LEGAL EAGLE

A Newsletter for the Criminal Justice Community November 2013

Refusal to Exit Vehicle

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Ofcr. T. Grimes was running radar and pulled over Casimir Clark for speeding. Grimes asked him for his driver's license and proof of insurance, and Clark told her that he did not have paperwork for the car. He did not have insurance at the time, and could not find his driver's license; while he was looking for it, Clark said, he may have left his license at home.

Clark testified that Ofcr. Grimes told him to get out of the car, but he did not want to because he did not have his license. He then remembered where he had put his license, and reached into the back of his car, got his backpack, retrieved his license, and gave it to Grimes. She again told him to get out of the car, and when he asked her why, she said "because I told you to." Clark again refused; he testified that Grimes' statement was not an "order" but a "request" and so he did not have to comply.

When Clark again refused, he said, Grimes called for backup. Other officers came and tried to persuade Clark to get out of the car, but he continued to refuse. Clark testified that Grimes did not call in his license and said that this was "not normal," he insisted that he did not have to get out of the car merely because Grimes had told him to do so.

A male officer then walked away from Clark's car and returned with two other police officers. They again told Clark to exit his car or *they would come in and get him.* When Clark continued to refuse, the officers broke out a window in his car. They opened the driver's side door and removed Clark from the car. He was then placed into one of the patrol cars.

A search of Clark's backpack turned up Xanax, which Clark told the officers was not his. Nonetheless, Clark was subsequently convicted of possession of Xanax, receiving a 15-year sentence. Some marijuana was also discovered, although Clark stated that he does not smoke marijuana, and he was also charged with resisting arrest.

The trial court in its findings stated: "Approximately eight minutes elapse between the time that Grimes first tells Clark to step out of his car and the time that he is removed from the car. During these eight minutes, *the officers tell Clark to step out of his car a total of 21 times prior to the breaking of the window and Clark's*

removal from the car."

Issue:

Does an officer have the legal authority to order a driver to exit his vehicle pursuant to a lawful traffic stop? **Yes.**

Automobile Stop:

The stop by police of an occupied automobile for a traffic violation constitutes a 'seizure' of 'persons' within the Fourth Amendment. Thus, "to justify a warrantless stop an officer must have an articulable, reasonable suspicion that a traffic violation has occurred."

Where a police officer has made a lawful traffic stop for the purpose of issuing a traffic summons, ordering the driver to exit the vehicle was reasonable under the Fourth Amendment, in light of officer safety issues. *Pennsylvania v. Mimms,* (S.Ct.1977). "What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety."

The courts have held that because law enforcement officials have the right to order the driver to exit the car, they also have the concomitant power to use appropriate forcible means to enforce this order. See, *Winters v. Adams*, (8th Cir.2001) (officers acted reasonably in smashing the windows of a vehicle after the occupants rolled up the windows, locked the doors, and refused to exit).

An officer making a traffic stop may order the passengers to exit the vehicle pending completion of the stop. "Danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car." *Maryland v. Wilson*, (S.Ct.1997).

Combining the rulings of both cases the 4th D.C.A. upheld the validity of an officer's directive to a driver to return to his vehicle for the remainder of the lawful traffic stop; citing officer safety considerations set forth in *Mimms* and *Wilson*. See, *Borski v. State* (4DCA 1998).

Court's Ruling:

The trial court relying on the in-car video of the traffic stop found the officers' actions reasonable in light of the defendant's obstreperous behavior. "In this case, the videotape shows that Clark was told to step out of his car no fewer than 21 times, giving him more than ample opportunity in which to do so. His continued refusal to comply with the police officer's lawful order necessitated the breaking of the car window and his forcible removal from the car. This action by the police officers was not unreasonable under the circumstances. Clark has failed to show a constitutional violation in this regard."

"Finally, Clark complained that the officers 'tried to Taser him.' The police reports show that after the window was broken out, one of the police officers reached into the car to remove Clark, who *continued to resist*. The officer pulled out his Taser gun and told Clark that if he did not comply he would be 'Tased,' and reached into the car with the Taser; Clark then exited the vehicle. Clark does not allege that the Taser gun was actually used on him."

