LEGAL EAGLE

April 2024

In this issue:

- Child Victim Testimony
- Abandonment
- Knowing Drug Possession

Published by:
Office of the State Attorney
West Palm Beach, FL 33401
Dave Aronberg, State Attorney
B. Krischer, Editor

Rendering Medical Aid

Officers observed Terrelle Thomas and another man walk from a bar and enter a vehicle as passengers. Officers followed the vehicle and made a traffic stop. Officer then noted that Thomas "spoke to her as if he had 'cotton mouth' and a large amount of an unknown item inside his mouth." She also observed that his lips were "pasty white," and that his "face was covered with a white powdery substance." Officer then concluded that Thomas had "ingested a large amount of cocaine."

Backup officers advised that they believed Thomas had ingested cocaine. Officer Salazar independently arrived at the same conclusion after observing a white powdery substance covering Thomas's lips and informed Thomas that ingesting cocaine could have an "ill effect" on his health. Corporal Johnsen "acknowledged the seriousness of ingesting cocaine by warning ... Thomas that he could possibly die from ingesting drugs."

Based on their observations, the Officers filed police reports indicating Thomas's cocaine ingestion, and Officer prepared and signed an Affidavit of Probable Cause noting that she had observed Thomas consume "crack cocaine in order to conceal it from police."

The Officers jointly determined that Thomas should be transferred to County Booking Center for detention and processing. Police Department policy dictated that officers take arrestees to the hospital if the arrestees have "consumed illegal narcotics in a way that could jeopardize their health and welfare."

Despite this policy and the observations noted above, the Officers did not take Thomas to the hospital. Instead, Officer Carriere arrested him and transported him to County Booking Center. En route, Thomas told Officer that he was hot despite an outdoor temperature of 46 degrees. Officer opened the window.

Upon arrival at the County Booking Center, Officer informed prison officials and medical staff there that Thomas "may have swallowed crack cocaine." The officials and PrimeCare staff noted that Thomas had white powder covering his lips, but they also failed to send him to a hospital. Instead, the officials placed Thomas in a cell without any medical care or observation. Less than two hours after Thomas's arrest, he suffered cardiac arrest. Only then did officials transport Thomas to the hospital, where he died three days later. His cause of death was "cocaine and fentanyl toxicity."

Thomas' estate filed suit

against all the officers for civil rights violation by failing to provide Thomas with adequate medical aid, despite his obvious medical emergency. The trial court denied the Officers' claim of qualified immunity. On appeal, that ruling was affirmed.

Issue:

In that it was established that the Officers were aware of Thomas' oral ingestion of a large quantity of narcotics were the Officers required to take reasonable steps to render medical care? **Yes**.

Right to Medical Care:

As a basic legal standard, the Supreme Court has held that the Eighth Amendment protects a (convicted) prisoner's serious medical needs. *Estelle v. Gamble*, (1976). Because the Fourteenth Amendment affords pre-trial detainees (still presumed to be innocent) protections at least as great as those available to (convicted) inmates under the Eighth Amendment, Thomas's claims for failure to render medical care under the Fourteenth Amendment applies the same standard used to evaluate claims brought under the Eighth Amendment.

To assert a violation of the right to medical care, an individual must allege 1. "a serious medical need" and 2. "acts or omissions by [individuals] that indicate a deliberate indifference to that need." A serious medical need is "one that has been diagnosed by a physician as requiring treatment or one that is **so obvious that a layperson would easily recognize the necessity for a doctor's attention**."

Deliberate indifference, or the intentional disregard of substantial safety or medical harm to a prisoner, is a subjective standard consistent with recklessness. It requires both that an individual be aware of facts from which the inference could be drawn of a substantial risk and that the individual actually draws that inference. In inadequate medical care cases, courts have found deliberate indifference where objective evidence of a serious need for care is ignored and where "necessary medical treatment is delayed for non-medical reasons."

Court's Ruling:

The Court of Appeals found that the Estate had established numerous facts demonstrating a serious medical need. The facts alleged supported the position that a layperson in the Officers' situation would have been aware both of the danger of cocaine ingestion and of the fact that Thomas had ingested cocaine. The officers' reports and the signed Affidavit of Probable Cause were sufficient to support the allegation that Officers believed that Thomas ingested cocaine.

