LEGAL EAGLE

A Newsletter for the Criminal Justice Community October 2009

Dying Declaration

Alexis Nurell enlisted Darryl White to assist her in robbing Davis, a drug dealer with whom she had a prior relationship. White, in turn, recruited Cobb. Under the ruse that she wanted to buy drugs, Nurell arranged to meet Davis behind a park. When Davis approached the van, White and Cobb jumped out and began shooting, chasing him into Vondasa Brown's yard where he was robbed and left to die. After White, Cobb, and Nurell fled, Davis made his way to Brown's front door where he rang the doorbell and began banging on her door. After calling 911, she went to her front door where Davis told her that he was going to die and to "tell them who did this." Davis named Nurell and White as his assailants.

Three police officers arrived at the crime scene and observed Davis lying in Brown's doorway. The officers secured the area by walking around the perimeter of the residence. The officers then individually asked Davis what happened and who injured him. Davis named Cobb, White, and Nurell. While responding to the officers' questions, Davis was bleeding, shivering, stated he was afraid he was going to die, and was drifting in and out of consciousness. One officer indicated that he was "injured to the point where his eyes were rolling in the back of his head and we had to keep shaking him to keep him awake." Subsequently, Davis died.

Issue:

On appeal Cobb renewed the objection he made prior to trial, that Davis' dying declarations to the officers were inadmissible because they were testimonial and their admission denied him the right to cross examine his accuser as protected by the 6th Amendment. He also contended that Davis' statement, that the shooting was payback for his romantic relationship with Nurell, should have been excluded because only that portion of a dying declaration relating to the actual crime is admissible.

Hearsay Rule:

Chapter 90 of the Florida Statutes is known as the Evidence Code. Section 90.802 sets out the Hearsay Rule. "Except as provided by statute, hearsay evidence is inadmissible." Hearsay is an out of court statement offered for the truth of the facts asserted therein. As a general rule hearsay is inadmissible because it denies the defendant the opportunity to cross examine the declarant. There

In This Issue:

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are a few exceptions to the Rule usually related to circumstances where the declarant is unavailable to testify at trial. One such example is the Dying Declaration.

Dying Declaration:

F.S. 90.804 provides for exceptions to the Hearsay Rule. Sub-paragraph (2) provides:

"The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness: (b) Statement under belief of impending death.--In a civil or criminal trial, a statement made by a declarant while reasonably believing that his or her death was imminent, concerning the physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death."

The initial decision as to the admissibility of the out of court statement made by the deceased about who and how he is about to die, that is being offered for the truth of those facts by the prosecution, is reserved to the trial judge. "Whether a sufficient and proper predicate has been laid for the admission of the dying declarations is a primary matter for determination by the trial court, being a mixed question of law and fact."

As the Florida Supreme Court said in 1916, "Under an indictment for homicide, where the State seeks to introduce a dying declaration of the deceased in evidence, it should be first shown to the satisfaction of the court that at the time the declarations were made deceased, not only considered himself in imminent danger of death, but that he evidently was without hope of recovery. The circumstances under which the statements were made must be shown, in order that the court may determine whether the statements are admissible as dying declarations." *Malone v. State*, 72 So. 415 (Fla.1916).

Consciousness of Impending Death:

Before the judge can reach a determination regarding the admissibility of the dying declaration it must first be established that the victim knew he was about to die, and his statements pertain to who his assailant was and how he was attacked. Despite the declaration being an obvious hearsay statement it is admitted in evidence as an exception to the hearsay rule because it is believed to be inherently truthful. The underlying notion is that a person who is about to "meet his maker" would not die with a lie on his lips. "While the religious justification for the exception may have lost its conviction for some persons, it can scarcely be doubted that there are still powerful psychological pressures to be truthful when death is imminent." Ehrhardt's Florida Evidence, §804.3.

"It is not required that the declarant make 'express utterances ... that he knew he was going to die, or could not live, or would never recover.' Rather, the court should satisfy itself, on the totality of the circumstances, 'that the deceased knew and appreciated his condition as being that of an approach to certain and immediate death.' The trial court did this. The sufficiency and propriety of the predicate for a dying declaration is a mixed question of law and fact, and a trial court's determination of the issue will not be disturbed unless clearly erroneous." *Henry v. State*, 613 So.2d 42 (Fla.1992).

Thus, in the event that a LEO is called to a scene where the victim has suffered a critical injury and is not expected to survive, or rides along with the victim in the ambulance to the emergency room, all comments made by the victim as to the circumstances surrounding his or her current condition, the who, where, and why, should be noted. Additionally, though not critical to the legal analysis, the officer should be prepared to articulate whether the victim was aware of the seriousness of his or her wounds and the likelihood of their survival. The statement may be in response to questioning, complete spontaneity is not required.

