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APPENDIX B

The Committee on Standard Jury Instructions in Criminal Cases
The Honorable Joseph A. Bulone, Chair
June 19, 2013

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Dear Committee Members:

The Florida Prosecuting Attorney's Association ("FPAA") respectfully offers the following comments on the proposed Standard Jury Instruction 8.25 regarding Violations of a Condition of Pre-Trial Release for domestic violence charges.

We believe the proposed jury instruction as it is presently worded is contrary to the legislative intent of Section 741.29(6), Florida Statutes, as well as the case law we rely upon. The FPAA specifically objects to the language "was released from custody," as it contradicts case law specific to this instruction.

Specifically, the instruction is in direct contrast with Santiago v. Ryan, 2013 WL 870375 (Fla. 3d DCA March 11, 2013) (attached as "Exhibit 1"). In Santiago v. Ryan, the defendant argued that he could not violate a condition of pre-trial release while still in custody. However, the court ultimately held that a defendant can violate a condition of pretrial release after bond is set but before the defendant is released from custody. Id. at 1. The notion that a defendant can violate a condition of pretrial release while still in custody has also been upheld in State v. Rispoli (attached as "Exhibit 2"), wherein a county court granted the State's Motion in Limine to exclude the Defense from talking about the Defendant never being released from custody. In its Order, the court held that the fact that the Defendant never posted bond is of no consequence to his pretrial release status. Id. The court further stated that a defendant may not opt to forego posting bond so that he can continually violate the law while in custody and be immune from punishment.

Moreover, in Rispoli, the court analyzed the legislative and statutory intent of Chapters 741 and 903.047, Florida Statutes. In so doing, the court reasoned that the statutory language of Section 741.29(6) and 903.047, Florida Statutes, does not indicate the defendant must be released from custody before the conditions of release apply. To read an element into the statute which permits the Defendant to harass the victim from jail without consequence would negate the intent of the Legislature in trying to ensure the safety of victims. See Section 741.2902, Florida Statutes.

The FPAA respectfully requests that this Committee redraft the proposed language in subsection 2 of the instruction to read:

“Before (his) (her) trial, **Defendant’s bond on the domestic violence charge was set** with a condition of (insert condition of pretrial release in Fla. Stat. 903.047).”

With this language, the jury instruction would then comport with the statutes and case law.

As always, the FPAA remains grateful for the time and efforts of the members of this Committee, and appreciates the opportunity to comment on these proposed jury instructions.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'William Eddins', is written over the typed name.

WILLIAM EDDINS

PRESIDENT OF

FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

Westlaw.

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109 So.3d 848, 38 Fla. L. Weekly D607
(Cite as: 109 So.3d 848)

H

District Court of Appeal of Florida,
Third District.
Henry SANTIAGO, Petitioner,
v.
Timothy P. RYAN, et. al., Respondents.

No. 3D13-420.
March 11, 2013.

Background: Defendant filed a petition for writ of habeas corpus challenging an order of the Circuit Court, Miami-Dade County, Stacy Glick, J., revoking his pretrial release on charge of aggravated stalking and detaining him without bond.

Holding: The District Court of Appeal, Schwartz, Senior Judge, held that statute governing revocation of pretrial release applied to defendant who committed new felonies from jail during period between setting of bond for prior offense and his release.

Petition denied.

West Headnotes

[1] Bail 49 ⚡ 73.1(1)

49 Bail

49II In Criminal Prosecutions

49k73.1 Revocation or Modification of Bail

49k73.1(1) k. In general. Most Cited Cases

Statute providing that a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that defendant committed a new crime while on pretrial release applies when defendant commits a new crime after the bond on his first case has been set but before he is released on the bond. West's F.S.A. § 903.0471.

[2] Bail 49 ⚡ 73.1(1)

49 Bail

49II In Criminal Prosecutions

49k73.1 Revocation or Modification of Bail

49k73.1(1) k. In general. Most Cited Cases

Statute providing that a court may, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that defendant committed a new crime while on pretrial release applied to permit trial court to revoke defendant's pretrial release and order pretrial detention, where defendant committed new felonies from jail, i.e., he made threatening phone calls to his ex-wife while incarcerated for committing aggravated stalking against her, during period between setting of bond for prior offense and his release. West's F.S.A. § 903.0471.