"The videotape shows that even after the window in his car was broken out, Clark continued to resist removal from his vehicle. As noted above, *the officers were entitled to use **reasonable force** to secure compliance with the lawful order to exit the vehicle*. Under these circumstances, the threat to use the Taser was not unreasonable, particularly in light of the fact that it was not actually used. See, *Draper v. Reynolds*, (11th Cir. 2004) (use of Taser to effect compliance with orders in the course of a traffic stop not unreasonable). Clark has failed to show a constitutional violation in this regard and his claim on this point is without merit."

"ORDERED that any and all motions which may be pending in this civil action are hereby DENIED."

Lessons Learned:

The U.S. Court of Appeals, 11th Cir., had for review a claim of excessive force by a motorist who was Tased by the arresting officer. "In the circumstances of this case, Reynolds's use of the Taser gun to effectuate the arrest of Draper was reasonably proportionate to the difficult, tense and uncertain situation that Reynolds faced in this traffic stop, and did not constitute excessive force. From the time Draper met Reynolds at the back of the truck, Draper was hostile, belligerent, and uncooperative. No less than five times, Reynolds asked Draper to retrieve documents from the truck cab, and each time Draper refused to comply. Rather, Draper accused Reynolds of harassing him and blinding him with the flashlight.

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FLORIDA CASE LAW UPDATE 13-08

Case: **Greenwade v. State, 2013 WL 5641794 (Fla. 2013)**

Date: **October 17, 2013**

Subject: **Testing individual baggies for drugs in trafficking cases**

FACTS: Officers executed a search warrant at a Jacksonville home. The officers found and detained Mr. Greenwade while executing the warrant. After he was detained, Greenwade told the officers, "I know why you're here…. What you are looking for is in the garage." He then led the detectives to the garage, and showed them a digital scale sitting next to a green bag; white residue could be seen on top of the bag. Greenwade admitted that he owned the bag, and he admitted that the bag contained cocaine. When the detectives searched the bag, they found nine smaller one-ounce baggies inside the larger green bag. Each of the smaller baggies contained a white powder. All nine baggies were individually field tested; however, the records do not reveal the results of this test. The baggies were then submitted to FDLE for testing. However, the FDLE chemist did not receive nine individual bags; instead, she received one Ziploc bag that comingled or contained the entire contents of each of the individual bags. It is unclear from the record how or when the individual bags were comingled. Ultimately, FDLE detected the presence of cocaine in the Ziploc bag, and calculated the total weight all contents as 234.5 grams.

The defendant was charged with Trafficking in Cocaine in an amount exceeding 200 grams. Greenwade was later convicted at trial and sentenced to fifteen years in prison. On appeal, Greenwade argued that he was entitled to a judgment of acquittal because the State never tested each individual bag for cocaine before comingling the contents and weighing them. The First District Court of Appeals affirmed his conviction. However, the Florida Supreme Court reversed the conviction for Trafficking and ordered that the defendant be convicted of and sentenced on the lesser charge of Possession of Cocaine.

RULING: If a defendant is charged with Trafficking based on multiple containers of a white, powdery substance, the State is required to prove that each individual packet contains a controlled substance.

DISCUSSION: This opinion resolves a conflict among Florida's intermediate appellate courts. In this case, the First District Court of Appeal had upheld Greenwade's conviction. The First District emphasized that Greenwade admitted to owning the green bag that was found in the garage, and he admitted that the bag contained cocaine. Thus, the First District concluded that the defendant had implicitly admitted that all of the individual, smaller baggies contained cocaine.

However, the Florida Supreme Court rejected this reasoning. The Court was worried that if the State is allowed to comingle individual baggies without testing each bag, there is a significant risk that one or more of the smaller containers may contain a non-controlled substance or a counterfeit controlled substance. According to the Court, that risk is especially great when the suspected substance is white powder: the white powder could be anything, including many non-controlled substances. Therefore, when law enforcement seizes multiple containers of white powder, each container must be tested to ensure the presence of a controlled substance. In reaching this conclusion, the Court emphasized that this rule applies only to white powder or other substances that carry a substantial risk of misidentification. Earlier cases held that marijuana and even rock cocaine do not carry a substantial risk of misidentification and do not need to be tested individually. The Court's opinion leaves those cases intact.