Limitations on Dying Declarations:

"Only statements which concern the cause of what the declarant believes is to be his or her impending death or the circumstances surrounding the impending death are admissible under section 90.804(2)(b). No other statements are admissible under the exception." Ehrhardt's, §804.3.

"In proving dying declarations,

only such statements should be received as evidence as relate to what actually transpired, who were the actors, the position of persons, what was said by the parties, what were the instruments used, who used them and how, and like matters, excluding, if possible, everything except what relates to the *res gestae* (the overall start-to-end sequence of the underlying felony)." *Malone v. State*.

Thus, in the opening scenario, *Cobb v. State,* (5DCA, August 7, 2009), that portion of the dying declaration made by the victim that the shooting "was payback for his romantic relationship with Nurell," should have been excluded as not part of the underlying circumstances surrounding the attack and shooting. Those portions related to past and other events as well as the opinion of the victim as to the motives of the accused are not properly part of a dying declaration admitted into evidence.

"It is necessary that the declarant would have been competent to testify to the facts in the statement had the declarant lived. The declarant must have first-hand knowledge of the facts recounted, and if the testimony or the statement is in the form of opinion, it must be one which would be [otherwise] admissible." Ehrhardt's, §804.3.

Admissibility:

As noted above, a dying declaration is admissible in both a criminal and civil trial. And the criminal action is not limited to a homicide case where the victim actually dies. The statement made, under a belief of impending death, would be admissible in an Attempted Murder or Aggravated Battery trial, if the victim was unavailable to testify as a result of his or her injuries.

In 2004, the U.S. Supreme Court decided *Crawford v. Washington*, and held that if the hearsay was testimonial then the Sixth Amendment required the witness be unavailable and the defendant have had a prior opportunity for cross-examination. If the primary purpose of the interrogation was "to establish or prove past events potentially relevant to later criminal prosecutions," the statements were testimonial. Clearly, in the *Cobb* case once the officers were on site and were asking the victim questions as to who attacked him, the victim's statements were testimonial in nature, and 6th Amendment would require the defendant to have had the opportunity to cross examine the unavailable witness.

The 5th D.C.A. in *Cobb* ruled that the dying declaration was admissible in evidence as an exception to the hearsay rule and the *Crawford* decision. Citing from a case decided in 1918 the D.C.A. said, "The right of the accused to be confronted with the witnesses against him has always been a part of the Bill of Rights, and yet dying declarations have been received in evidence for time out of mind. The legislature doubtless intended to confer upon a defendant in a criminal action the right to be confronted with any *living* witnesses against him… It is invariably held that the deceased is not a witness, within the meaning of such a provision of the Bill of Rights, and that it is sufficient if the defendant is confronted with the witness who testifies to the declaration."

"These cases of historical vintage invite two conclusions about how the common law treated dying declarations. First, dying declarations were a recognized exception to the right of confrontation, and were admitted out of necessity to prevent manifest injustice. Second, the Sixth Amendment's right of confrontation is satisfied as long as the defendant had the opportunity to cross-examine the witness who testified about the dying declaration."

"Based on the historical cases addressing this issue, we conclude that dying declarations are an exception to the Sixth Amendment's Confrontation Clause. Accordingly, allowing the officers to testify about Davis' dying declarations did not violate Cobb's right of confrontation. Furthermore, Cobb's right of confrontation was not violated because he had the opportunity to cross-examine the officers about the dying declarations." Conviction affirmed. **BEK**

Critical Incidents

FBI Report on Cop Attackers and Their Weapons

New findings on how offenders train with, carry and deploy the weapons they use to attack police officers have emerged in a published, 5-year study by the FBI.

Among other things, the data reveal that most would-be cop killers:

☹ show signs of being armed that officers miss;

☹ have more experience using deadly force in "street combat" than their intended victims;

☹ practice with firearms more often and shoot more accurately;

☹ have no hesitation whatsoever about pulling the trigger. "If you hesitate," one told the study's researchers, "you're dead. You have the instinct or you don't. If you don't, you're in trouble on the street."

"Violent Encounters"

These and other weapons-related findings comprise one chapter in a 180-page research summary called, "Violent Encounters: A Study of Felonious Assaults on Our Nation's Law Enforcement Officers." The study is the third in a series of long investigations into fatal and nonfatal attacks on Police Officers by the FBI team of Dr. Anthony Pinizzotto, clinical forensic psychologist, and Ed Davis, criminal investigative instructor, both with the Bureau's Behavioral Science Unit, and Charles Miller III, coordinator of the LEOs Killed and Assaulted program.