*849 Carlos J. Martinez, Public Defender, and John Eddy Morrison, Assistant Public Defender, for petitioner.

Pamela Jo Bondi, Attorney General, and Jay E. Silver, Assistant Attorney General, for respondents.

Before SHEPHERD and LAGOA, JJ., and SCHWARTZ, Senior Judge.

SCHWARTZ, Senior Judge.

Santiago seeks habeas corpus relief from an order revoking his pretrial release and detaining him without bond entered pursuant to section 903.0471, Florida Statutes (2000):

Notwithstanding s. 907.041, a court *may*, on its own motion, revoke pretrial release and order pretrial detention if the court finds probable cause to believe that the defendant committed a new crime while *on pretrial release*.

(Emphasis added). The legal issue presented by the undisputed facts is whether the statute applies when the defendant commits new felonies from jail

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agreed with the factual premises of the appellant's argument but not with his conclusion, finding that it could lead to paradoxical results:

Since Williamson's probationary term, which was to follow his year in jail, had not yet begun, he could not have been in violation of any of its express terms prior to that time—even if he had committed a first degree murder while at liberty.

Id. at 1347. Affirming the revocation of probation and resentencing, this Court found the following language of *Martin* to be controlling:

"The question here is whether a defendant probationer can, with impunity, engage in a criminal course of conduct (or for that matter any course of conduct which is essentially contrary to good behavior) during the interval between the date of an order of probation and some subsequent date when the probationary term is to commence. We think not. To hold otherwise would make a mockery of the very philosophy underlying the concept of probation, namely, that given a second chance to live within the rules of society and the law of the *851 land, one will prove that he will thereafter do so and become a useful member of society.

Again to draw upon the language of the *Martin* opinion, it would be a mockery to permit Williamson to claim his continued entitlement to future probation after he deliberately and knowingly violated the trust reposed in him upon the granting of his own request for a reciprocal benefit.

We will not approve such a result."

Williamson, 388 So.2d at 1347–48 (quoting *Martin*, 243 So.2d at 190–91).

[2] Similarly, in the case at bar, we think that the claim that a defendant is free to commit new crimes without endangering a previous order of pretrial release merely because he had not yet complied with the conditions requires an unsupportable

anomaly in the statute, which, as in *Williamson*, we will not approve. See *State v. Hackley*, 95 So.3d 92, 95 (Fla.2012); *State v. Burris*, 875 So.2d 408, 414 (Fla.2004); *Maddox v. State*, 923 So.2d 442, 448 (Fla.2006).

In essence, the issue is one of statutory interpretation which, of course, is based entirely upon a correct reading of legislative intent. The very purpose of enacting section 903.0471 was to reinstate the common and well justified practice of, in effect, granting a defendant only one shot at pretrial release and, as it were, automatically revoking it when he has violated its most basic term by committing another offense thereafter. By doing so, the legislature overruled *Paul v. Jenne*, 728 So.2d 1167 (Fla. 4th DCA 1999), *rev. granted*, 741 So.2d 1137 (Fla.1999), which held that this could not lawfully be done. See also *Parker v. State*, 780 So.2d 210 (Fla. 4th DCA 2001), *rev. granted*, 800 So.2d 615 (Fla.2001). It is inconceivable, that the legislature would contemplate that the policy of "two strikes and you're in" would not take effect merely because the defendant did not even have the goodness to be released from jail before he violated his first bond. See *State v. Martinez*, 103 So.3d 1013 (Fla. 3d DCA 2012).

Habeas corpus denied.

Fla.App. 3 Dist.,2013.
Santiago v. Ryan
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END OF DOCUMENT

14 Fla. L. Weekly Supp. 662a

Criminal law -- Domestic violence -- Pretrial release -- Violation of conditions -- Fact that defendant did not post bond and remained in jail at time he violated no-contact condition of release by making numerous telephone calls to victim through third party is not relevant to charge of violation of condition of release, and defendant is precluded from arguing that he cannot be charged with violation of condition because he had not been released from custody at time of alleged violations

STATE OF FLORIDA, Plaintiff, vs. JAMES ROBERT RISPOLI, Defendant. County Court, 18th Judicial Circuit in and for Brevard County. Case No. 05-2006-MM-17497-AXXX. December 22, 2006. Kenneth Friedland, Judge. Counsel: Jason P. Arthur, Assistant State Attorney, Office of the State Attorney. Christina Pryor, Office of the Public Defender, for Defendant.

