motherf--ker." *C.L.B. v. State*, 689 So.2d 1171 (Fla. 2nd DCA 1997).
- A loud, belligerent, accusatory tirade against an officer was sufficient to establish disorderly conduct where it excited a gathering crowd of 10 or more people to such a level that a second officer developed safety concerns. *Marsh v. State*, 724 So.2d 666 (Fla. 5th DCA 1999).
- Defendant's act of brushing the officer aside, yelling at him, throwing his wallet at him, and defying his lawful order to leave the store were sufficient to support a disorderly conduct conviction where the events occurred in a supermarket, the defendant was being asked to leave because the store was closing, and his conduct was so belligerent that it attracted the attention of both employees and customers of the store. *Wiltzer v. State*, 756 So.2d 1063 (Fla. 4th DCA 2000).

In considering these cases, the courts have been careful to distinguish between situations indicating a mere "angry altercation" (In re: *Fuller*, 255 So.2d 1 [Fla. 1971]), or a mere "annoyance" (*K.G. v. State*, 338 So.2d 72 [Fla. 3rd DCA 1976]) and those situations where a commotion has occurred which truly breaches the public order.

### *Nudity, Exposure, Urinating In Public*

Having sexual relations in a car that is parked in a public area, urinating in public, topless sunbathing, and exposure of sexual organs *without* lewd intent (asleep or unconscious and lying face up in a public area) are all disorderly conduct. See *State v. Magee*, 259 So.2d 139 (Fla. 1972) (sexual relations in a car); *Payne v. State*, 463 So.2d 271 (Fla. 2nd DCA 1984) (urinating in public); *Moffett v. State*, 340 So.2d 1155 (Fla. 1976) (topless sunbathing); *Goodmakers v. State*, 450 So. 2d 888, FN 1 (2nd DCA 1984) (exposure *without* lewd intent).

## Disorderly Intoxication

By Assistant State Attorney Valerie Towery

### ***Statutory Provision* - § 856.011. *Disorderly intoxication***

*(1) No person in the state shall be intoxicated and endanger the safety of another person or property, and no person in the state shall be intoxicated or drink any alcoholic beverage in a public place or in or upon any public conveyance and cause a public disturbance.*

*(2) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.*

*(3) . . . Any peace officer, in lieu of incarcerating an intoxicated person for violation of subsection (1), may take or send the intoxicated person to her or his home or to a public or private health facility, and the law enforcement officer may take reasonable measures to ascertain the commercial transportation used for such purposes is paid for by such person in advance. Any law enforcement officers so acting shall be considered as carrying out their official duty.*

### *Two Methods of Proof*

It should be noted that the statutory language and standard jury instructions allow proof of disorderly intoxication by two separate methods.

1. Defendant was intoxicated, and endangered the safety of another person or property, *or*

2. Defendant was intoxicated or drank any alcoholic beverage in a public place or in or upon a public conveyance and caused a public disturbance.

### *Intoxication*

Florida Standard Jury Instructions define "intoxication" as, "*more than merely being under the influence of an alcoholic beverage. Intoxication means that the defendant must have been so affected from the drinking of an alcoholic beverage as to have lost or been deprived of the normal control of either his body or his mental faculties, or both. Intoxication is synonymous with* 'drunk.'"

Note that this definition far exceeds the burden of "impairment" found in the DUI statutes. Specific testimony and evidence would be required to prove actual intoxication and not merely consumption of alcohol or impairment by alcohol. *Also see State v. Weast, 8 FLW Supp. 863a (County Court., 7th Jud. Cir., St. Johns Cty, 2001).* It is also noteworthy that this statute specifically prohibits behavior that is connected to the consumption of alcohol and fails to include drugs or other chemical substances as possible intoxicants. Unless there is a substantive change in the law, when drugs are involved, the arrest and charging decisions should focus on whether disorderly conduct has occurred rather than disorderly intoxication.

Investigative Techniques
By Assistant State Attorney
Valerie Towery

When investigating a disorderly conduct or disorderly intoxication case, all circumstances surrounding the defendant's conduct are relevant and should be specifically noted in the investigating officer's case report. Examples of circumstances that have been deemed important in past appellate cases include:

1. When speech is involved, whether defendant's speech constitutes "*unprotected* speech".

a. "Fighting words," words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

b. Words, known to be false, reporting some physical hazard in circumstances where such a report creates a clear and present danger of bodily harm to others, such as shouting "fire" in a crowded theater.

2. When *protected* speech is concerned, whether there is a public interest that outweighs defendant's right to free speech.

3. Time of day.

4. Location of disturbance.

5. Whether a crowd gathers, how large the crowd is, and whether the crowd appears to be angered or incited by the conduct of the defendant.

6. Specific safety concerns to citizens or law enforcement caused by defendant's conduct.

7. Disturbance of normal activities of persons or businesses.

8. Whether defendant is trespassing at the time of the disturbance.

9. Whether vehicular or pedestrian traffic is affected.

10. Whether defendant's conduct interferes with a legitimate law enforcement activity.

11. Whether defendant was intoxicated.

12. How loud defendant is.

13. Defendant's physical demeanor.

14. How long the disturbance lasted.

In addition to the above, the investigating officer's police report should contain the following information and attachments:

1. When words are spoken, the report should detail the exact words used, as near as possible.

2. Complainant statements. A statement from the person who initiated the complaint about defendant's conduct, if any. Their statement should include a detailed narrative about defendant's exact conduct and words.

3. Witness statements. A statement from any eye witnesses to defendant's conduct, which should include a detailed narrative about defendant's exact conduct and words.

4. When investigating an **alcohol-**related disorderly conduct or a disorderly intoxication case, the officer should consider requesting voluntary field sobriety exercises and requesting voluntary breath or blood samples. All indicators of alcohol consumption, impairment, or intoxication should be specifically noted in the police report, including any admissions made by defendant and any witnesses who saw defendant drinking or served alcohol to defendant at a drinking establishment. Regardless of whether any physical exercises or chemical tests are performed, the police narrative should clearly indicate the specific observations that led to the officer to conclude that the defendant was intoxicated by alcohol.

5. When investigating a **drug**-related disorderly conduct case, the officer should consider administering similar voluntary physical and chemical testing as well as detailing admissions and physical observations of impairment or intoxication.

6. Where defendant is in possession of an alcoholic beverage or other intoxicating substance, such item(s) should be taken into evidence, or at least photographed for evidence if the officer determines that the item is appropriate for immediate disposal.