"What a long, strange trip it's been."
— The Grateful Dead

Is It 2021 Yet?

by
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As I write this column of the DUI Notes section of *The Defender* magazine, the embers of the firestorm that is the calendar year 2020 still are aglow. It is hard to write a column about "drunk driving" law when people haven't been driving due to the lockdowns, whether they be governmental or self-imposed restrictions. Still, there is much to talk about. How about those Tampa Bay Lightning! No, wait. Not that.

So, what can I talk about? Well, perhaps the issue of blood. In 2019 (a very good year; we just didn't know it yet), the Fifth District Court of Appeals appeared to create a gaping exception to the requirement that a warrant be obtained before blood may be drawn from a person suspected of being DUI. In *Campbell v. State*, 288 So.3d 739 (Fla. 5th DCA 2019), the 5th DCA held that the "inevitable discovery doctrine" applies to cases in which the blood drawn was otherwise obtained (for, say, improperly telling the citizen that they had to consent to the blood draw or that the officer really needed to make this happen).

The Campbell case unfolded as follows:

While driving at an extremely high rate of speed during a heavy rain, Campbell lost control of his vehicle and smashed into the rear of a car that was stopped at a red light. A passenger in the stopped car died as a result of injuries suffered in the crash. Campbell was subsequently charged by Information with DUI manslaughter and vehicular homicide. He filed a motion to suppress all evidence derived from the blood drawn at the direction of the police. Specifically, he argued that the blood draw, obtained without a warrant, was unconstitutional under *Birchfield* [*Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)] because the implied consent warning given to him improperly advised him that the refusal to consent to a blood draw would constitute a criminal offense. Campbell had submitted to a breath test and blew "triple zeros," which indicated that he had no alcohol in his system at the time. Campbell was then read an implied consent warning for a urine test.

Now it should be noted that at the scene of the crash, Campbell had admitted to the officer that he had used marijuana earlier that day and that he had also taken various prescription medications. Despite agreeing to provide a urine sample, Campbell subsequently indicated to the officer [Keane] that he was unable to urinate. Officer Keane considered Campbell's failure to give a urine sample to be a "refusal," issued Campbell a citation for refusing to submit to a urine test, and advised him that his license was suspended.

While at the DUI breath test center,

Officer Keane learned that a passenger in the car that had been struck by Campbell's vehicle had died. He told Campbell that "someone has passed" and that "[t]here may be a warrant or you can consent. It's one of those things. But the State will probably get your blood tonight." Officer Keane further testified that he explained "the process" to Campbell and that the State was going to get Campbell's blood. After being read the implied consent warning again (for, now, a second time), Campbell grudgingly consented to the blood draw. *Id.* at 740-742.

The trial court determined that the implied consent warning given to Campbell violated his Constitutional rights because it suggested that his failure to consent would constitute a criminal offense, and the Fifth DCA did not disturb that finding. And while the trial court went on to find that the "good faith" exception applied because *Birchfield* was decided only one day before Campbell's arrest, the Fifth DCA concluded that the "good faith" exception could not be applied where the police officer's acts occur subsequent to a binding appellate court decision which determines that such acts are violative of the Fourth Amendment.

But here is where things go off the rails. As the Fifth DCA noted, "[d]uring the motion to suppress hearing, the trial court also considered the application of the inevitable discovery exception to the exclusionary rule. The court concluded that the State could not rely on the inevitable discovery exception because law enforcement had not taken any actions to obtain a warrant before obtaining Campbell's consent. We respectfully disagree with the trial judge's conclusion." *Id.* at 742. The court then held as follows:

> In this case, the police had initiated an investigation of Fitzpatrick prior to requesting a blood sample.... The record reveals that the police considered Fitzpatrick a suspect prior to requesting a blood sample from him.... Based on this evidence, requesting a blood sample from Fitzpatrick or obtaining it through a warrant would have been a normal investigative measure that would have occurred regardless of any police impropriety.... Therefore, even if Fitzpatrick's consent to the taking of his blood was involuntary, the error is harmless because the police had probable cause for a warrant requiring a blood sample, and the blood sample would have been inevitably obtained.

Id. at 742-743

The *Campbell* court's decision was, well, I would say curious considering the fact that in *Rodriguez v. State*, 187 So.3d 841 (Fla. 2015), Florida's Supreme Court wrote that:

> [t]he question before this Court is whether the inevitable discovery rule requires the prosecution to demonstrate that the police were in the process of obtaining a warrant prior to the misconduct or whether the prosecution need only establish that a warrant could have been obtained with the information available prior to the misconduct. ***We conclude that permitting warrantless searches without the prosecution demonstrating that the police were in pursuit of a warrant is not a proper application of the inevitable discovery rule. The rule cannot function to apply simply when police could have obtained a search warrant if they had taken the opportunity to pursue one, but can only apply if they actually were in pursuit of one.*** Within the inevitable discovery exception to the exclusionary rule there is no room for probable cause to obviate the requirement to pursue a search warrant, for this would eliminate the role of the magistrate and replace judicial reasoning with the current sense impression of police officers ... The constitutional guarantee to freedom from warrantless searches is not an inconvenience to be dismissed in favor of claims for police and prosecutorial efficiency. While it is true that here the police were already in possession of the information leading to the evidence before the misconduct, they failed to pursue a legal means to attain this evidence. The police attempted to gain consent from Rodriguez to enter his home, but his consent was found to be coerced and invalid. With no valid consent, and no pursuit of a search warrant, there are no legal means present that would have led to the evidence. In this way, the discovery was not inevitable notwithstanding the police misconduct, ***and the rule cannot be applied.*** Because the exclusionary rule works to deter police misconduct by ensuring that the prosecution is not in a better position as a result.

Id. at 849 (emphasis added).

Numerous District Courts of Appeal since 2015 have followed the *Rodriguez* rule requiring the officer to be in the actual pursuit of a warrant or had otherwise began the machinations to prepare for such an application for the inevitable discovery rule to apply. See *Young v. State*, 207 So.3d 267 (Fla. 2d DCA 2016) (home); *Clayton v. State*, 252 So.3d 827 (Fla. 1st DCA 2018) (home); *Perez v. State*, 269 So.3d 574 (Fla. 2d DCA 2018) (computer hard drive); *Aguilar v. State*, 259 So.3d 262 (Fla. 2d DCA 2018) (home); *O'Hare v. State*, 263 So.3d 255 (Fla. 5th DCA 2019) (home); *Rodgers v. State*, 264 So.3d 1119 (Fla. 2d DCA 2019) (RV parked next to a home); and *Dinkins v. State*, 278 So.3d 828 (Fla. 5th DCA 2019) (medical records obtained from a hospital).

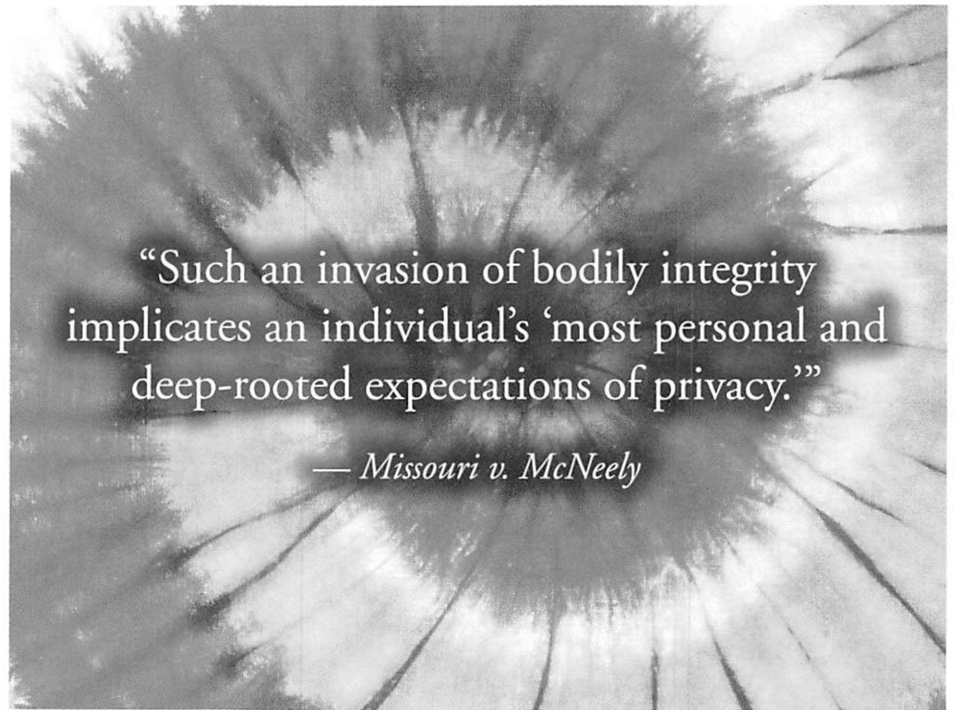
Not a single court to my knowledge (and as far as Shepards© shows) has evaluated or cited to the rational of the *Campbell* court to date. Additionally, requests for rehearing, rehearing en banc,

or an appeal to the Florida Supreme Court were not made in the *Campbell* case as the public defender's office was discharged as Campbell's counsel after the appellate order was entered and no further action was taken by Campbell or on his behalf.

It is worth noting when talking about the "inevitable discovery" rule, the Fifth DCA had previously stated that "the Florida Supreme Court has ruled that in order to rely on this exception, the State must show that the law enforcement officers were in the process of obtaining a search warrant prior to the police misconduct that resulted in the evidence being seized." Dinkins, 278 So.3d at 836, citing to *Rodriguez v. State*, 187 So.3d 841, 849-50 (Fla. 2015) (emphasis added).