"Violent Encounters" also reports in detail on the personal characteristics of attacked officers and their assaulters, the role of perception in life-threatening confrontations, the myths of memory that can hamper officer involved shooting investigations, the suicide-by-cop phenomenon, current training issues, and other matters relevant to officer survival.

From a pool of more than 800 incidents, the researchers selected 40, involving 43 offenders and 50 officers, for in-depth exploration. They visited crime scenes and extensively interviewed surviving officers and attackers alike, most of the latter in prison. Here are highlights of what they learned about weapon selection, familiarity, transport and use by criminals attempting to murder cops, a small portion of the overall research:

Weapons

Predominately handguns were used in the assaults on officers and all but one were obtained illegally, usually in street transactions or in thefts. In contrast to media myth, none of the firearms in the study was obtained from gun shows. What was available "was the overriding factor in weapon choice," the report says. Only one offender hand-picked a particular gun "because he felt it would do the most damage to a human being." Researcher Davis, in a presentation and discussion for the International Association. Of Chiefs of Police, noted that none of the attackers interviewed was "hindered by any law--federal, state or local--that has ever been established to prevent gun ownership. They just laughed at gun laws."

Familiarity

Several of the offenders began regularly to carry weapons when they were 9 to 12 years old, although the average age was 17 when they first started packing "most of the time." Gang members especially started young. Nearly 40% of the offenders had some type of formal firearms training, primarily from the military. More than 80% "regularly practiced with handguns, averaging 23 practice sessions a year," the study reports, usually in informal settings like trash dumps, rural woods, back yards and "street corners in known drug trafficking areas."

One spoke of being motivated to improve his gun skills by his belief that officers "go to the range two, three times a week [and] practice arms so they can hit anything." In reality, victim officers in the study

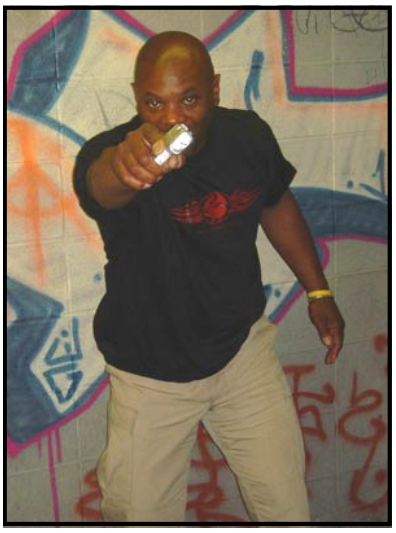
averaged just 14 hours of sidearm training and 2.5 qualifications per year. Only 6 of the 50 officers reported practicing regularly with handguns apart from what their department required, and that was mostly in competitive shooting. *Overall, the offenders practiced more often than the officers they assaulted, and this "may have helped increase [their] marksmanship skills," the study says*.

The offender quoted above about his practice motivation, for example, fired 12 rounds at an officer, striking him 3 times. The officer fired 7 rounds, all misses. More than 40% of the offenders had been involved in actual shooting confrontations before they feloniously assaulted an officer. Ten of these "street combat veterans," all from "innercity, drug-trafficking environments," had taken part in 5 or more "criminal firefight experiences" in their lifetime. One reported that he was 14 when he was first shot on the street, "about 18 before a cop shot me." Another said getting shot was a pivotal experience "because I made up my mind no one was gonna shoot me again."

Concealment

The offenders said they most often hid guns on their person in the front waistband, with the groin area and the small of the back nearly tied for second place. Some occasionally gave their weapons to another person to carry, "most often a female companion." None regularly used a holster, and about 40% at least sometimes carried a backup weapon.

In motor vehicles, they most often kept their firearm readily available on their person, or, less often, under the seat. In residences, most stashed their weapon under a pillow, on a nightstand, under the mattress--somewhere within immediate reach while in bed.



Almost all carried when on the move and strong majorities did so when socializing, committing crimes or being at home. About one-third brought weapons with them to work. Interestingly, the offenders in this study more commonly admitted having guns under all these circumstances than did offenders interviewed in the researchers' earlier 2 surveys, conducted in the 1980's and 1990's.

According to Davis , "Male offenders said time and time again that female officers tend to search them more thoroughly than male officers. In prison, most of the offenders were more afraid to carry contraband or weapons when a female CO was on duty." On the street, however, both male and female officers too often regard female subjects "as less of a threat, assuming that they not going to have a gun," Davis said. In truth, the researchers concluded that more female offenders are armed today than 20 years ago-- "not just female gang associates, but female offenders generally."