"In view of these allegations, the Officers cannot credibly argue that Thomas's denial that he ingested cocaine, taken in the light most favorable to [Estate], would negate the conclusion that a layperson would believe that he had, in fact, ingested a significant amount of cocaine and therefore had a serious medical need. Ironically, an arrestee, who consumed drugs for the purpose of concealing them, would probably deny having done so."

"In view of the undisputed evidence of record, the Officers fail in their argument that Thomas's alleged lack of observable symptoms negate the facts from which an inference of a substantial risk to Thomas's health could be drawn. Second, the Complaint alleges that each Officer actually drew the inference of a substantial risk to Thomas's health. Cocaine ingestion poses an obvious health risk, and the Amended Complaint asserts that at least two officers, … publicly drew such an inference in the presence of the other Officers, acknowledging that ingestion could lead to an 'ill effect' on health or to death. The Complaint alleges adequate circumstantial evidence to suggest that the remaining officers made, or should have made, a similar inference."

"Finally, the Complaint alleges that the Officers ignored evidence of this risk and delayed medical care by deciding to book Thomas and by taking him to a booking center that was ill-equipped to handle emergencies. Moreover, this decision was in direct violation of the department policy cited in the Complaint, which states that individuals who have consumed narcotics should be taken to the hospital if the narcotic consumed could jeopardize their health. … Because there are sufficient allegations here from which to find deliberate indifference, as well as a serious medical need, [Estate] has plausibly alleged a violation of the **right to medical care**."

"We may rely on general principles to find that the facts here present a violation that is 'so obvious' 'that every objectively reasonable government official facing the circumstances would know that the [Officers'] conduct... violated federal law when [they] acted.' As applied to the facts of this case, we hold therefore that *when an officer is aware of the oral ingestion of narcotics by an arrestee under circumstances suggesting the amount consumed was*

sufficiently large that it posed a substantial risk to health or a risk of death, that officer must take reasonable steps to render medical care. In this case, that care would have been to take the arrestee to a hospital, as provided for in the Police Department policy. For the above reasons we will affirm the [trial] Court's denial of the Officers' claims for qualified immunity. AFFIRMED."

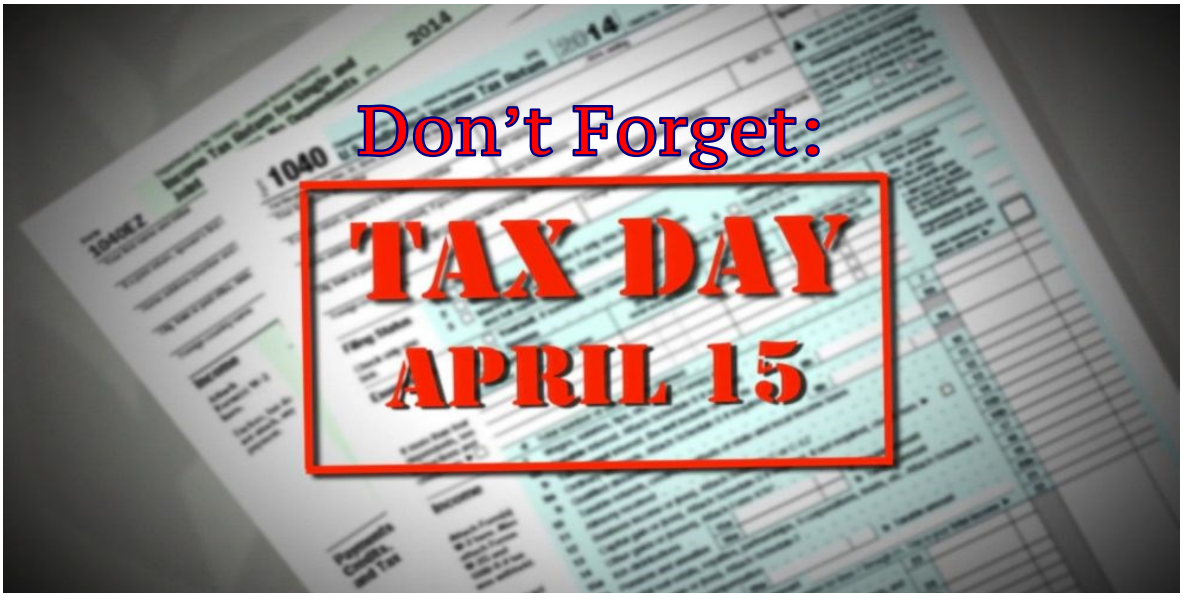
Lessons Learned:

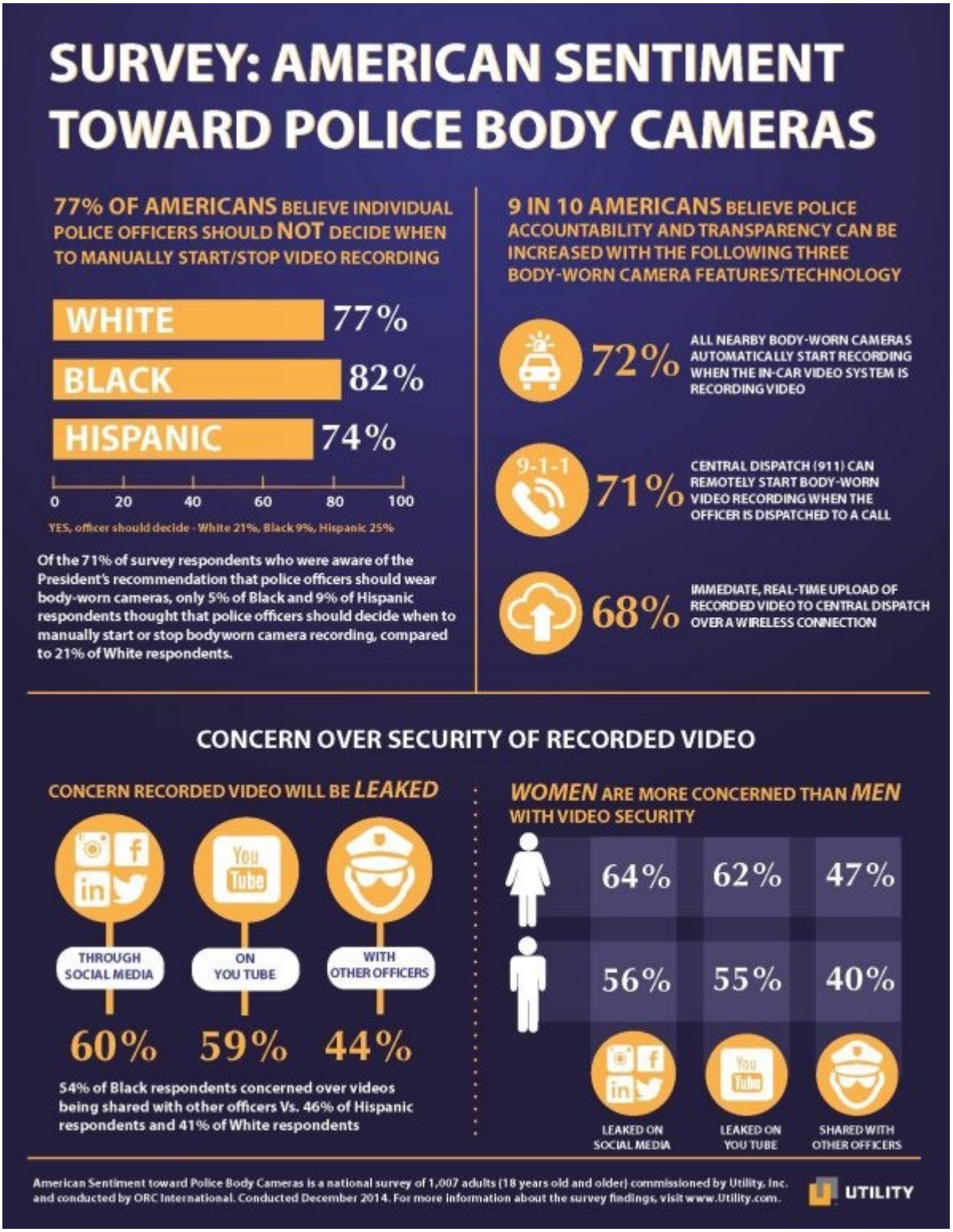
The officers countered the court's ruling with the rhetorical question: How did Thomas have a constitutional right established "beyond debate" to be taken to a hospital emergency room for treatment when: 1. none of the officers witnessed him ingest drugs, 2. he repeatedly denied cocaine ingestion even when warned it could cause his death, 3. his companions denied seeing cocaine, 4. he denied experiencing symptoms consistent with cocaine or fentanyl toxicity, 5. he did not request medical care, 6. he showed no overt signs of being in medical distress, and 7. was taken directly to the prison booking center where he was assessed medically and cleared by the prison's medical staff to remain?

