FLORIDA TRAFFIC-RELATED APPELLATE OPINION SUMMARIES

October – December 2016

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referenced as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court; that is, plaintiff or defendant. In administrative suspension cases, the driver will be referenced as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will control its placement order in these summaries.]

I. Driving Under the Influence (DUI)

***Kennedy v. State*, __ So. 3d __, 2016 WL 7405632 (Fla. 5th DCA 2016)**

The defendant's probation was revoked for failure to complete a DUI course. The state conceded error, as the defendant had already attended two of the three required classes and still had 27 days left to finish the course, so the appellate court reversed and remanded. http://www.5dca.org/Opinions/Opin2016/121916/5D15-4341.op.pdf

***Rodriguez v. State*, 24 Fla. L. Weekly Supp. 486a (Fla. 11th Cir. Ct. 2016)**

The defendant was convicted of DUI and appealed, asserting that a comment in the state's closing argument was an attempt to shift the burden of proof. The circuit court, in its appellate capacity, agreed and reversed, holding that:

> when the State asked the jury to "[r]emember the conflicting testimony he gave you. Remember that he chose to refuse to blow, when he could have blown our case away[,]" moments before they were to begin deliberating, this comment constituted an attempt to shift the burden. . . . The State's comment . . . also implies that the Defendant failed to produce evidence to refute an element of the crime. Although the State properly commented on the Defendant's refusal to submit to the breathalyzer by saying "[r]emember that he chose to refuse to blow," by asserting that the Defendant "could have blown our case away," the

> State was commenting on the Defendant's failure to produce evidence. As such, the comment improperly shifts the burden and the [state] has failed to establish that the comment was harmless.

II. Criminal Traffic Offenses

Daugherty v. State, __ So. 3d __, 2016 WL 7405662 (Fla. 5th DCA 2016)

The defendant was sitting in a parked car when another individual tried to climb through a window. The defendant drove away, and the other person hit the ground, sustaining a fatal head injury. The defendant was charged with leaving the scene of a crash involving death. He filed a motion for judgment of acquittal, arguing that the state failed to prove a crash had occurred between his car and the victim. The trial court denied the motion, relying on *State v. Gaulden*, 134 So. 3d 981 (Fla. 1st DCA 2012) ("holding that passenger's collision with road was a crash"), and the defendant was convicted. The appellate court reversed, noting that meanwhile the Florida Supreme Court reversed that opinion and held in *Gaulden v. State*, 195 So. 3d 1123 (Fla. 2016), that when a victim collides with the pavement it "does not constitute a crash under the statute." http://www.5dca.org/Opinions/Opin2016/121916/5D15-3805.op.pdf

In re forfeiture of 1994 Ford Explorer, __ So. 3d __, 2016 WL 6609599 (Fla. 1st DCA 2016)

After a traffic stop, a deputy discovered that the license of the driver was suspended. The driver and two passengers were arrested for traffic and drug offenses, and the sheriff sought forfeiture of the vehicle. The lower court dismissed the sheriff's complaint, holding there was no probable cause to support the seizure. The appellate court reversed, holding that "the complaint and accompanying affidavits, aided by a statutory presumption that the vehicle was used to transport contraband, adequately established probable cause." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/November/November%2009,%202016/2D15-2085.pdf

Charles v. State, __ So. 3d __, 2016 WL 6476446 (Fla. 4th DCA 2016)

The defendant's probation was revoked for, among other violations, driving without a license. But the appellate court reversed, stating that "the State did not mention this ground or submit any evidence proving it at Defendant's VOP hearing." Further, the "Defendant's testimony established her violations of probation were not willful and substantial, and the State did not present any evidence to the contrary." https://edca.4dca.org/DCADocs/2015/3094/153094_DC13_11022016_092442_i.pdf

Trainer v. State, 203 So. 3d 191 (Fla. 4th DCA 2016)

The defendant was convicted of felony driving with a suspended or revoked license and leaving the scene of a crash involving damage to an attended vehicle. The state conceded error in the conviction for leaving the scene of a crash, "as it failed to prove that the vehicle damaged in the crash was attended at the time of the accident." Therefore the appellate court reversed and directed a judgment of acquittal on that count.

***Williams v. State*, __ So. 3d __, 2016 WL 6432950 (Fla. 3d DCA 2016)**

After a crash that resulted in death, the defendant was convicted of fleeing the scene of an accident. She appealed, arguing that her motion to dismiss the statements she made about the crash should have been granted under the accident privilege statute. But the appellate court affirmed, stating that section 316.066, Florida Statutes, "does not confer any benefit or privilege on a person who abandons her duty to remain at the scene of any automobile accident which results in death, and who chooses instead to leave the scene of an accident." http://www.3dca.flcourts.org/Opinions/3D14-2853.pdf

***State v. Godard*, 202 So. 3d 144 (Fla. 2d DCA 2016)**

A deputy responded to a call about dogs left in a vehicle with the windows up in a parking lot, and after stopping the defendant charged her with driving while license permanently revoked, DUI, and refusal to submit to testing. The defendant filed a motion to suppress, which the trial court granted, holding that "the dogs did not appear to be in immediate distress when the deputy approached the vehicle," and therefore the defendant's continued detention violated her Fourth Amendment rights. The state appealed the suppression order, and the appellate court reversed, stating that the trial court erred in concluding that "if the purpose of the stop had been accomplished, then the deputy could make no contact with the driver. In addition, the facts testified to by the deputy did not indicate that the purpose of the investigation had concluded." It noted further that the case did not involve an anonymous tipster. http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/October/October%2014,%202016/2D16-22.pdf

***Anthony v. State*, 24 Fla. L. Weekly Supp. 414a (Fla. 11th Cir. Ct. 2016)**

The defendant was convicted of leaving the scene of an accident, with adjudication withheld. He appealed, arguing that the state "improperly shifted the burden to the defense to prove his innocence" and that there was a double jeopardy violation. The circuit court, in its appellate capacity, found no merit in the burden-shifting argument, but reversed and remanded because it found the double jeopardy violation to be reversible error. It stated that

> the trial court orally found in open court [the defendant's] "actions not guilty by reason of doubt" because the State failed to prove [he] committed the charge beyond a reasonable doubt. . . . [W]e find that jeopardy terminated when this oral pronouncement of not guilty in open court during this non-jury trial occurred. We further find that double jeopardy attached in barring the trial court below from retracting this oral pronouncement of not guilty which became final without any indication that the matter was still under consideration. . . .
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> Here, the trial court was never requested by the State to correct any legal error in the evidence after the oral pronouncement of not guilty. Rather, the State interrupted the trial court's constructive criticism of the State and its lack of evidence of who called 911 to interject that testimony existed that the victim . . . called the police. Upon realizing that this "important" testimony existed for the State, the trial court retracted by stating, "I find the Defendant guilty. What do

you want? I find the Defendant is guilty." . . . [W]e find this further proceeding was improper and the judgment of guilty violates double jeopardy.