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Recent Case Law

C.C.F. and Stop and Frisk

Officer May was on patrol in a high crime area. He testified that he pays close attention to, "a lot of hand motions and waistbands and pockets…" While driving slowly, Officer May observed Anthony Mackey standing on one side of a fence. At that time, Officer May noticed that: "Mackey's right pocket looked like it was-it was something, a big mass, like a big solid thing in his pocket. And then I looked and it was like a piece of the handle sticking out; not much, but a piece enough for me to identify a firearm." Officer May stated that his ability to identify the item in Mackey's pocket as a firearm was based upon his training, knowledge, and experience.

May approached Mackey and patted him down, retrieving the firearm. Officer May then asked Mackey if he possessed a concealed weapons license, and Mackey answered in the negative. Mackey was arrested and charged with CCF and possession of a firearm by a convicted felon.

Mackey filed a motion to suppress the firearm. He argued that even if the firearm was concealed for purposes of the statute prohibiting the carrying of a concealed firearm, Officer May lacked reasonable suspicion to conduct the investigatory stop -also referred to as a *Terry* stop- because no facts or circumstances indicated that Mackey did not possess a license to carry the firearm. Mackey asserted that because the observations by Officer May did not reveal any suspicion of criminal activity, there was no legal basis for Officer May to conduct the *Terry* stop. In contending that suppression was required, Mackey relied upon the decision of the 4th D.C.A. in *Regalado v. State*, (4DCA 2009).

In *Regalado* under similar circumstances the 4th D.C.A. ruled that carrying a concealed firearm is not illegal in Florida if one has a concealed weapons permit. Because the officer had no knowledge that the suspect did not possess a permit there was no legal basis for the stop that led to the discovery of the firearm. The 3rd D.C.A. when reviewing Mackey's conviction refused to be bound by the 4th D.C.A.'s ruling, and upheld Mackey's CCF conviction. On appeal to the Florida Supreme Court, the Court agreed with the *Mackey* court.

Issue:

Is the offense of possession of a concealed firearm completed when the officer observed a firearm partially protruding from a pocket in the defendant's pants, and is the related investigatory stop within the 4th Amendment? **Yes**.

Terry Stop:

John Terry and his compatriot were observed "casing a job, a stickup" of a jewelry store. The detective stopped the two, frisked them and found firearms. The trial court denied their motion to suppress the weapons, concluding that, although probable cause did not exist to arrest the defendants for a crime, the detective, based upon his experience, "had reasonable cause to believe ... that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." The trial court further held that the stop and frisk of the defendants was distinct from an arrest and a "full-blown" search for evidence of a crime. The trial court concluded that the frisk "was essential to the proper performance of the officer's investigatory duties, for without it, the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible." The defendants appealed.

The U.S. Supreme Court concurred with the trial judge and sustained Terry's conviction. "Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area

to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him."

Further, to justify an investigatory stop, the law enforcement officer must provide "specific and articulable facts," as well as rational inferences that may be drawn from those facts, in support of the stop. The Supreme Court has subsequently reiterated that the police may "make a forcible stop of a person when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *U.S. v. Place*, (S.Ct. 1983). Factors that may be considered in evaluating whether a reasonable, articulable suspicion exists are the area in which the encounter occurred and whether the person observed engaged in nervous, evasive conduct, such as fleeing from the police. *Illinois v. Wardlow*, (S.Ct. 2000).

Court's Ruling:

The Florida Supreme Court in *Mackey* found the officer's actions lawful. "We conclude that under the totality of the circumstances, Officer May had a reasonable, articulable suspicion to believe that Mackey was engaged in illegal activity. Further, because Officer May knew that Mackey was in possession of a firearm, the stop and frisk pursuant to *Terry* was constitutionally valid."