The Court of Appeals was not moved: "The law, however, does not require such specificity. Although the Officers are correct that the right must be defined beyond a high level of generality, there need not be 'a case directly on point for a right to be clearly established.' 'A public official,' after all, 'does not get the benefit of 'one liability-free violation' simply because the circumstance of his case is not identical to that of a prior case.' Instead, the law requires only that the right 'is sufficiently clear that a reasonable official would understand that what he is doing violates that right.' *That standard is met when a violation is **'so obvious' it becomes likewise evident that a clearly established right is in play**, 'even in the absence of closely analogous precedent.'* As a result, qualified immunity is not appropriate when the case in question presents 'extreme circumstances' to which 'a general constitutional rule already identified in the decisional law may apply with obvious clarity.' That is the case before us."

Or more simply put, "Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." Here, the need for medical intervention was so clear that failure to act caused liability to attach.

Thomas v. City of Harrisburg
U.S. Court of Appeals – 3rd Cir.
(Dec. 6, 2023)





Police departments want technology that standardizes and automates when body-worn video is recorded – minimizing the impact of human bias, increasing citizen and police accountability, and increasing the police officer's personal safety.

Source: www.utility.com

Recent Case Law

Statement of a Child Victim

Jose Benito Larioszambrana, was arrested for two separate offenses of lewd and lascivious molestation on a child less than 12 years of age. The State filed a notice of its intent to rely on two out-of-court statements made by the child victim, seeking their introduction under section 90.803(23), F.S. That statute sets out requirements of reliability and trustworthiness that must be met, and findings that must be made, before an out-of-court statement of a child victim may be deemed admissible at trial.

The statute further provides that an out-of-court statement of a child victim is not admissible unless the child either: 1. Testifies; or 2. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. "Unavailability" includes a finding by the trial court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm.

In the present case the child victim did not testify at the hearing. Further, the State did not offer any evidence (nor did the trial court make any determination) that the child victim was "unavailable as a witness." As a result, the out-of-court statements of the child victim did not meet the statutory requirements and constituted inadmissible hearsay.

These inadmissible hearsay statements were the only statements of the child victim introduced by the State. The law is clear that the State may not rely exclusively on inadmissible hearsay to establish probable cause in an adversary hearing.

Issue:

Did the State present any other admissible evidence to establish probable cause that an offense has been committed and that the Defendant has committed it? **No**.

Child Witness Testimony:

While the present case was centered on the quantum of evidence and the admissibility of that evidence, the key issue at play was the admissibility of a child victim pre-trial statement, often to a parent, guardian, or Child Protective Services, as an exception to the hearsay rule. Importantly, for the child's statement to be admissible through a third party the trial court must make a finding that the child is unavailable. Unavailability includes a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm.

Florida statute 90.803(23) of the Florida Evidence Code provides a hearsay exception for the statement of a child victim of abuse and provides for the admission of such a statement as "evidence in any civil or criminal proceeding." But "to be admissible, the source of the information through which the statement was reported must be trustworthy and the time, content, and circumstances of the statement must reflect that the statement is reliable." When determining the reliability of a statement, the court may consider these factors:

The statement's spontaneity; whether the statement was made at the first available opportunity following the alleged incident; whether the statement was elicited in response to questions from adults; the mental state of the child when the abuse was reported; whether the statement consisted of a child-like description of the act; whether the child used terminology unexpected of a child of similar age; the motive or lack thereof to fabricate the statement; the ability of the child to distinguish between reality and fantasy; the vagueness of the accusations; the possibility of any improper influence on the child by participants involved in a domestic dispute; and contradictions in the accusation.
See, *State v. Townsend*, (Fla. 1994).

Florida statute recognizes that child victims are often called upon to testify to events that occurred when they were toddlers, often two or three years in the past. Further, that children do not retain details for a long time, which is why forensic interviews of children are recorded. See, *Townsend*, (recognizing the difficulty of asking an eight-year-old about events that occurred when the child was two years old). Section 90.803(23) allows such preserved statements of a child victim of abuse to be admitted in a criminal prosecution:

A section 90.803(23)

statement, for example, is based upon a legislative determination that this category of out-of-court statements is sufficiently reliable to support a conviction even when the declarant is unavailable at trial. The enactment of this narrow exception to the hearsay rule is grounded in the truism that this particular category of victims cannot always effectively communicate in a trial environment. They are also vulnerable to manipulation when, as is often the case, the defendant is a family member or friend. As a reliability safeguard, the victim's prior out-of-court statement can only be admitted as evidence after the trial judge makes specific findings of reliability based on evidence.