***State v. Tucker*, 24 Fla. L. Weekly Supp. 324c (Fla. 17th Cir. Ct. 2016)**

The defendant was charged with driving on an expired license for more than six months, having no proof of insurance at a crash, and improper backing. The trial court dismissed that charges because of a discrepancy in the arresting officer's testimony regarding the make and model of the vehicle the defendant was driving. The state appealed, and the circuit court in its appellate capacity reversed and remanded, finding that "the State was not afforded adequate opportunity to controvert the motion to dismiss."

III. Civil Traffic Infractions

IV. Arrest, Search and Seizure

***Williams v. State*, 2016 WL 6637817 (Fla. 2016)**

The defendant was arrested for DUI and refused a breath test, and he was convicted under Florida's refusal-to-submit statute. He argued that the statute was unconstitutional as applied, but the Fifth District Court of Appeal, in *Williams v. State*, 167 So. 3d 483 (Fla. 5th DCA 2016), held that there was no constitutional bar prohibiting the state from criminally punishing the defendant for refusing the test. The Florida Supreme Court originally accepted jurisdiction to review the case but then noted that "[t]he United States Supreme Court subsequently issued its decision in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016). Because the Fifth District did not have the benefit of the United States Supreme Court's opinion in *Birchfield* when it decided *Williams*, we vacate the decision in *Williams* and remand to the Fifth District for reconsideration in light of *Birchfield*."

***State v. Ross*, __ So. 3d __, 2016 WL 7174171 (Fla. 2d DCA 2016)**

While investigating a noise complaint, officers saw the defendant asleep in the driver's seat of a car. When they woke him up he drove off, without headlights and at over 80 mph. The officers went to the address on the car registration and got a call that a man who looked like the defendant had run into a nearby home. They went into the house and found the defendant in a bedroom. An officer looked into the defendant's car and saw a piece of crack cocaine on the floor, and without a warrant searched the car, finding powder cocaine and more crack. The defendant was charged with possession of cocaine, fleeing and eluding an officer, and reckless driving. The trial court granted his motion to suppress, based on warrantless searches of the home and car. The state appealed, and the court affirmed as to the search of the home but reversed as to the search of the car, stating that the "lawful observation of illegal drugs in the car gave the police probable cause to believe that the car contained evidence of a crime. The warrantless search of the car was thus authorized by the automobile exception." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/December/December%2009,%202016/2D15-3682.pdf

***Gallardo v. State*, __ So. 3d __, 2016 WL 7176746 (Fla. 5th DCA 2016)**

After being stopped for driving about 20 mph over the speed limit, the defendant was arrested and charged with possession of cannabis with intent to sell or deliver, possession of a controlled substance, and possession of drug paraphernalia,. He filed a motion to suppress, which the trial court denied, and he entered a nolo contendere plea. He appealed, arguing the stop was unlawful. The appellate court affirmed, stating that a "law enforcement officer may stop a motor vehicle if he or she has a well-founded, articulable suspicion that the driver has committed a traffic offense," and that "[i]t is well established in Florida that a vehicle may be stopped for a speeding violation based on an officer's visual observations. Accordingly, actual speed need not be verified by the use of radar equipment or clocking."
http://www.5dca.org/Opinions/Opin2016/112816/5D16-1399.op.pdf

***State v. K.C.*, __ So. 3d __, 2016 WL 7118843 (Fla. 4th DCA 2016)**

K.C., a minor, was in a stolen car that a police officer stopped for speeding and not having headlights on at night. K.C. and another person fled, and the officer found K.C.'s cell phone, which he gave to the police department. Some months later a forensic detective, believing the phone to be abandoned, unlocked it without getting a search warrant, and K.C. was charged with burglary of a conveyance. The trial court granted his motion to suppress, and the state appealed. The appellate court affirmed, stating:

> Because both the United States Supreme Court and the Florida Supreme Court have recognized the qualitative and quantitative difference between cell phones (and their capacity to store private information) and that of other physical objects and the right of privacy in that information, we conclude that the abandonment exception does not apply to cell phones whose contents are protected by a password. Paraphrasing Chief Justice Roberts, "[o]ur answer to the question of what police must do before searching [an abandoned, password protected] cell phone . . . is accordingly simple—get a warrant."

https://edca.4dca.org/DCADocs/2015/3290/153290_DC05_12072016_085303_i.pdf

***Luu v. State*, 203 So. 3d 201 (Fla. 4th DCA 2016)**

The defendant was driving a vehicle, with a passenger, that was involved in an accident. An officer examining the vehicles saw a pen wrapped in tinfoil on the driver's side rear floorboard, which tested positive for cocaine, and a blood test showed a cocaine metabolite in the defendant's blood. She was charged with possession of drug paraphernalia, and she filed a motion for judgment of acquittal, which the trial court denied. She appealed, arguing that "the State failed in its proof of constructive possession given the joint occupancy of the vehicle and the location of the paraphernalia." The appellate court agreed and reversed.
https://edca.4dca.org/DCADocs/2015/1683/151683_DC13_11092016_091942_i.pdf