ORDER GRANTING STATE'S MOTION IN LIMINE

FOR DETERMINATION OF PRETRIAL RELEASE

This cause came before the Court for hearing and trial on June 5, 2006 on both parties' Motion In Limine For Determination of Pretrial Release. The Court having considered representations of fact, the arguments and the presentations by counsel, applicable law, and having been otherwise advised in the premises; the Court hereby finds as a matter of fact and concludes as a matter of law, as follows:

Factual Background

1. On January 6, 2006, the Defendant, James Robert Rispoli was arrested for Battery-Domestic Violence ("DV") and was ordered to have no contact with the victim in said case. The Defendant posted the required bond and was released from jail the same day.
2. On January 7, 2006, the Defendant, James Robert Rispoli, was arrested for Violation of a Condition of Release when he allegedly made contact with the victim of the previous case. He was given another no contact order with the victim of the Battery - DV case and again posted the required bond. The Defendant was released from jail the next day.
3. On February 2, 2006, the Defendant, James Robert Rispoli, was arrested for Violation of Condition of Release, Tampering with a Witness, and Aggravated Stalking. He was once again given a no contact order with the victim and was granted a bond. As of June 5, 2006, the Defendant had not posted the bond in this case and remained in jail.
4. Between February 15, 2006 and February 19, 2006, the Defendant, James Robert Rispoli, allegedly made numerous telephone calls via a third party to the victim in the three pending cases in violation of the court orders. The Defendant was subsequently charged by Information with six counts of Violation of Condition of Release. These six charges are the basis for the State's Motion In Limine in this case.

The State charged the Defendant with six counts of Violation of Condition of Release under Fla. Stat. § 741.29(6) (2006) which states: "A person who willfully violates a condition of release provided in s. 903.047, when the original arrest was for an act of domestic violence as

defined in s. 741.28, commits a misdemeanor of the first degree. . . .”

Section 741.29(6) references Fla. Stat. § 903.047 (2006) which directs what a court must require of a defendant if the defendant is placed on pretrial release. This section states *inter alia*, “[T]he court shall require the defendant refrain from criminal activity of any kind; and the defendant refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure.” *Id.*

The State sought, through a motion in limine, to prevent the Defense from disclosing to the jury during trial that the Defendant had not been released from custody, as it was irrelevant to the crime charged, was more prejudicial than probative, and would only act to confuse and mislead the jury as to what the elements of the crime of Violation of Condition of Release are.

The Defendant asserted that since he had not been released from jail when he allegedly made the telephone calls to the victim between February 15, 2006 and February 19, 2006, he could not be charged, much less convicted of a Violation of a Condition of Release. The Defendant claimed that § 741.29(6) is vague, and therefore the Rule of Lenity applies in this case.

Fla. Stat. § 775.021 (2006), commonly referred to as the Rule of Lenity, provides that statutes shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorably to the accused. *See State v. Rubio*, 917 So.2d 383, 397, 398 (5th DCA 2005). The Defendant asserted that § 741.29(6) is ambiguous as to the meaning of “release” and “release” can only mean release from custody. Since the Defendant in the instant case was still in custody when the alleged telephone calls were made, he had not been released per the statute, and therefore could not be charged with Violation of a Condition of Release. The Defendant wanted to be able to argue to the jury, that his failure to be released from custody was a defense to the charges.

The State claimed that the statutory intent would be vitiated if the Court were to accept the Defendant’s argument. The State also argued that the Defendant added an element to the statute that did not exist i.e. release from custody. Lastly, the State asserted that pretrial release is equivalent to a bond whether it is a surety bond, signature bond, or release on recognizance. Therefore, whether the Defendant can post the required bond is immaterial and the no contact condition takes effect from the point it was ordered by the judge at first appearance.