See, *Clarke v. State*, (5DCA 2018).

Court's Ruling:

"The trial court … ruled that the out-of-court statements of the child victim were admissible …Those statements were introduced through the testimony of the two witnesses called by the State. However, the child victim did not testify at the … hearing. Further, the State did not offer any evidence (nor did the trial court make any determination) that the child victim was 'unavailable as a witness.' As a result, the out-of-court statements of the child victim did not meet the requirements for admission under section 90.803(23), *and constituted inadmissible hearsay*. *Fuller v. State*, (5DCA 1989) ('As a condition of admissibility, the statute [section 90.803(23)] requires that the court find that the time, content and circumstances of the statement provide sufficient safeguards of reliability **and that the child either testifies or is unavailable as a witness**.')."

"These inadmissible hearsay statements were the only statements of the child victim introduced by the State … in support of a finding of probable cause that Petitioner committed the crime of lewd and lascivious molestation of the child victim. The law is clear that the State may not rely exclusively on inadmissible hearsay to establish probable cause in an adversary preliminary hearing."

"[Defendant] contends that, because the statements of the child victim were inadmissible hearsay, and there was no other admissible evidence to establish probable cause that an offense has been committed and that the Defendant has committed it, he is entitled to a release on recognizance. Upon our review of the record, we agree. While the State certainly introduced some admissible evidence at the hearing, the State failed in its burden to present admissible evidence establishing 'probable cause to believe that an offense has been committed and that the Defendant has committed it.' Indeed, the only evidence that a crime was committed, and that Petitioner committed it, came from the inadmissible out - of-court statements of the child victim."

Lessons Learned:

An example of the legal issues, as a condition precedent, to the State's use of a child's out-of-court statement at trial can be found in subsection (23) of section 90.803: "In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement."

Another issue involves the taking of multiple statements from child victims. F.S. 914.116 authorizes the Chief Judge of each Circuit to establish limits on the number of interviews that a minor must submit to for law enforcement or discovery purposes. Agencies and officers should be familiar with your individual Circuit's limitations, and exceptions to those limitations prior to engaging with a child witness.

Clearly, this area of the law is technical and Criminal Rule, as well as Florida Statute, driven. It is therefore strongly suggested that in investigating cases reliant on child victim testimony collaboration with the Crimes Against Children Unit of the State Attorney Office in your circuit occur early and often.

Larioszambrana v. State
3rd D.C.A.
(March 14, 2024)

Abandonment

Officer Copeland was told to be on the lookout for a truck that was registered to Albert Ramirez's mother. Subsequently, he observed the truck, with Ramirez in the driver's seat, close to his mother's house. Officer observed Ramirez roll through a stop sign before pulling into his mother's driveway. Officer initiated a stop in response to the traffic violation. However, by then Ramirez was already exiting the vehicle, which was now parked in front of his mother's house and chain link fence. Officer observed Ramirez walk toward the

gate and toss his jacket over the fence onto a closed trash bin in his mother's yard.

Officer confronted him, patted him down, placed him in handcuffs, and detained him in the back of his patrol vehicle. While patting him down, Officer asked Ramirez whether he had any weapons, and Ramirez responded that he did not. He then asked Ramirez for permission to search the truck, which Ramirez gave. No contraband was found in the truck. Backup Officer arrived soon thereafter. He was asked to reach over the fence to retrieve the jacket and, searching it, discovered a gun in one of its pockets. Officer Copeland did not ask for consent to search the jacket or to enter the property.

Ramirez was charged with being a felon in possession of a firearm. He moved to suppress the gun, arguing that he did not abandon his jacket by tossing it over his mother's fence and that the search therefore violated the Fourth Amendment. The trial court denied his motion. On appeal, that ruling was reversed.

Issue:

Did the Defendant, by tossing his jacket over the fence onto his mother's property, forfeit his property or privacy interest in the jacket, thereby allowing the officers to seize and search the jacket without consent or a warrant? **No**.

Abandonment:

The concept of "abandonment" is viewed differently in the context of search and seizure law rather than property law. "The test for abandonment is whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." "No search occurs when police retrieve property voluntarily abandoned by a suspect in an area where the latter has no reasonable expectation of privacy." *State v. Milligan*, (4DCA 1982).