***State v. Johnson*, __ So. 3d __, 2016 WL 5940067 (Fla. 4th DCA 2016)**

A detective and a deputy saw the defendant driving without a seatbelt, and when the defendant stopped and the deputy approached, the defendant drove off. While pursuing the vehicle, the detective saw someone throw something out the passenger's window, and after the pursuit was called off the detective saw the vehicle broken down on the side of the road. The

defendant was convicted of fleeing and eluding and trafficking in cocaine and filed a motion for judgment of acquittal, arguing that there was no evidence that he had "dominion and control over the cocaine." The trial court granted the motion as to the trafficking charge. The state appealed and the appellate court reversed, stating that while there was conflicting evidence, "the State was able to show that [the defendant] had constructive possession of the cocaine," and the evidence "was enough for the State to survive a motion for judgment of acquittal."
https://edca.4dca.org/DCADocs/2015/0567/150567_DC13_10132016_085851_i.pdf

***State v. Paez*, 201 So. 3d 80 (Fla. 4th DCA 2016)**

After a traffic stop, the defendant was charged with the sale, delivery, or possession of oxycodone. The trial court denied her motion to dismiss. The appellate court affirmed, stating:

> The evidence, when viewed in the light most favorable to the State, supports the conclusion that [the defendant] purchased Percocet without a prescription at her work and was on her way to deliver those pills to her boyfriend who also did not have a prescription. It is true that there is other evidence that the Percocet was obtained under [her] own prescription and under a prescription for her friend, both situations that may support the prescription defense. . . . But at this stage of the proceedings it is not the place of this Court or the trial court to weigh this evidence. [It] must be viewed in the light most favorable to the State, and when that light is cast a prima facie case is illuminated.

https://edca.4dca.org/DCADocs/2015/2918/152918_DC13_10052016_084847_i.pdf

***State v. Walker*, 24 Fla. L. Weekly Supp. 338a (Fla. 15th Cir. Ct. 2016**)

The defendant was involved in a car crash in which the other motorist died. Although there was "no suggestion of alcohol impairment," an officer was called to conduct a drug impairment assessment, which confirmed that the defendant was impaired by narcotics. The defendant was arrested for DUI and his blood was drawn without his consent. He filed a motion to suppress warrantless the blood test results, but the circuit court, in its appellate capacity, denied the motion based on the exigent circumstances exception to the requirement for a warrant:

> This case involved a traffic crash and a resulting fatality which creates a more compelling situation. . . . By the time law enforcement had establish the necessary probable cause to obtain a warrant approximately two and a half hours had passed since the time of the crash. The Court finds that amount of time was reasonable to make this important decision. During this time, the evidence contained in the defendant's blood stream was actively dissipating and unlike alcohol evidence where retrograde extrapolation may be performed, such an option doesn't exist under drug impairment. Due to the fact that the ewarrant system was not available or approved for use on the date of this crash, it would have then taken another two to four hours on this Saturday to obtain a warrant from the Duty Judge to draw blood if everything had gone exactly right.

***State v. Cooper*, 24 Fla. L. Weekly Supp. 336a (Fla. 15th Cir. Ct. 2016**)

After killing another motorist in an early morning crash, the defendant was arrested for DUI and her blood was drawn without her consent. She filed a motion to suppress warrantless blood draw. The circuit court, in its appellate capacity, denied the motion based on the exigent circumstances exception to the requirement for a warrant: "The draws were conducted one hour and forty-five minutes after the crash. The entire process to obtain a warrant would have taken at least another two to four hours. . . . Law enforcement had knowledge that [the defendant] had consumed alcohol *earlier* in the night and the odor of alcohol was light. . . . One could reasonably conclude that the impairment evidence contained within [her] blood had already substantially dissipated from earlier in the evening and was rapidly continuing to dissipate."

V. Torts/Accident Cases

General Employees Insurance Company v. Isaacs, __ So. 3d __, 2016 WL 7118845 (Fla. 4th DCA 2016)

Isaacs was injured in a car accident and sued GEICO, her uninsured motorist carrier, for past and future medical expenses and pain and suffering. At trial, she was awarded $750,000 for medical expenses and pain and suffering. After a reduction of $60,000 for collateral source setoffs, judgment was entered for $690,000, which included an award for future medical expenses of $360,000. GEICO moved for remittitur and a new trial, "arguing the jury's award for future medical expenses was excessive and belied by the manifest weight of the evidence." The appellate court agreed, stating: "Due to the lack of evidence relating to Isaacs' life expectancy, in addition to the fact that the amount awarded for future medical expenses far exceeded what the evidence supported, we remand this case to the trial court for a new trial solely on the issue of Isaacs' life expectancy relating to the $2,000 per year for future medical expenses."
https://edca.4dca.org/DCADocs/2015/2263/152263_DC08_12072016_085048_i.pdf

Auto Club Ins. Co. of Florida v. Babin, __ So. 3d __, 2016 WL 7046285 (Fla. 5th DCA 2016)

Babin was injured when an uninsured driver hit the car behind him, driven by Scott, which in turn rear-ended Babin. Babin sued Scott and Auto Club, Scott's UM carrier. A jury awarded Babin "$120,000 in past medical expenses, $70,000 in past lost earnings, $160,000 in future medical expenses, $72,000 in lost earning ability for future years, $15,000 for past pain and suffering, and $15,000 for future pain and suffering. Only the damages awarded for future medical expenses, past lost earnings, and future earning capacity are in dispute. As to those claims, Auto Club [appealed, arguing that] the trial court erred in failing to grant its motion for directed verdict." The appellate court agreed with Auto Club and "reverse[d] the jury's award on Babin's claims for future medical expenses, past lost wages, and future earning capacity and remand[ed] for new trial solely on the issue of future medical expenses. In all other respects, the final judgment is affirmed."
http://www.5dca.org/Opinions/Opin2016/111416/5D15-1337.op.pdf

Hartford Fire Ins. Co. v. Smith, __ So. 3d __, 2016 WL 6611193 (Fla. 4th DCA 2016)

Smith was involved in a multi-vehicle accident while driving a semi-truck owned by O & L Transport. He was transporting cargo for Peninsula Logistics, which was insured by Hartford with a $1 million limit per accident. Erb, who was severely injured, and the estate of Wood, who

was killed, sued Peninsula and Smith, among others, who were defended by Hartford's attorneys. Hartford settled with Wood's estate for the $1 million policy limit, and Erb's lawsuit resulted in judgments against Peninsula and Smith. Peninsula and Smith appealed, and the appellate court affirmed as to Smith but reversed as to Peninsula, noting that Smith was an independent contractor and Peninsula did not own the truck Smith was driving. Although Hartford had earlier obtained a declaratory judgment from a federal court that "it had no duty to defend or indemnify Peninsula and Smith in connection with the Erb case," the federal court "excluded any claim against the insurer for bad faith in settling the estate's claim for the policy limits and excluding others." Smith sued Hartford for bad faith, including as defendants one of Hartford's attorneys and the law firm, based on the failure to settle the claims of Wood's estate and Erb within the policy limits. Smith also claimed that the attorney and law firm "committed legal malpractice by failing to advise Hartford that they needed time to initiate settlement negotiations with both claimants." Hartford moved to bifurcate the two counts or, in the alternative, to dismiss the complaint for improper joinder of parties. It also moved to dismiss the complaint for improper venue or transfer venue for forum non conveniens. The trial court denied all of the motions.