But the Fifth DCA then turned around and stated in the *Campbell* case that "Campbell argues that pursuant to *Rodriguez v. State*, 187 So.3d 841, 849-50 (Fla. 2015), the inevitable discovery doctrine cannot be applied in the instant case because law enforcement was not in active pursuit of a warrant at the time Officer Keane obtained the constitutionally infirm consent for a blood draw from him. However, in *Rodriguez*, the Florida Supreme Court did not recede from *Fitzpatrick* [*Fitzpatrick v. State*, 900 So.2d 495 (Fla. 2005)]. Rather, the court distinguished Fitzpatrick on the basis that *Fitzpatrick* did not involve the search of a suspect's home." *Id.* at 743.

It appears that the Fifth DCA has made a distinction that the Florida Supreme Court did not make in *Rodriguez*. Quite frankly, this just doesn't make much sense when looking at the decision from a logical vantage point. The Supreme Court in *Rodriguez* cited numerous reasons as well as cases to



justify the "added pursuit of a warrant" requirement. If they intended for this requirement to only apply to searches of the home, that is all they had to do — say it. But, they did not. They spoke in general terms. Further, the Florida Supreme Court did not "recede" from Fitzpatrick in Rodriguez; they actually added an element to the inevitable discovery doctrine.

Sorry, folks, but I don't get it. After all, the United States Supreme Court has affirmed, twice, the strict requirements of the Fourth Amendment where the police seek "the physical intrusion beneath [a person's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" See *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) (citations omitted) and *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2178 (2016) (discussing the fact that blood tests "require piecing the skin [to] extract a part of the subject's body").

How can the piercing of one's veins, an "invasion of [a person's] bodily integrity" implicate any less expectations of privacy than the search of one's home? One would think that such carefully guarded requirements apply more fully to the physical intrusion into a person's veins to obtain blood samples. If a home (or an RV) is worthy of such carefully guarded requirements, how could the invasion of one's body not be?!

That's just my opinion. I could be wrong (just ask my wife).[1] Stay safe! Stay healthy! Stay sane (for me, that ship may have already sailed)! 🏛

[1] The author wishes to acknowledge the assistance and thank Fleming Kanan Whited III, author of *The Drinking/Driving Law Letter, Drinking/Driving Litigation: Criminal and Civil Trial Notebook* (West Group, Second Edition) and *Florida DUI Defense: Law, Tactics & Procedures* (Revere Legal Publications) for his assistance with this legal analysis.

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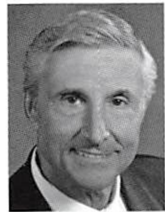
CIRCUMSTANTIAL EVIDENCE: No More Reasonable Hypothesis of Innocence



by
Denis deVlaming

The year was 2017. The case, *Wright v. State*, 221 So.3d 512 (Fla. 2017). The court concluded its opinion in this murder case where the death penalty had been imposed by stating

> *The evidence presented in this purely circumstantial case does not establish a reasonable and moral certainty that the accused and no one else committed the offense charged. Although the facts established at trial support a strong suspicion of guilt, they are not inconsistent with innocence. We therefore conclude that the evidence is insufficient to sustain Wright's convictions. Accordingly, we reverse the convictions, vacate the sentences of death, and remand with directions to enter judgments of acquittal.* (*Wright* at 525).

The Supreme Court Justices, all concurring with the decision, were Labarga, Pariente, Lewis, Quince, Polston, Lawson and Canady.

Fast forward to 2020. Another case, *Bush v. State*, 295 So.3d 179 (Fla. 2020), similar to *Wright*, is now before the Florida Supreme Court. However now, the court is made up differently. Justices Pariente, Lewis and Quince are gone by mandatory retirement. Justice Muniz has been appointed by Governor DeSantis and participated in the opinion. Justices Couriel and Grosshans will follow after the *Bush* decision. Justices Luck and Lagoa were appointed to the Florida Supreme Court in 2019 but were subsequently chosen to sit on the United States Court of Appeal for the 11th circuit following a nomination by then President Donald Trump. The issue involving the circumstantial evidence rule is once again before the court. However, a very different result occurred. In a sweeping in scope decision, changing what Justice Labarga referred to as "over one hundred years of settled law," the state's highest court has now abrogated *Wright* and ruled that the circumstantial evidence rule is no longer the law in Florida even though Justice Labarga noted in his dissent in *Bush* to doing away with the circumstantial evidence rule

> *Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain a conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypothesis, any of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.* (*Bush* at 216).

Notwithstanding, our State's highest court has now ruled that the reasonable doubt standard replaces the circumstantial evidence rule. In doing so, it wrote:

> *The standard of review historically applied to a determination of the legal sufficiency of evidence to support a criminal conviction, at least where there is some direct evidence, is simply whether the state*

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