Analysis

It is well established that it is the jury’s function to decide the facts of the case, and the judge’s responsibility to instruct the jury as to the applicable law. It would be a miscarriage of justice to allow either party to argue a misstatement of the law to the jury at any point during the trial. Upon further review, there seems to be little authority, if any at all, directly on point with the instant issue to guide this Court and, therefore, this may be an issue of first impression.

After considering the arguments of both parties and the applicable laws, this Court finds that the Defendant’s argument that any ambiguity within § 741.29(6) should be resolved and construed in favor of the Defendant is without merit in the instant case for the reasons stated below.

Statutory Intent

To discern legislative intent, the courts apply a common-sense approach which requires consideration of the statutory language, the purpose of the statute, the evil to be corrected, the legislative history, and the pertinent case law that has applied the statute or similar enactments. 917 So.2d at 397. The legislative intent with respect to the judiciary's role in domestic violence cases can be found under Fla. Stat. § 741.2902 (2006).

It is the intent of the Legislature with respect to domestic violence cases, that at first appearance the court shall consider the safety of the victim, the victim's children, and any other person who may be in danger if the defendant is released, and exercise caution in releasing defendants. *Id.* at 741.2902(1).

The statutory language of sections 741.29(6) and 903.047 does not indicate that the defendant must be released from custody before the conditions of release apply. However, to read an element into the statute which permits the Defendant to harass the victim from jail without consequence would negate the intent of the Legislature, specifically that the Court consider the safety of the victim, the victim's family, and any other person who may be in danger when imposing the conditions of pretrial release.

Pretrial Release

The State argues that ordering conditions of pretrial release is equivalent to the Court granting a bond. In support of its argument, the State points out that upon arrest, a defendant is guaranteed one of two options: the first being pretrial detention; and the second being pretrial release.

The guidelines for pretrial detention are set out under Fla. Stat. § 907.041(4) (2006) and Fla. R. Crim. P. 3.132. Pretrial detention differs from pretrial release in that, under pretrial release, a defendant is given an opportunity to be released from custody. If being held under pretrial detention, a defendant may not be released until the basis for detention has been eliminated, or until further order of the court. *Id.* at 907.041(4)(k).

Pretrial release is outlined in §§ 907.041(1-3) and Fla. R. Crim. P. 3.131. Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or ensure the integrity of the judicial process, the accused may be detained. *Id.* at 3.131(a).

Bail is defined as any of the forms of release stated in Fla. R. Crim. P. 3.131(b)(1). The forms of release stated in this section include personal recognizance of the defendant, an unsecured appearance bond, placement of restrictions on travel and the place of abode of the defendant during period of release, placement of the defendant in the custody of a designated person or organization, execution of a bail bond with sufficient solvent sureties, or any other condition deemed reasonably necessary to assure appearance as required. *Id.* Under Rule 3.131,

pretrial release is defined and thus not susceptible to differing opinions. The Rule of Lenity does not apply in this case.

The Defendant in the instant case was not being held under pretrial detention; he was given a bond with specific conditions to follow. The bond and conditions of release originated at first appearance. The fact that the Defendant never posted the bond is of no consequence to his pretrial release status. Inability or unwillingness to post a reasonable bond does not give a defendant the opportunity to violate the law without consequence.

The argument can be made that the issuance of the bond and the conditions of release that followed were a contract between the Court and the Defendant. When the Defendant did not post the bond, he did not ratify the contract and thus the conditions were not in force. This position could have potentially had merit if this were a civil case, but it does not comport with the facts presented here. The State was correct when it argued that the Defendant was entitled to pretrial release as long as he did not qualify for pretrial detention. Pretrial release is not a contract that a Defendant can choose not to accept. Rather, pretrial release is a Constitutional right granted to all qualifying Defendants under article 1, section 14 of the Florida Constitution. *Ho v. State*, 929 So.2d 1155, 1157 (Fla. 5th DCA 2006). A Defendant may not opt to forego posting bond so that he can continually violate the law while in custody and be immune from punishment; to hold otherwise would be in stark contrast to the legislative intent, a disservice to the victim, and a disservice to the community as a whole.

Release from custody is not relevant to the crime of Violation of a Condition of Release and permitting the Defendant to argue otherwise would likely mislead the jury. Therefore, the Defendant is excluded from arguing that he cannot be charged with the instant crime since he was not released from custody at the time it was allegedly committed. Had the Defendant in this case been held under Pretrial Detention rather than Pretrial Release, the opinion of this Court may have been different.