The appellate court dismissed the appeal of denial of Hartford's motion to sever or bifurcate because it was not an appealable nonfinal order and jurisdiction did not extend to that portion of the order. And "[c]ertiorari does not lie because Hartford has not demonstrated irreparable harm caused by the denial of severance or bifurcation." The appellate court affirmed as to the remaining venue issues. It stated that section 47.122, Florida Statutes, provides "[f]or the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought," and that "several witnesses for Smith are located in counties outside of Palm Beach. However, [Hartford] did not demonstrate that Smith actually intended to call them at trial. Further, Hartford failed to indicate the significance of their testimony or show how any of them would be inconvenienced by having to travel to Palm Beach County to testify. Absent such a showing, a trial court's denial of a motion to transfer for convenience will be affirmed." https://edca.4dca.org/DCADocs/2016/0498/160498_DC05_11092016_093413_i.pdf

***Davis v. Baez*, __ So. 3d __, 2016 WL 6611663 (Fla. 3d DCA 2016)**

Davis, a high school student, was injured by a car while crossing the street to get to a school bus stop. She sued, among others, the county school board and Baez, a school bus driver, alleging they were negligent for failing to instruct her to wait on the other side of the street until the bus got to the bus stop and stop traffic so she could cross the street safely; in fact, Baez admitted telling Davis if she wasn't waiting across the street he would not wait for her to cross and would not pick her up. The trial court entered a summary judgment in favor of Baez, determining that sovereign immunity barred the claim against him for individual negligence. The appellate court reversed because "there remain disputed issues of material fact as to whether Baez acted in a manner that would place him beyond the protection of sovereign immunity and render him individually liable to Davis." Although the appellate court had earlier affirmed that the school board, and by extension Baez, owed no duty to Davis because "she was not on the bus or otherwise within the physical custody or control of the School Board at the time of the accident," its "affirmance did not address or determine whether Baez could be held individually liable if . . . he voluntarily undertook to act, thereby creating a separate duty owed to Davis" and whether he "did so in a manner that would place him beyond the protection of sovereign

immunity and render him personally liable." It held that there were genuine issues of material fact that remained in dispute on that issue, precluding summary judgment.
http://www.3dca.flcourts.org/Opinions/3D16-0013.pdf

***State Farm Mut. Auto. Ins. Co v. Bailey*, __ So. 3d __, 2016 WL 6609623 (Fla. 2d DCA 2016)**

Bailey was 10 to 20 feet away from his work vehicle, monitoring a co-worker who was working with a crane, when he was struck by an uninsured motorist. Bailey sued his employer's insurer for UM coverage. The trial court held he was entitled to UM coverage, but the appellate court reversed, noting that "[t]he separation between Mr. Bailey and the truck in both time and distance precludes a finding that [he] was occupying the vehicle at the time he was struck as a matter of law."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/November/November%2009,%202016/2D15-3487.pdf

***Robinson v. Ward*, __ So. 3d __, 2016 WL 6609585 (Fla. 2d DCA 2016)**

L.W., a minor, was injured in an automobile accident. Ward (her mother) sued Robinson (the driver of the other vehicle) but voluntarily dismissed his employer. The jury found both drivers at fault and awarded L.W. damages for past medical expenses but not future expenses. L.W. moved for a new trial or, in the alternative, mistrial and sanctions based on alleged misconduct by Robinson's attorneys. Finding that "such misconduct had indeed occurred and had interfered with the jury's ability to be fair," the circuit court granted a new trial and ordered sanctions against Robinson's attorneys. Robinson appealed. The appellate court affirmed the order for new trial and sanctions against one of the attorneys, but reversed as to sanctions against the other attorney because she "did not commit the conduct detailed in the sanctions order."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/November/November%2009,%202016/2D14-4799.pdf

***Allstate Fire and Cas. Ins. Co. v. Hradecky*, __ So. 3d __, 2016 WL 6249155 (Fla. 3d DCA 2016)**

After being rear-ended by a sheriff's office vehicle, Hradecky sought uninsured motorist coverage under his Allstate policy. Allstate filed a motion to dismiss, arguing that venue was proper in Pennsylvania because based on the address listed for Hradecky on his policy declarations page, Hradecky had to bring suit in Pennsylvania. Hradecky "argued that 'it would be judicially uneconomical' to litigate his UM claim in Pennsylvania while continuing to litigate his negligence claim against the sheriff's office in Florida," and that that "because the Endorsement conflicted with the venue clause in the Policy, the provision which provided greater coverage prevailed." The trial court agreed with Hradecky and denied Allstate's motion to dismiss, stating that for the endorsement to control, "it would have had to have referenced the general provision, as well." The trial court also denied Allstate's motion for reconsideration. Allstate appealed, and the appellate court reversed, stating: "The law in Florida is clear that to the extent an endorsement is inconsistent with the body of the policy, the endorsement controls. . . . Here, the Endorsement modifies and amends the insurance contract with respect to forum selection," and as it was not found to be unreasonable or unjust, it must be enforced.
rrhttp://www.3dca.flcourts.org/Opinions/3D16-0999.pdf