One of the many ways a criminal suspect can forfeit his reasonable expectation of privacy, and thus Fourth Amendment protection, is by abandonment—the quintessential example being a fleeing suspect who abandons contraband by tossing it to the ground as he runs from the police (a.k.a. dropsy) and the suspect who abandons an item by insisting that it does not belong to him. In cases of abandonment, courts look to "all relevant circumstances existing at the time" to determine "whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question." *United States v. Colbert*, (5th Cir. 1973).

Where the police are in a place where they have a lawful right to be and observe property left out in the open, it may be seized without violating the 4th Amendment rights of the individual who placed the item there.

Court's Ruling:

"Whether considered under the rubric [classification] of Ramirez's property rights or that of his reasonable expectation of privacy, Ramirez's jacket continued to enjoy Fourth Amendment protections because Ramirez did not demonstrate an intent to abandon it."

"This would be a different case if Ramirez had dropped his jacket on the public sidewalk and ran away, or if he had insisted before the search that the jacket did not belong to him. It would also be a different case if the evidence demonstrated that Ramirez was not permitted to leave his possessions on his mother's property. But the Government has not offered any evidence to that effect. To the contrary, the evidence offered at the suppression hearing overwhelmingly showed that Ramirez was welcome on the property."

"The Government maintains on appeal that 'a defendant abandons an object when he throws it to the ground as officers approach.' As Ramirez points out, however, the authorities cited by the Government for this blanket rule all involve the critical additional facts that the challenged evidence was discarded in a *public place* while the suspect was fleeing arrest. *United States v. Bush*, (5th Cir. 1980) (holding that defendant had no legitimate expectation of privacy in a package containing cocaine he hurled to the ground in a public bowling alley); *United States v. Jones*, (5th Cir. 2009) (holding that defendant abandoned $100 bill and drugs dropped in a parking lot while running from police); *United States v. Williams*, (5th Cir. 2003) (holding that defendant abandoned gun he tossed in a stranger's backyard while running from police). Ramirez did not flee from Officer Copeland or leave his jacket in a public place."

"The Government also argues that Ramirez 'manifested an intent to abandon the jacket' when he walked away from the jacket and towards Officer Copeland. … Ramirez, by contrast, did not disclaim ownership of his jacket, did

not place it in a public place, and consequently did not walk away in a manner consistent with an intent to abandon it. On the contrary, he tossed it over the fence and onto his mother's property."

"Ramirez's placement of his jacket on his mother's property does not support an inference of abandonment. To the contrary, Ramirez's conduct indicates a continued interest in keeping the contents of the jacket private. He placed it where he could expect it would be safe, and where he could return to it later."

"While Ramirez's actions might support the inference that Ramirez intended to conceal his jacket and its contents from Officer Copeland, they do not evince an intent to discard, leave behind, or otherwise disavow an ownership or privacy interest in the jacket. In the absence of alternative arguments from the Government, we hold that Ramirez did not lose his reasonable expectation of privacy in the jacket or its contents, and that Officer Copeland's search was subject to Fourth Amendment constraints. … Ramirez's placement of his jacket on family property 'excludes the very idea of abandonment.' He put it for safekeeping where he knew he could find it again, and where he could trust that strangers—if acting lawfully—would be unable to get at it. And so, Ramirez's jacket enjoyed Fourth Amendment protection under property-rights formulation too."

"We hold that Ramirez did not abandon his jacket by tossing it over his mother's fence because he did not thereby manifest an intent to discard it. REVERSED."

Lessons Learned:

In contrast to property law, which defines the often-subtle nuances of ownership, courts treat the concept of "abandonment" differently in the context of search and seizure law. In *State v. Kennon*, (2DCA 1995), during a surveillance of two bars, the police saw a patron kneel beside a vehicle, place an item behind the right rear tire, and walk away. One of the undercover officers walked over, picked up the item (a cigarette pouch), and found five or six bags of marijuana inside of it. The D.C.A., quoting a search and seizure text by Wayne R. LaFave, held, "Where the presence of the police is lawful and the discard occurs in a public place where the defendant cannot reasonably have any continued expectancy of privacy in the discarded property, the property will be deemed abandoned for purposes of search and seizure."

In reversing the trial court's suppression of the drugs, the D.C.A. concluded that the defendant "could not expect Fourth Amendment protection when she chose to hide drugs under the wheel of a vehicle in a public area and walk away."