Stop and Frisk has been codified by F.S. 901.151. And while sec. 901.151(5) provides that when an officer has "probable cause "to believe the suspect he is detaining is armed with a dangerous weapon, the Florida Supreme Court in *Mackey* emphasized that "probable cause" is **not** the touchstone. "Contrary to the decision below, Officer May did not need probable cause to frisk Mackey. Only reasonable, articulable suspicion is required before an officer may conduct a protective frisk pursuant to the decision of the United States Supreme Court in *Terry*."

See also, *State v. Webb*, (Fla. 1981), "Viewing section 901.151 in the context of its stated purpose to permit officers to temporarily detain and question persons under circumstances reasonably indicating criminal activity, past, present, or imminent, and to frisk where they have reasonable belief that the person detained is armed, it would be unreasonable and contrary to the legislature's intent to require an officer, before he may frisk a person whom he *reasonably believes is armed with a dangerous weapon*, to have the same probable cause that would be required for an arrest or for a search warrant."

The Florida Supreme Court also concurred with the 3rd D.C.A.'s finding that whether a suspect has a concealed weapons permit is an *affirmative defense* and not an element of the criminal offense of CCF.

"Florida's legislative scheme causes us to hold that licensure is an affirmative defense to a charged crime of carrying a concealed weapon, as codified at section 790.01, F.S., and the lack of a license is not an element of the crime."

Lessons Learned:

The 4th D.C.A. in *Regalado* found as a matter of law, "… the only information received by the officer was that the individual had a gun. *Possession of a gun is not illegal in Florida*. Even if it is concealed, it is not illegal if the carrier has obtained a concealed weapons permit. Although the officer observed a bulge in Regalado's waistband, which in his experience looked like a gun, no facts and circumstances were presented to show that Regalado's carrying of a concealed weapon was without a permit and thus illegal..."

The Florida's Supreme Court's ruling in *Mackey* is inconsistent with this statement. The Court found that the permit is an affirmative defense to be raised by the defendant **after** his arrest; it is not element of the crime to be disproved by the officer **prior** to effecting the CCF arrest.

Mackey v. State
Fla. Supreme Court (Oct. 17. 2013)

Stop and Frisk Effective Report Writing

Officer Sanchez testified that he and Officer Dunaske were patrolling a high-crime area, known for guns, shootings, and illegal drugs, at ten o'clock at night. They observed three males standing in a poorly-lit vacant lot, and appeared to be looking into the house on the other side of the fence. The officers testified that, based on their experience, knowledge, and training, they believed that this conduct was consistent with the men "casing" the house in preparation of a burglary.

Upon seeing the marked patrol car, however, the men immediately dispersed and began to walk away in three different directions.

The officers observed Saivon Cruse "holding his waistband and manipulating something in his waistband" as if the defendant was attempting to conceal a weapon. Officer Dunaske testified that, based on his training from recruit school, SWAT school, and Special Tactic school, this gesture was "one of the known indicators" that someone was carrying a gun. The officers testified that because of the high-crime nature of the neighborhood, and its history of incidents involving guns, the officers generally avoided one-on-one confrontations in that area. Because of the defendant's movements witnessed by Officer Sanchez, the fact that the men dispersed in different directions, and the officers' concern for their safety, the two officers decided to approach the defendant as a team. Officer Sanchez made contact with Cruse and Officer Dunaske provided cover.

Officer Sanchez approached the defendant and initiated a consensual encounter by asking if he would mind answering a few questions. The defendant responded by stopping and facing the officer. Officer Sanchez then asked the defendant if he had any weapons or illegal items on him. The defendant responded by raising both of his hands in the air. At that point, Officer Sanchez asked the defendant for permission to conduct a pat-down for officer safety purposes. The defendant cooperated by moving towards the front of the police car, where Officer Sanchez conducted the pat-down and found the firearm at issue in the defendant's right waistband.

Officer Dunaske further testified that because he had noticed the defendant manipulate his right side in a manner consistent with trying to keep an un-holstered gun from slipping, Officer Dunaske and Officer Sanchez had elected to pursue Cruse.