***Erie Ins. Exchange v. Larose*, 202 So. 3d 148 (Fla. 2d DCA 2016)**

Larose was involved in an accident while driving a vehicle with the insured's permission. He sought to recover underinsured motorist benefits, and the insurer, an out-of-state company that did not do business in Florida, filed a motion to dismiss. The trial court denied the motion, and the insurer appealed. The appellate court reversed, stating: "While the trial court properly found that Larose had established a statutory basis for long-arm jurisdiction, [it] erred in concluding that Erie had the requisite sufficient minimum contacts with Florida to satisfy constitutional due process."
http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/October/October%2019,%202016/2D15-5750.pdf

***Finkel v. Batista*, 202 So. 3d 913 (Fla. 3d DCA 2016)**

After a car accident, Batista and Sanchez sued the Finkels. The jury awarded the plaintiffs no damages, but the court ordered a new trial, based on "the general rule that a plaintiff is entitled to recover at least the medical expenses incurred for any diagnostic testing reasonably necessary to determine whether an accident caused injury." The defendants appealed, and the appellate court reversed "because exceptions to this general rule apply, sufficient evidence supported the jury's verdict, and the plaintiffs failed to object to the verdict form that invited the jury to return a verdict on an 'all-or-nothing' basis."
http://www.3dca.flcourts.org/Opinions/3D15-2509.pdf

***Murphy v. Roth*, __ So. 3d __, 2016 WL 5803658 (Fla. 4th DCA 2016)**

After an automobile accident, Murphy sued Roth for injuries. A final judgment was entered, and Murphy filed a motion for new trial, which the trial court denied. She appealed, claiming that "a juror engaged in misconduct by posting comments about the case on social media and by failing to disclose certain information during *voir dire*." But the appellate court affirmed, stating that the trial court must have found that the juror's "tweets" did not relate specifically to the case and were not sufficiently prejudicial to require a new trial, and the record did not establish that the juror's nondisclosure during voir dire of an accident was material.
https://edca.4dca.org/DCADocs/2014/4830/144830_DC05_10052016_084606_i.pdf

***MDM Chiropractic Center, PA. v. Progressive Select Insurance Co.*, 24 Fla. L. Weekly Supp. 491a (Fla. 15th Cir. Ct. 2016)**

Initially, MDM sued Progressive American to recover no-fault benefits as assignee of the insured. Progressive American filed a motion to dismiss on the ground that MDM named the wrong insurer – that it should have named Progressive Select – and the parties settled. Then MDM sued Progressive Select, which filed a motion to dismiss on the basis of res judicata. The trial court dismissed MDM's complaint with prejudice, MDM appealed, and the circuit court, in its appellate capacity, reversed. It stated that "a court cannot consider affirmative defenses, such as res judicata, on a motion to dismiss." And while "[a]n exception arises . . . when 'the face of the complaint and attachments demonstrate a defense's unquestionable merit,'" that was not the situation in this case. It stated:

> Progressive Select claims that the affirmative defense of res judicata was apparent on the face of the 2012 complaint against Progressive American. However, the "prior pleading" language of Rule 1.110(d) does not refer to a complaint filed in a prior lawsuit. . . . The "prior pleading" in the instant case was the operative complaint filed in 2013 by MDM against Progressive Select. Therefore, the trial court could not have considered the 2012 complaint as a "prior pleading" under Rule 1.110(d) in ruling on the motion to dismiss.
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> Progressive Select argues that the trial court was entitled to take judicial notice of the 2012 complaint. . . . However, . . . here, neither party requested the Court to take judicial notice of a prior appeal to this Court between the same parties to the underlying action. Further, nothing in the record indicates that Progressive Select requested the trial court to take judicial notice of the 2012 case.
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> Alternatively, Progressive Select argues that the Tipsy Coachman rule supports an affirmance of the trial court's dismissal order. However, both of Progressive Select's alternative grounds would require the trial court to look beyond the four corners of the complaint. Accordingly, Progressive Select has not provided an appropriate alternative basis for affirming the trial court's dismissal order.

VI. Drivers' Licenses

DHSMV v. Walsh, __ So. 3d __, 2016 WL 6929968 (Fla. 1st DCA 2016)

The defendant's license was permanently revoked after a DUI manslaughter conviction. Five years later he sought a hardship license, but he admitted to drinking alcohol in the past five years, and the hearing officer denied the request because section 322.271, Florida Statutes, required that he remain "drug-free" for the five years preceding the request. The defendant sought review, and the circuit court granted his request for reinstatement. DHSMV appealed, and the appellate court quashed the circuit court decision, holding that "drug-free" includes no alcohol, and that a miscarriage of justice had occurred: "the Department has been ordered to issue a hardship license to which [the defendant] is not entitled; his prior exercise of driving privileges resulted in the death of another due to his DUI, yet he did not abstain from alcohol use for the requisite five years to become eligible. It is serious error to put a license in his hands, creating the very risk of harm to others that the statute clearly was enacted to prevent." https://edca.1dca.org/DCADocs/2016/0511/160511_DC03_11282016_090440_i.pdf

Gomez v. DHSMV, 24 Fla. L. Weekly Supp. 471a (Fla. 2d Cir. Ct. 2016)

The defendant's license was suspended for four DUI convictions. He requested administrative review, claiming he did not have four DUI convictions. At the hearing, DHSMV considered an uncertified copy of a printout of the defendant's driving record, which showed four DUI convictions, including one from Taylor County in 1975. The defendant testified that he had never been to Taylor County, and DHSMV records did not include a copy of that citation. The defendant also argued that a Leon County DUI citation from 1974 "was unreadable and failed to contain sufficient information to identify [him] as the person charged." The hearing officer entered an order granting the defendant's challenge, but then rescinded the order without

stating the reason. The defendant filed a petition for writ of certiorari, with DHSMV conceding that "the second order should be quashed as a violation of due process." The circuit court granted the petition, quashed the order, and remanded for entry of a new ruling setting forth the reasons for the change from the first order. The hearing officer entered a third order, affirming revocation of the defendant's license, stating that the original order granting the defendant's challenge "was the result of a clerical error that occurred when an order entered on another case was accidentally copied." The defendant sought review and asked the court to direct DHSMV "to produce the record from the other case that was erroneously duplicated by the hearing officer to provide an evidentiary basis for the determination that a clerical error occurred." The circuit court, in its appellate capacity, declined to address the clerical error issue but granted review, quashed the administrative order, ordered DHSMV to remove the two DUI citations from the defendant's Florida driving record, and ordered DHSMV to reinstate the defendant's license if he is otherwise eligible, holding: "Even if the hearing officer had the authority to find that the first order was entered by mistake, set it aside, and enter the final order under review, [the defendant] is entitled to prevail on the merits. . . . The only evidence supporting the Taylor County DUI is the uncertified copy of a printout of [his] driving record. The Department's reliance on that document is misplaced. . . . When there is a genuine issue concerning the accuracy of the information contained in the driving record, a certified copy is required." The court stated further that "even if an uncertified copy of the driving record is sufficient prima facie evidence to shift the burden to the driver, [the defendant] has carried his burden by providing unrebutted testimony that he does not have a DUI conviction from Taylor County. [He] also established that the citation for the Leon County DUI is unreadable and fails to establish his identity as the person convicted."