With respect to the abandonment exception, the Eleventh Circuit Court of Appeals has held that an individual forfeits his privacy interest in a vehicle when he abandons his vehicle. *United States v. Falsey*, (11th Cir. 2014).

"In the motion to suppress context, the issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." A defendant may not contest the seizure of evidence as violative of the Fourth Amendment if the defendant abandoned the evidence. *United States v. Jefferson*, (11th Cir. 2011).

In *Falsey*, the defendant, believing the police were pursuing him, parked his car in a parking lot and sprinted into the woods, leaving his car unlocked and the keys inside the vehicle. The Eleventh Circuit held that in doing so, Falsey "voluntarily relinquished his interest in the car such that he no longer had a reasonable expectation of privacy in it or its contents" when law enforcement impounded and conducted a warrantless search of the vehicle. Therefore, Falsey could not assert a Fourth Amendment challenge to evidence found in the car.

United States v. Ramirez
U.S. Court of Appeals – 5th Cir.
(May 10, 2023)

Knowingly Possessing Contraband

In the middle of the night two men drove to Raquan Gray's house with a bag of marijuana in the trunk. Gray got in the backseat of the car with a black bag in hand and directed the group to drive.

When an officer pulled the car over for a traffic stop he instructed Gray and his companions to exit the car. Gray began to panic. He immediately blurted out that he knew "nothing about anything in the vehicle." Smelling marijuana from the car, the officer called for backup. Responding officers searched the car, where they found a black bag and three packages wrapped in black electrical tape in the backseat where Gray had been sitting. Multiple quantities of multiple types of

contraband substances were recovered. Gray, along with the two other men in the car, was indicted for conspiracy to possess with intent to distribute methamphetamine.

During jury deliberations the trial court clarified the law: "The Government is required to prove beyond a reasonable doubt that the Defendant knew that the unlawful purpose of the plan was distribution of a controlled substance. The Government is not required to prove that the Defendant knew the substance was methamphetamine. The government need only prove that it was methamphetamine."

After his conviction, the Defendant argued on appeal that it was not enough for the Government to prove that he knew he possessed, generally speaking, a controlled substance. He based his argument on the wording of his Indictment. According to Gray, the fact that it refers to "a Schedule II controlled substance, to wit: 50 grams or more of methamphetamine" means that the government charged him not with knowing possession of *any* controlled substance, but with knowing possession of *methamphetamine* in particular. By instructing the jury that the Government need only show knowledge of any controlled substance, Gray argued, the trial court committed reversible error. On appeal, the 11th Circuit disagreed – again, having previously ruled on this very matter.

Issue:

Is the prosecution required to prove only that the Defendant knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance? **Yes**.

Possession:

The Florida Supreme Court in *Chicone v. State*, (Fla.1996), noted, "that at common law, all crimes consisted of an act or omission coupled with a requisite mental intent or *mens rea*. The general rule was that scienter or *mens rea* was a necessary element in the Indictment and proof of every crime. *United States v. Balint*, (S.Ct. 1922). This rule was subsequently followed in regard to statutory crimes even where the statutory definition did not expressly include scienter in its terms."

"In short, we conclude that good sense and the background rule of the common law favoring a scienter requirement should govern interpretation of the two statutes in this case. ... Thus, we hold that the State was required to prove that Chicone knew of the illicit nature of the items in his possession."

The Florida Legislature did not agree, as a result F.S. 893.101 was enacted. The Legislative notes include the following: "Legislative findings and intent – 1. The Legislature finds that the cases of *Scott v. State*, (Fla. 2002) and *Chicone v. State*, (Fla. 1996), holding that the State must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession, *were contrary to legislative intent*.

2. The Legislature finds that knowledge of the illicit nature of a controlled substance is not an element of any offense under this Chapter. Lack of knowledge of the illicit nature of a controlled substance is an affirmative defense to the offenses of this Chapter.

3. In those instances in which a Defendant asserts the affirmative defense described in this section, the possession of a controlled substance, whether actual or constructive, shall give rise to a permissive presumption that the possessor knew of the illicit nature of the substance. It is the intent of the Legislature that, in those cases where such an affirmative defense is raised, the jury shall be instructed on the permissive presumption provided in this subsection."