The defendant filed a motion to suppress the gun arguing the officers did not have founded suspicion to engage him in a stop. The trial court held that while the facts may have supported a consensual encounter, they did not give rise to the level necessary to support a detention and the pat-down of the defendant. The trial court granted the defendant's motion to suppress the gun. The 3rd D.C.A. did not agree.

Issue:

Did the officers articulate sufficient facts to support an investigative stop and its related frisk? **Yes**.

Police-Citizen Contact:

The Florida Supreme Court has recognized three levels of police-citizen contacts. See, *Popple v. State*, (Fla. 1993). A consensual police-citizen encounter during which an officer merely approaches and asks a citizen routine questions such as the name or address of the citizen, is minimally intrusive and does not give rise to any Fourth Amendment constitutional issues. The hallmark of a consensual encounter is the person's right to terminate the encounter and walk away. On the other hand, the second level of a police-citizen encounter, an investigative stop, known as a *Terry*-stop, does require that the officer possess a reasonable suspicion that the citizen has committed, is committing, or is about to commit a crime in order to support the detention. See, 901.151(2), F.S. The third, and most intrusive, level of police-citizen encounter involves an arrest, which must be supported by probable cause that a crime has been or is being committed.

The Frisk:

In order to justify their search of Cruse, which resulted in the discovery of the firearm, the officers must have possessed a reasonable belief that the defendant was armed and presented a threat to their safety. Moreover, the search of the defendant had to be strictly limited to the extent necessary to reveal the weapon and protect the officers. Accordingly, "if the defendant was legally detained pursuant to section 901.151 (2), and the firearm was discovered as the result of a legal search, pursuant to section 901.151(5), and both the detention and the search were based upon the officers' 'reasonable, articulable suspicion,' the firearm was admissible into evidence."

Court's Ruling:

"We disagree with the trial court's analysis, and find that the totality of the circumstances provided the officers with sufficient cause to believe that a crime was being, or was about to be, committed. Accordingly, the defendant's detention was lawfully supported by the officers' reasonable and particularized suspicion, *which*

the officers were able to, and did, adequately articulate at the hearing on the defendant's motion to suppress."

The D.C.A. then set out the factors that an officer may consider to arrive at a reasonable suspicion that a crime is at hand. "The time; the day of the week; the location; the physical appearance of the suspect; the behavior of the suspect; the appearance and manner of operation of any vehicle involved; anything incongruous or unusual in the situation as interpreted in the light of the officer's knowledge. To this list may be added, the factor of flight."

The D.C.A. found that while the initial encounter was consensual once the suspect was stopped and asked if he was in possession of weapons the encounter became an investigative stop, and the officer "needed to possess a reasonable, articulable, and particularized suspicion of criminal activity."

The D.C.A. went on to find exactly that. The officers' testimony demonstrated that the information known to them "at the time they seized the defendant was sufficient to create a reasonable suspicion that criminal activity was taking place. The undisputed facts show that the encounter with the defendant took place (1) at ten o'clock in the evening, (2) in a dark and poorly-lit area, (3) in a high crime neighborhood known for shootings and narcotics."

"In addition to these facts, the men were standing close to a chain link fence separating the field from a house and they appeared to be looking into the house. While this conduct may arguably be consistent with innocent activity, the officers testified that, *based on their training and experience,* they believed that the men were casing the house in preparation for a burglary. Also, as soon as the men saw the marked police vehicle turn around, the men dispersed and headed away from the officers. While not 'headlong flight,' this evasive action by the men certainly contributed to the officers' reasonable suspicion that criminal activity was being, or was about to be, committed. See, *U.S. v. Gordon*, (11th Cir. 2000)(underscoring that the key to flight is not whether it is headlong or fast, but rather whether it is unprovoked, and noting that the suspect's evasive conduct, which was provoked only by the appearance of a police vehicle and eye contact with the police officer could constitute flight and arouse reasonable suspicion)."