***Crawley v. DHSMV*, 24 Fla. L. Weekly Supp. 412a (Fla. 7th Cir. Ct. 2016)**

The defendant was arrested for DUI and refused a breath test. His license was suspended for 18 months because it was his second refusal. He filed a motion to suppress based on the "confusion doctrine" – that he had been confused "by the interplay between the *Miranda* warnings and the implied consent warnings, and therefore there was no willful refusal to submit to the breath test." The hearing officer denied the motion, finding the defendant's testimony unpersuasive. The defendant sought review, challenging whether the hearing officer's decisions were supported by competent substantial evidence. The circuit court, in its appellate capacity, denied review, finding that the hearing officer's decision was based on competent substantial evidence. The defendant "did not make his confusion known to [the officer], and the *Miranda* warnings were not given contemporaneously to the implied consent warnings. Other than his own testimony, there is no evidence to support [his] assertion that he was confused over his right to remain silent and the officer's request . . . to take the breath test."

The defendant also argued the officer did not have the authority to stop him in a private "pay to park" lot. But the court found that while the defendant may have been "inside of the perimeter fencing," he "was not a paying customer who was legally parked" in the lot. Rather, according to an attendant, the defendant "come [sic] barreling thru [sic] our barricades, and wire cable" and refused to stop after the attendant told him to, but rather "put the gas on [sic] *continued onto the property*, hitting two parked vehicles," causing the attendant to fear for her life.

***Ardolino v. DHSMV*, 24 Fla. L. Weekly Supp. 409a (Fla. 7th Cir. Ct. 2016)**

The defendant's license was revoked for 10 years after his third DUI charge. He sought a hardship license, but DHSMV denied the request after finding that the defendant had continued to drive after the revocation. He sought review, claiming exigent circumstances, contending that he had driven only to get to the hospital for medical assistance. But the circuit court, in its appellate capacity, denied review, stating that it could not reweigh the evidence.

***Bosecker v. DHSMV*, 24 Fla. L. Weekly Supp. 404a (Fla. 6th Cir. Ct. 2016)**

The defendant's license was suspended for three months after she accumulated 18 points within an 18-month period. She sought early reinstatement based on hardship, but the circuit court, in its appellate capacity, denied it, stating that she "does not complain that she was not afforded procedural due process [or] argue that the Hearing Officer failed to observe the essential requirements of law or that competent, substantial evidence does not support the hearing officer's decision. Instead, [she] sets out a short factual recitation and repeats some of the statements she made to the hearing officer as to why the suspension of her license causes a serious hardship and impairs her ability to perform her employment as an attorney." But "[t]his Court is not to reweigh the evidence; it may only review the evidence to determine whether it supports the Hearing Officer's decision," which it did in this case.

***Sobotka v. DHSMV*, 24 Fla. L. Weekly Supp. 402a (Fla. 4th Cir. Ct. 2016)**

The defendant's license was suspended after he was arrested for DUI and he sought review, asserting that the officer who inspected and maintained the Intoxilyzer was not properly certified. The circuit court, in its appellate capacity, denied review, stating simply that the issue was addressed in *Johns v. DHSMV*, 22 Fla. L. Weekly Supp. 1139a (Fla. 4th Cir. Ct. 2015).

***Standridge v. DHSMV*, 24 Fla. L. Weekly Supp. 399a (Fla. 4th Cir. Ct. 2016)**

After a call about a suspicious vehicle, an officer saw the defendant's vehicle irregularly parked with the engine running, and the defendant slumped over the passenger seat. The officer knocked on the window to ask the defendant if she was okay, and eventually the defendant was arrested for DUI and her license was suspended. She sought review, asserting that the investigating officer did not have reasonable suspicion, and that the officer who inspected and maintained the Intoxilyzer was not properly certified. The circuit court, in its appellate capacity, denied review, stating there was reasonable suspicion, the officer's "decision to open the [defendant's] car door was a lawful exercise under the 'community caretaker doctrine,'" and the arrest was lawful. As to the Intoxilyzer inspection, the court simply stated that the issue was addressed in *Johns v. DHSMV*, 22 Fla. L. Weekly Supp. 1139a (Fla. 4th Cir. Ct. 2015).

***Graca v. DHSMV*, 24 Fla. L. Weekly Supp. 329c (Fla. 20th Cir. Ct. 2016)**

The defendant's license was suspended after he was arrested for DUI and he sought review, asserting that he "did not object to the telephonic hearing of the [officer] witness, but he expected that the requirements of the State's subpoena would be upheld, and that rules concerning the use of communication equipment would apply" (i.e., that a notary or other person authorized to administer oaths be present and administer the oath). The circuit court, in its

appellate capacity, denied review, stating that a hearing officer may conduct hearings using communications technology and the hearing officer and the witness need not be in each other's presence for the hearing officer to place the witness under oath.

***Greider v. DHSMV*, 24 Fla. L. Weekly Supp. 327b (Fla. 19th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test, and he sought review, arguing that his refusal was not incident to a lawful arrest. The circuit court, in its appellate capacity, granted review and quashed the suspension because the case "consisted of a paper only record with conflicting documents." The deputy's sworn affidavit of refusal to submit to a test stated that the defendant was arrested for DUI on February 2 at 12:11 a.m., but that affidavit and the breath alcohol test affidavit stated that the refusal occurred on February 1 at 12:03 a.m. and 12:02 a.m., respectively, and the cover sheet for the arrest affidavit stated the arrest was on February 2 at 1:45 a.m. The court stated that DHSMV "argues that the arrest affidavit alone is competent substantial evidence that the arrest occurred prior to the implied consent warnings. However, [it] is asking this court to reweigh and reevaluate the evidence, which it cannot do. . . . [It] put on no live testimony at the hearing and instead chose to rely solely on the written documents. . . . Without live testimony to explain the discrepancies, the conflicting documents are not competent substantial evidence to affirm the suspension."