Subsequently, the Florida Supreme Court authored *State v. Adkins*, (Fla.2012), where the Court ruled, "Here, the Legislature's decision to make the absence of knowledge of the illicit nature of the controlled substance an affirmative defense is constitutional. Under section 893.13, as modified by section 893.101, the State is not required to prove that the Defendant had knowledge of the illicit nature of the controlled substance in order to convict the Defendant of one of the defined offenses. The conduct the Legislature seeks to curtail is the sale, manufacture, delivery, or possession of a controlled substance, regardless of the Defendant's subjective intent. As a result, the Defendant can concede all elements of the offense but still coherently raise the 'separate issue' of whether the defendant lacked knowledge of the illicit nature of the controlled substance. The affirmative defense does not ask the Defendant to disprove something that the State must prove in order to convict, but instead provides a Defendant with an opportunity to explain why his or her admittedly illegal conduct should not be punished."

"In enacting section 893.101, the Legislature eliminated from the definitions of the offenses in Chapter 893 the element that the Defendant has knowledge of the

illicit nature of the controlled substance and created the affirmative defense of lack of such knowledge."

Thus, as noted below, Florida law is now in sync with the federal statutes as well.

Court's Ruling:

"We first address Gray's contention that it was not enough for the Government to prove that he knew he possessed, generally speaking, a controlled substance."

"We have already addressed and rejected Gray's argument in *United States v. Colston*, (11th Cir. 2021), and we do so again here. There, just as here, the Indictment charged the Defendant with violations of [federal law], and it specifically named the drug involved (cocaine rather than methamphetamine). And there, just as here, the Defendant challenged the sufficiency of the evidence, claiming that the Government was required to prove her knowledge of the particular drug listed in her indictment but failed to do so."

"But as we explained in *Colston*, [the statutes] do not require the Government to prove a defendant's knowledge of a specific drug. 'Section 841(a)(1) makes it unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, *a controlled substance*,' and makes it a crime to conspire to violate [statute]. For both, the same state of mind is necessary: 'the defendant must knowingly possess, and intend to distribute, a controlled substance, but need not know which substance it is.' Section 841(b), on the other hand, provides the possible penalties for a § 841(a)(1) violation 'based on only the type and quantity of drug 'involved,' not on what the defendant knew.' So it has no *mens rea* requirement at all. That, we said, was why the indictment needed to list the type of substance—by both name and schedule."

"In short, Gray's Indictment for violating 21 U.S.C. § 841(a)(1) and § 846 required the government to prove only that he knew he possessed a controlled substance, not that he knew he possessed a certain controlled substance. The fact that the indictment named a specific substance does not change this general-knowledge requirement. Nor does the 'Schedule II' notation. All that listing methamphetamine did, then, was provide an element of an enhanced penalty under § 841(b)—which does not carry a knowledge requirement. The [trial] court did not err when it instructed the jury that the Government need only prove that Gray knew he possessed a controlled substance. AFFIRMED."

Lessons Learned:

The possession statute by its very terms applies to actual and/or constructive possession. Actual possession is self-evident, constructive possession is more complex.

"To establish constructive possession, the State must prove that the Defendant 'had dominion and control over the contraband, had knowledge that the contraband was within his presence, and had knowledge of the illicit nature of the contraband.' " **Mere proximity to contraband is not enough to establish dominion and control**.

The standard jury instruction on possession of a controlled substance is also illustrative of this point: "Control can be exercised over a substance whether the substance is carried on a person, near a person, or in a completely separate location. Mere proximity to a substance does not establish that the person intentionally exercised control over the substance *in the absence of additional evidence*. Control can be established by proof that (Defendant) had direct personal power to control the substance or the present ability to direct its control by another."

In *J.J. v. State*, (3DCA 2020). the State argued that because J.J. was the individual closest to the contraband, he exercised dominion and control over it, providing probable cause for the officer to arrest J.J. This is incorrect. Though the totality of the circumstances may have provided a lawful basis for a *Terry* stop to confirm or deny the commission of a crime in progress.

In *Martoral v. State*, (4DCA 2007) the court ruled: "Knowledge of the presence of the drugs and the ability to exercise dominion and control over the drugs are not the same thing. See *Jean v. State*, (4DCA 1994) recognizing that knowledge and dominion and control are separate elements and stating that "it is conceivable that an accused might be well aware of the presence of the substance but have no ability to maintain control over it."

In the case law, the concepts of "dominion" and "control" involve more than the mere ability of the Defendant to reach out and touch the item of contraband.

United States v. Gray
U.S. Court of Appeals – 11th Cir.
(Feb. 29, 2024)