Therefore, it is hereby ORDERED and ADJUDGED that the State's Motion in Limine is GRANTED.



Florida Public Defender Association, Inc.

May 7, 2013

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Dear Committee Members:

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Standard Jury Instructions published in the April 1, 2013 edition of The Florida Bar News.

The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members have tremendous practical experience with the standard jury instructions and are deeply interested that those instructions promote fairness, integrity, and accuracy in the criminal justice system.

The FDPA agrees with the vast majority of those amendments and is grateful for all of the hard work and effort that is manifest in the many proposed amendments. The FPDA, however, is concerned with three of the amendments and appreciates this opportunity to comment on them. These comments will address the proposed standard jury instruction in the order published.

12.1, 12.2—Arson

The committee has proposed adding an instruction to be read in every case that: "In order to convict the defendant of Arson, it is not necessary for the State to prove [he] [she] intended to damage the [dwelling] [structure]." Thus, this proposal is a negative jury instruction, telling the jury on what are not the elements of this crime.

The proposal cites two cases as supporting this instruction, but neither case addressed the issue of jury instructions. Instead, both *N.K.D. v. State*, 799 So. 2d 428 (Fla. 1st DCA 2001), and *Knoghten v. State*, 568 So. 2d 1001 (Fla. 2d DCA 1990), address sufficiency of the evidence and hold that arson is general intent crime, one in which the person need only intend the actions, not the consequences.

First, this negative jury instruction is unnecessary. The arson instructions already tell the jury that the elements are: (1) an intent to start a fire; and (2) that it caused damage. Those two elements adequately tell the jury that intent goes only to the action, not the consequence.

Case law also suggests that such negative instructions are unnecessary. *See Peters v. State*, 33 So. 3d 812, 814 (Fla. 4th DCA 2010) (if jury is properly instructed on the elements of a principal, jury should not be instructed that mere presence at the scene is not sufficient for conviction); *McGuire v. State*, 639 So. 2d 1043, 1046-47 (Fla. 5th DCA 1994) (same); *Alvarez v. State*, 890 So. 2d 389, 395-97 (Fla. 1st DCA 2004) (if jury is properly instructed on evaluating witnesses, the jury need not be given an instruction that jail-house snitches are particularly unreliable); *Thomas v. State*, 494 So. 2d 240, 246-47 (Fla. 4th DCA 1986) (if instructed on the state's burden to prove case beyond reasonable doubt, jury need not be negatively instructed that if the jurors were not convinced beyond a reasonable doubt, they must acquit).

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Florida Public Defender Association, Inc.

Second, this negative jury instruction is little more than a jury argument, and should be left to the prosecutor. If this negative jury instruction were given, defense counsel could then ask for its own negative instruction, equally supported by case law: “if the fire was not set intentionally but negligently, then the jury must acquit.” See *J.H. v. State*, 107 So. 3d 1249, 1249 (Fla. 1st DCA 2013); *T.E. v. State*, 701 So. 2d 1237, 1238 (Fla. 3d DCA 1997). The trial court should not breach its neutrality by giving either negative instruction.

28.4, 28.82, 28.84—Leaving the Scene of an Accident and Fleeing and Eluding

The committee proposes amending all of these instructions to require that the defendant “knew or should have known from the nature of the crash or accident of the injury or death of the person.”

The “should have known” language first appeared as dicta in *State v. Mancuso*, 652 So. 2d 370, 372 (Fla. 1995). The prior element requiring that the defendant knew or should have known of the crash (the committee proposes adding “or accident”) is very much in doubt. As of January 2013, the law in the State of Florida is that actual knowledge of the crash or accident is required making the “or should have known” language an incorrect statement of law. *Dorsett v. State*, 38 Fla. L. Weekly D233 (Fla. 4th DCA Jan. 30, 2013). The state has sought, but not yet been granted, review of *Dorsett* in the Supreme Court of Florida. The FPDA believes that the entire concept of imputed knowledge under this statute is questionable.

Even assuming that such imputed knowledge is proper, and the Supreme Court of Florida will probably have to decide the issue, the standard jury instructions should not tell the jury to impute that knowledge from only one fact: “the nature of the crash or accident.”