***Padgett v. DHSMV*, 24 Fla. L. Weekly Supp. 325a (Fla. 19th Cir. Ct. 2016)**

The defendant's license was suspended for refusal to submit to a breath test, and he sought review, arguing that his refusal was not incident to a lawful arrest. The circuit court, in its appellate capacity, granted review and quashed the suspension because the case "consisted of a paper only record with conflicting documents." The deputy's sworn affidavit of refusal to submit to a test stated that the defendant was arrested for DUI on February 6 at 6:52 p.m., but that affidavit and the breath alcohol test affidavit stated that the refusal occurred on February 6 at 6:01 p.m., and the cover sheet for the arrest affidavit stated the arrest was on February 7 at 12:25 a.m. The court stated that DHSMV "argues that the arrest affidavit alone is competent substantial evidence that the arrest occurred prior to the implied consent warnings. However, [it] is asking this court to reweigh and reevaluate the evidence, which it cannot do. . . . [It] did not present live testimony at the hearing and instead chose to rely solely on the written documents. . . . Without live testimony to explain the discrepancies, the conflicting documents are not competent substantial evidence to affirm the suspension."

***Spillman v. DHSMV*, 24 Fla. L. Weekly Supp. 324b (Fla. 18th Cir. Ct. 1992)**

The defendant's license was suspended for refusal to submit to a breath test, and he sought review, arguing that his refusal was not incident to a lawful arrest. The circuit court, in its appellate capacity, granted review and stated:

> The only evidence before the hearing officer touching upon the issue was the preprinted statement of the officer in the Affidavit of Refusal: "That I did have probable cause to believe the person had been driving or had been in actual physical control of a motor vehicle within the state while under the influence of alcoholic, or chemical or controlled substances." There is no factual evidence,

> direct or circumstantial, in the officer[']s affidavit that would support that bare opinion. Nothing in any of the documents before the hearing officer provides a legal basis for the conclusion that the officer had probable cause to believe Defendant was driving or in actual physical control of a motor vehicle.

The court held the hearing officer's decision was not supported by competent, substantial evidence and ordered DHSMV to restore the defendant's license within ten days.

***Gonzalez v. DHSMV*, 24 Fla. L. Weekly Supp. 322a (Fla. 11th Cir. Ct. 2016)**

The defendant's license was suspended, and he filed a petition for writ of certiorari. The circuit court dismissed the petition for lack of prosecution, "thus eliminating his ability to challenge the final administrative order," granted summary relief to him, and refused to accept DHSMV's response as timely filed. The defendant filed a motion for rehearing before the circuit court in its appellate capacity, asserting that the order summarily quashing the final administrative order and the order dismissing the defendant's petition were inconsistent. The court clarified and vacated the order dismissing the defendant's petition, reinstated the petition for certiorari, and vacated the order granting summary relief.

***Hilton v. DHSMV*, 24 Fla. L. Weekly Supp. 317a (Fla. 8th Cir. Ct. 2016)**

The defendant's license was suspended after he refused to take a breath test, and he sought review, arguing that the traffic stop was not lawful "because the officers lacked probable cause to believe he had committed a traffic infraction or reasonable suspicion of criminal activity." The circuit court, in its appellate capacity, denied review, stating that the officer saw a silver truck driving in the parking lot, lost sight of it for a moment, and then heard a crash. He then saw the vehicle leaving the parking lot with "fresh damage to the tail light assembly." The officer he asked to conduct a stop while he investigated further saw the tail-light assembly dangling from the truck before conducting the stop. "The traffic stop was conducted based on these facts, which are more than a mere hearing of spinning tires and slamming brakes."

***Edwards v. DHSMV*, 24 Fla. L. Weekly Supp. 313b (Fla. 9th Cir. Ct. 2016)**

After the defendant was stopped for making an improper right turn, his license was suspended for his refusal to take a breath test. The circuit court, in its appellate capacity, denied the defendant's petition for writ of certiorari "because the trooper made an objectively reasonable mistake of law that provides reasonable suspicion necessary to support the traffic stop." The court held further that the defendant "failed to preserve his argument for appellate review that there was no reasonable suspicion justifying a request to perform field sobriety exercises, he was sufficiently told that there would be adverse consequences for refusing to perform the field sobriety exercises, and his due process rights were not violated regarding the hearing officer's approach to the video he presented that would not play during the hearing."

VII. Red-light Camera Cases

***City of Oldsmar v. Trinh*, __ So. 3d __, 2016 WL 6352509 (Fla. 2d DCA 2016)**

The defendant got a citation for a red-light camera violation. She filed a motion to dismiss, which the trial court granted. The city and the attorney general challenged the dismissal and certified two questions:

> 1. DOES SECTION 316.0083(1)(a) AUTHORIZE A MUNICIPALITY TO CONTRACT WITH A THIRD PARTY VENDOR TO SORT IMAGES FROM A TRAFFIC INFRACTION DETECTOR SYSTEM INTO QUEUES BASED ON WRITTEN DIRECTIVES FROM THE MUNICIPALITY?
>
> 2. DO SECTIONS 316.640(5)(a) AND 316.0083, FLORIDA STATUTES, PROHIBIT A MUNICIPALITY FROM CONTRACTING WITH A THIRD PARTY VENDOR TO ELECTRONICALLY GENERATE AND MAIL A NOTICE OF VIOLATION AND UNIFORM TRAFFIC CITATION AFTER THE CITY'S TRAFFIC INFRACTION HEARING OFFICER FINDS PROBABLE CAUSE TO ISSUE A NOTICE OF VIOLATION AND AUTHORIZES THE VENDOR TO ELECTRONICALLY GENERATE AND MAIL THE NOTICE BY CLICKING "ACCEPT" IN THE SOFTWARE PROGRAM USED BY THE CITY AND VENDOR?