"Lastly, and importantly, Officer Dunaske observed the defendant manipulating something in his waistband, which, *based on his training and experience*, he believed was a firearm. We find that these facts are sufficient to establish a reasonable suspicion that the defendant was engaging, or preparing to engage, in some criminal activity including carrying a concealed firearm. Accordingly, the officers' detention of the defendant was lawful and authorized by Florida law."

"Because the detention was lawful, we now consider whether the pat-down of the defendant was justified. Under Florida law, three conditions are necessary to effectuate a lawful pat-down: (1) the suspect's temporary detainment must be lawful; (2) the officer must have a reasonable suspicion that the suspect is armed; and (3) the pat-down must be strictly limited 'only to the extent necessary to disclose, and for the purpose of disclosing,' the weapon. Because we find that all three conditions are satisfied, we hold that Officer Sanchez's pat-down of the defendant was lawful. Accordingly, the firearm discovered during the lawful pat-down was admissible into evidence and the trial court erred in granting the defendant's motion to suppress."

Lessons Learned:

Clearly the officers' combined testimony saved the day. That was only possible if the operating facts were reduced to writing in a complete, detailed, and coherent report. Once again an example of the information needed to be successful at a motion to suppress was summarized by the 3rd D.C.A. here:

The court focused on "…the reasonableness of the officers' suspicion that the defendant was armed with a dangerous weapon and presented a threat to their safety. Therefore, in addition to the defendant's gesture of manipulating his waistband and hiking up his pants, the time of day, the poorly-lit conditions, the high-crime nature of the area, the fact that the suspects appeared to be casing the neighboring house and dispersed as soon as they noticed the marked police vehicle also factor into this Court's analysis of whether the de-

fendant's pat-down was justified by a reasonable suspicion that he was carrying a concealed weapon."

State v. Cruse
3rd D.C.A. (September 11, 2013)

Constructive Possession and Motor Vehicle

Shawn Smith was driving a truck with an expired tag. An officer conducted a traffic stop of the truck. Smith was accompanied by a female passenger who was riding in the front seat. The officer approached the vehicle, explained the reason for the stop, and asked for Smith's license and registration. Smith appeared nervous and began fumbling behind the visor that was located above his seat. The officer removed Smith and the passenger from the vehicle and placed Smith under arrest.

The officer then conducted an inventory search of Smith's truck, which was littered with trash, and found contraband in three locations. The officer found a round blue pill on the driver's side floorboard between the seat and the gas pedal. He found a second round blue pill on the floorboard of the center console. The pills were tested and identified as oxycodone, a controlled substance. And the officer found an eyeglass case containing syringes and a residue-covered spoon behind the driver's visor. The residue was not tested or identified. Smith was convicted of possessing all contraband items recovered from his truck. The 2nd D.C.A. disagreed.

Issue:

Was there sufficient proof that the defendant was in possession of the controlled substance found in his jointly occupied vehicle to sustain a conviction? **No**.

Constructive Possession:

The standard jury instructions sets forth the three elements that must be proven to establish possession of drug contraband under section 893.13(6)(a), which are: 1) that the defendant possessed a substance; 2) that the substance was controlled; and 3) that the defendant had *knowledge* of the presence of the substance. Possession may be actual or constructive. "Possession is actual when the contraband is (1) in the defendant's hand or on his person, (2) in a container in the defendant's hand or on his person, or (3) within the defendant's 'ready reach' and the contraband is under his control." *Sundin v. State*, (2DCA 2009).

If the premises on which the contraband is found is in *joint, rather than exclusive*, possession of a defendant, knowledge of the presence of the contraband on the premises and the accused's ability to maintain control over it will not be inferred, but *must be established by independent proof.* Such proof may consist either of evidence establishing that the accused had actual knowledge of the presence of the contraband, or of evidence of incriminating statements and circumstances, *other than the mere location of the substance*, from which a jury might lawfully infer knowledge by the accused of the presence of the contraband on the premises. *Dupree v. State*, (4DCA 1998).