Once again, that instruction is really an argument of counsel. Typically, prosecutors argue that a defendant should have known that someone was hurt based on the facts or severity of the crash itself. But directing the jury to look at only the nature of the crash is suggesting that the jury not look at other facts that may suggest a different outcome—severe weather, distracting circumstances on the roadway, distractions in the car, etc.

The jury should be free to look at all facts when coming to this decision. The trial court should not breach its neutrality by suggesting that the jury look to only one factor, the nature of the crash, in making its determination that a driver should have known about the crash. .

28.18—Failure to Obey

Broadly read, section 316.072(3), Florida Statutes, criminalizes disobeying any lawful order by a police officer, making it, as a practical matter, redundant with the resisting without violence charge in section 843.02, Florida Statutes. The key element under both statutes is that the police action or order must be “lawful.” The problem is that what is “lawful” depends on the specific situation and a wide body of law that governs in various of contexts.

The issue was recognized by the Supreme Court of Florida almost 20 years ago in *State v. Anderson*, 639 So. 2d 609 (Fla. 1994), which upheld the standard jury instruction (telling the jury only that conviction requires a “lawful execution of a legal duty”) but then held: “However, in those cases where the defendant maintains that the arrest was unlawful and requests that the jury be instructed on that defense, an instruction should be given to insure that the jury understands that it must decide the issue.” *Id.* at 610. Thus, the standard instruction is sufficient only in cases where no special instruction is requested. See *Thomas v. State*, 970 So. 2d 460, 462 (Fla. 1st DCA 2007). The standard instruction has never been amended because the instructions have to be tailored to the specific case. See *Brown v. State*, 36 So. 3d 826, (Fla. 5th DCA 2010) (“Unfortunately, there is no standard instruction appropriate to all circumstances so courts have struggled with these instructions.”). Similarly, there is no one-size-fits-all option that makes this statute subject to a standard jury instruction.

The standard jury instruction on resisting without violence has become a trap for the unwary. See, e.g., *Stevens v. State*, 982 So. 2d 1239 (Fla. 5th DCA 2008); *Albury v. State*, 910 So. 2d 930, 933-34 (Fla. 2d DCA 2005);



Florida Public Defender Association, Inc.

Bratcher v. State, 727 So. 2d 1114, 1117 (Fla. 5th DCA 1999); *Elliot v. State*, 704 So. 2d 606 (Fla. 4th DCA 1997). Generally, the standard jury instructions are presumed to be correct. It does no service to the criminal justice system to have a standard jury instruction that is admittedly inadequate except in the rarest of cases when the legality of the police officer's order or action is not at issue.

To use an example that has often troubled the disorderly conduct/breach of the peace statute, many times the police officers' orders are for citizens to leave a public forum (streets or sidewalks) and/or cease protesting (often with much vulgarity) police actions or presence. Such protests, however distasteful, are constitutionally protected even if they are disobeying police orders. See *C.N. v. State*, 49 So. 3d 831, 832 (Fla. 2d DCA 2010) ("[T]he officer instructed the teens in the vicinity to move along, but C.N. failed to do so and rolled her eyes."); *Fields v. State*, 24 So. 3d 646, 647 ("Fields did not comply with the verbal command [to get down on the ground] and responded by stating, 'What the f--- you got that gun out for, you are going to go and shoot me?'); *B.R. v. State*, 657 So. 2d 1184, 1185 (Fla. 1st DCA 1995) (when police officer demanded to know defendant's name, she replied "I don't have to tell you a fucking thing."). Nothing in the proposed jury instruction begins to address these constitutional issues.

Additionally, there may be a narrowing construction that avoids many (but not all) of these constitutional problems. There is only one case interpreting section 316.072(3), *Koch v. State*, 39 So. 3d 464 (Fla. 2d DCA 2010), and that case arose in an unusual procedural posture—a request by the defense for an instruction on this statute as a lesser-included crime. As a result, no party was before the court who could point out constitutional problems with this statute: the defendant was trying to get a charge under this statute, and the state certainly was not going to point out the statute's more problematic aspects.