The appellate court answered the first question in the affirmative and the second in the negative, and reversed the order dismissing the citation. It stated further: "We also disagree with the Fourth District's decision in [*City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014)] to the extent it conflicts with our decision, and we certify conflict with *Arem*." http://www.2dca.org/opinions/Opinion_Pages/Opinion_Pages_2016/October/October%2028,%202016/2D15-4898.pdf

***City of Boynton Beach v. Boss*, 24 Fla. L. Weekly Supp. 494b (Fla. 15th Cir. Ct. 2016)**

The defendant's red-light violation was dismissed, and the city appealed. The circuit court, in its appellate capacity, reversed, distinguishing this case from *City of Hollywood v. Arem*, 154 So. 3d 359 (Fla. 4th DCA 2014), because "the City's contract with ATS [the vendor] specifically establishes that ATS does not and cannot make any decisions regarding whether a violation occurred. ATS's discretion is similarly limited by the [Business Rules Questionnaire], which sets forth easily observable standards that dictate whether ATS should forward or otherwise discard images of potential infractions. Most critically, . . . ATS does not itself issue the UTC."

***Klunder v. City of South Pasadena*, 24 Fla. L. Weekly Supp. 313a (Fla. 6th Cir. Ct. 2016)**

The defendant's red-light violation was upheld and he appealed. The circuit court, in its appellate capacity, affirmed, stating that the defendant's argument that he was not the registered owner of the vehicle was without merit and contrary to public policy, since it was "based on his failure to renew his motor vehicle registration. . . . An owner is defined as the 'person who holds the legal title of a vehicle.' . . . Because [the defendant] was the owner of the vehicle at the time of the violation, he was liable for the violation, despite the fact that his registration was expired."

The court further held that the defendant's argument that "the vehicle did not run a steady red light . . . rests on an imaginary threshold amount of time after a yellow light turns red before

it is considered 'steady.' . . . [The defendant] asserts that the statute is vague and does not define steady red. He argues that a light needs to be red 'for a least a second' to be considered a steady red light. [His] argument is misplaced. Section 316.075(1)(c) describes the red light as steady only to differentiate it from the flashing red lights discussed in another section of the statute."

VIII. County Court Orders

***State v. Jackson*, 24 Fla. L. Weekly Supp. 580b (Monroe Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress the results of his Horizontal Gaze Nystagmus test. The court granted the motion, stating: "The State . . . agreed that the results of the [HGN] test would not be admissible. However, the state argues that the officer who administered HGN could testify that the Defendant was not able to follow the instructions given before the exercise was conducted. The Court after viewing the videotape . . . , will not allow the portion of the video during which this exercise is conducted to be admitted in any trial of this matter. The State will have ample opportunity to describe the appearance and performance of the Defendant in other areas addressed in this case."

***State v. LaPlante*, 24 Fla. L. Weekly Supp. 570a (Hillsborough Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress breath results and/or dismiss for violation of public records law. The court granted the motion to suppress because "the deionized water used in analyzing alcohol reference solutions [in the defendant's] lot numbers . . . was not tested prior as required by [FDLE's] standard operating procedures." It held further that an FDLE department inspector intentionally violated the public records law and fined him $500 and awarded the defendant reasonable costs of enforcement, stating it "was literally dumbfounded [that the inspector] would deliberately bypass FDLE's legal department, asking no assistance or even a helpful review regarding defense counsel's public records requests."

***State v. Fletcher*, 24 Fla. L. Weekly Supp. 545a (Volusia Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress. The court granted it, finding that her "driving did not create a reasonable suspicion that she was impaired. . . . A driving pattern may be unusual without being erratic. Here, Defendant's driving pattern — multiple U-turns, slowing to below the speed limit, and stopping at a gas station (perhaps to ask for directions) — is strongly suggestive of a person who is lost."

***State v. Swick*, 24 Fla. L. Weekly Supp. 543a (Volusia Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress. The court granted it, stating that although the officer had probable cause to stop the defendant based on his failure to maintain a single lane, and he had reasonable suspicion to stop him for a well check, "nothing was done to address either the . . . traffic infraction or to investigate a possible DUI charge. The wait for someone else to arrive to begin a DUI investigation was unreasonable."

***State v. Plebanek*, 24 Fla. L. Weekly Supp. 542a (Volusia Cty. Ct. 2016)**

The defendant was arrested for DUI and filed a motion to suppress. The court denied the motion, noting that the road where the defendant had been stopped was closed for public safety during an airplane event, not to detect drivers who were DUI. Therefore, it did not involve a "true investigatory roadblock," and "compulsory interaction with law enforcement is lacking."

***State v. Ryan*, 24 Fla. L. Weekly Supp. 452b (Manatee Cty. Ct. 2016)**

The defendant was charged with DUI and filed a motion to suppress the evidence of his performance on field sobriety exercises and a breath test. The court denied the motion as to the field sobriety exercises because, while the defendant did not freely consent to them, consent is not necessary when there is probable cause or reasonable suspicion of DUI. But it granted the motion as to the breath test, finding the defendant's claim that he requested a blood test more credible than the trooper's testimony to the contrary, and that the defendant was discouraged from pursuing a blood test by the trooper's incomplete and incorrect statement of the law.

The defendant also sought sanctions against the sheriff's office for failing to preserve the jail video, but the court declined to impose sanctions, citing a lack of bad faith and a showing by the state "that the any evidence revealed by the video would have been, at most, 'potentially useful,' but not 'materially exculpatory.'"

***State v. Perez*, 24 Fla. L. Weekly Supp. 431a (Leon Cty. Ct. 2016)**

The defendant was charged with DUI and filed a motion to suppress, which the court granted. The court stated that there while it was not disputed that the defendant had actual physical control of the vehicle, there was not sufficient evidence that he had "the capability to operate the vehicle, regardless of whether [he was] actually operating the vehicle at the time." The officers had not observed the defendant in actual physical control of the vehicle, and the defendant's "keys were not in the ignition, not on his person, not in a front console area, or anywhere inside of the vehicle. [He] was separated from his keys by a physical barrier, the driver's side door, while he sat inside of an inoperable vehicle."