Most importantly, the bedrock rule is that, "Mere proximity to the contraband is insufficient to prove either actual or construction possession." And, "when contraband is found in a vehicle which is in the possession of two or more persons, circumstantial evidence of the defendant's knowledge of the presence of the contraband must be consistent with the accused's guilt, inconsistent with innocence, and must exclude every reasonable hypothesis except that of guilt." *Daniels v. State*, (4DCA 2001).

Court's Ruling:

"If the area where the contraband was found was in Smith's exclusive possession, then we could infer knowledge and control. In this case, however, Smith was traveling with a female passenger. Thus, knowledge and control over the areas accessible to the passenger cannot be inferred but must be proven by independent proof. Mere proximity to the contraband is insufficient in itself to meet this burden."

"Smith's repeated fumbling with the items behind the visor and his nervous appearance provide independent proof of Smith's knowledge and control over the paraphernalia. See, *Meme v. State*, (4DCA 2011) (holding that, whether considered as an actual or constructive possession case, the State presented sufficient evidence of the defendant's possession of cocaine in a jointly-occupied vehicle because it was found in a container under the front seat where

the defendant, who was acting nervous, had been reaching prior to the stop). Accordingly, the State established Smith's constructive possession of the paraphernalia, and we affirm that conviction."

"As for the oxycodone pills, the fact that the pills were in plain view on the floor of the vehicle near Smith's feet, even among the litter in the vehicle, established Smith's knowledge. However, the concept of *dominion and control* is separate from that of knowledge. And it requires 'more than the mere ability of the defendant to reach out and touch the item of contraband.' The only evidence suggestive of Smith's dominion and control over the oxycodone pills was his nervousness upon being stopped. However, nervousness itself does not provide legally sufficient evidence of dominion or control because it could be attributed to the fact that Smith's vehicle had been stopped or that he was in possession of the paraphernalia. Accordingly, there was insufficient evidence to sustain Smith's conviction for possession of a controlled substance."

Lessons Learned:

It has been oft stated in these analyses that mere proximity to contraband is insufficient to prove constructive possession. Further, that three occupants in a vehicle with guns or drugs secreted under a seat will not support a conviction for possession of the contraband without independent evidence such as fingerprints, DNA, or an admission from one of the occupants.

"Here, the State's sole proof of Hargrove's constructive possession was the pipe's proximity to the seat that he had been occupying in the car. Even if we accept the State's view of the evidence and its argument that Hargrove's knowledge of the contraband should be inferred because the pipe was *emanating smoke* when the deputy found it, there was no evidence that Hargrove was able to exercise **dominion and control** over the pipe." *Hargrove v. State*, (2DCA 2006). As can be seen establishing the legal elements of constructive possession is exceedingly difficult.

Smith v. State
2nd D.C.A. (October 16, 2013)

(Continued from page 2)

Refusal to Exit Vehicle

Draper used profanity, moved around and paced in agitation, and repeatedly yelled at Reynolds. Because Draper repeatedly refused to comply with Reynolds's verbal commands, starting with a verbal arrest command was not required in these particular factual circumstances. More importantly, a verbal arrest command accompanied by attempted physical handcuffing, in these particular factual circumstances, may well have, or would likely have, escalated a tense and difficult situation into a serious physical struggle in which either Draper or Reynolds would be seriously hurt. Thus, there was a reasonable need for some use of force in this arrest."

"Although being struck by a Taser gun is an unpleasant experience, the amount of force Reynolds used—*a single use of the Taser gun* causing a **one-time** shocking—was reasonably proportionate to the need for force and did not inflict any serious injury. Indeed, the police video shows that Draper was standing up, handcuffed, and coherent shortly after the Taser gun stunned and calmed him. The single use of the Taser gun may well have prevented a physical struggle and serious harm to either Draper or Reynolds. Under the 'totality of the circumstances,' Reynolds's use of the Taser gun did not constitute excessive force, and Reynolds did not violate Draper's constitutional rights in this arrest." *Draper v. Reynolds*, (C.A.11, 2004).

Clark v. Rusk Police Department
U.S. District Court – Tyler Texas (2008)