The narrow holding of *Koch* is that this statute is not a lesser included offense of fleeing and eluding. The *Koch* court did not consider whether there must be a nexus between traffic control and the lawful order. The proposed jury instructions list those as two separate elements with no nexus. That interpretation is probably incorrect. This statutory section is entitled: "Obedience to and effect of traffic laws." The prior section makes violating the traffic laws in chapter 316 a moving violation. The subsequent sections govern whether the traffic laws apply to work crews, emergency vehicles, and the like. A couple of sections later is the section requiring obedience to traffic control devices. § 316.074, Fla. Stat. (2012).

Statutes are to be interpreted in context. This statute is a traffic control statute, and the lawful order therefore must be an order regulating the flow of traffic. The proposed instruction, however, contains no such limitation—it allows conviction for disobeying any order if at the time the person given the order is a driver or pedestrian on any street or road even if the lawfulness of the order had nothing to do with traffic on the roadway. This interpretation does not comport with the rule of lenity codified in section 775.021(1), Florida Statutes.

The FPDA respectfully suggests that this committee not draft proposed jury instructions for this statute until the courts have had an opportunity to consider all of these issues. As it stands now, this committee's proposal is more of an attempt to make law than it is a reflection of existing law.

Respectfully submitted,

/s/ Julianne M. Holt

Julianne M. Holt

President, Florida Public Defender Association, Inc.

Bart Schneider

From: Darrell Sedgwick [DarrellSedgwick@morganandbarbary.com]
Sent: Wednesday, May 22, 2013 10:18 AM
To: Criminal Jury Instructions
Cc: Patrick Barbary
Subject: Amendments to criminal case jury instructions

Dear Committee:

In my April 1, 2013 issue of the Florida Bar News, I read the suggested amendments to criminal case jury instructions, which were published "for comments." I have one comment:

I feel that the suggested amendment to 28.14 Boating Under the Influence should not be allowed, and that the instruction be left as it is presently worded. The amendment would remove the requirement that a "vessel" be defined as such, at least partly, by the fact that it is "subject to a license tax for operation." To remove that qualifying description of vessel would leave open to charges of DUI anyone operating "every description of watercraft" without qualification. Certainly, there are prosecutors in Florida who would seek to convict competitors in bathtub races, as such a tub is certainly a "watercraft." A creative mind could find a long list of floatables that could all fall within the concept of "every description of watercraft," and thereby defeat the common-sense public safety intent of the DUI law.

Thank you,

Darrell Sedgwick

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BREVARD & SEMINOLE COUNTIES

MARY LU TOMBLESON
EXECUTIVE DIRECTOR

BLAISE TRETTIS
PUBLIC DEFENDER

April 8, 2013

Standard Jury Instructions Committee in Criminal Cases
c/o Bart Schneider, General Counsel's Office
Office of the State Courts Administrator
500 S. Duval Street
Tallahassee, Florida 32399-1900

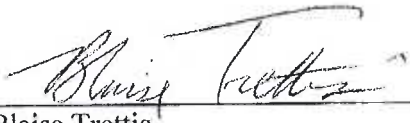
ARGUMENT THAT PROPOSED NEW INSTRUCTION 29.3
CRIMINALIZES CONDUCT THAT IS NOT A CRIME

Element 1.a. combined with element 2 of proposed new instruction 29.3 would make it a crime for a person to give an alcoholic beverage to a person under the age of 21. This is not a crime. If this were a crime then Catholic priests would be committing a crime thousands of times every week giving Holy Communion wine to Catholics under the age of 21. It would also be a crime for a parent to give their children packages of alcohol to carry in the house from the car. Section 562.11 Fla. Stat. regulates only licensed vendors of alcoholic beverages upon the licensed premises of such vendors. See *Bryant v. Pistulka*, 366 So.2d 479, 480 (Fla. 1st DCA 1979) and decisions cited therein.

The instruction would not criminalize conduct that is not a crime if the words "on licensed premises" were added to the end of proposed element 1.a.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was sent electronically in Word format to CrimJuryInst@flcourts.org and was sent by U.S. mail delivery to Standard Jury Instructions in Criminal Cases, c/o Bart Schneider, 500 S. Duval St., Tallahassee, FL 32399-1900 this 8th day of April 2013.


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