Shooting Style

Twenty-six of the offenders, including all of the street combat veterans, "claimed to be instinctive shooters, pointing and firing the weapon without consciously aligning the sights,." "They practice getting the gun out and using it," Davis explained. "They shoot for effect."

Hit Rate

More often than the officers they attacked, offenders delivered at least some rounds on target in their encounters. Nearly 70% of assailants were successful in that regard with handguns, compared to about 40% of the victim officers, the study found. (Efforts of offenders and officers to get on target were considered successful if any rounds struck, regardless of the number fired.) Davis speculated that the offenders might have had an advantage because in all but 3 cases they fired first, usually catching the officer by surprise. Indeed, the report points out, "10 of the total victim officers had been wounded [and thus impaired] before they returned gunfire at their attackers."

Missed Cues

Officers would less likely be caught off guard by attackers if they were more observant of indicators of concealed weapons, the study concludes.

These particularly include manners of dress, ways of moving and unconscious gestures often related to carrying. "Officers should look for unnatural protrusions or bulges in the waist, back and crotch areas," the study says, and watch for "shirts that appear rippled or wavy on one side of the body while the fabric on the other side appears smooth." In warm weather, multilayered clothing inappropriate to the temperature may be a giveaway. On cold or rainy days, a subject's jacket hood may not be covering his head because it is being used to conceal a handgun. Because they eschew holsters, offenders reported frequently touching a concealed gun with hands or arms "to assure themselves that it is still hidden, secure and accessible" and hasn't shifted. Such gestures are especially noticeable "whenever individuals change body positions, such as standing, sitting or exiting a vehicle." If they run, they may need to keep a constant grip on a hidden gun to control it. Just as cops generally blade their body to make their sidearm less accessible, armed criminals "do the same in encounters with LEOs to ensure concealment and easy access."

An irony, Davis noted, is that officers who are assigned to look for concealed weapons, while working off-duty security at night clubs for instance, are often highly proficient at detecting them. "But then when they go back to the street without that specific assignment, they seem to 'turn off' that skill," and thus are startled--sometimes fatally--when a suspect suddenly produces a weapon and attacks.

Mind-set

Thirty-six of the 50 officers in the study had "experienced hazardous situations where they had the legal authority" to use deadly force "but chose not to shoot." They averaged 4 such prior incidents before the encounters that the researchers investigated. "It appeared clear that none of these officers were willing to use deadly force against an offender if other options were available," the researchers concluded.

The offenders were of a different mind-set entirely. In fact, Davis said the study team "did not realize how cold blooded the younger generation of offender is. They have been exposed to killing after killing, they fully expect to get killed and they don't hesitate to shoot anybody, including a police officer. They can go from riding down the street saying what a beautiful day it is to killing in the next instant."

"Offenders typically displayed no moral or ethical restraints in using firearms," the report states. "In fact, the street combat veterans survived by developing a shoot-first mentality."

"Officers never can assume that a criminal is unarmed until they have thoroughly searched the person and the surroundings themselves." Nor, in the interest of personal safety, can officers "let their guards down in any type of law enforcement situation."

Editor's Note: Source for this article was the FBI Report.

(Continued from page 8)

Automobile Stop & Miranda

restraints during the stop that were comparable to the restraints associated with a formal arrest.

Lessons Learned:

A court's analysis of traffic stops are fact specific and analyzed by the "totality of the circumstances."

In simplest terms the motorist at a traffic stop is not your prisoner. Don't treat him or her like one, and *Miranda* issues will not surface.

Without causing safety issues, limit the number of deputies at the scene. An overwhelming number will communicate to the motorist that he is in custody and not free to leave, which *will cause Miranda* issues to surface.

Ask questions, don't a*ccuse*.

Keep the atmosphere of the stop non-coercive.

Be polite not confrontational.

Limit orders of where to stand, and where to place one's hands, and any other demonstrations of authority consistent with the motorist being taken into custody. In this instance actions speak louder than words.

"The court held that [defendant] was not under arrest because a reasonable person in her situation would not have believed they would be arrested merely for driving without a valid driver's license."

Finally, keep in mind the Court's admonition, "if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*."

Recent Case Law

Automobile Stop and Miranda

Officer Hilsdon received information from an officer watching a suspected drug house that the vehicle Martissa was driving was seen at the location. Officer Hilsdon, a uniformed officer, observed the vehicle, and it did not have a functional tag light. Officer Hilsdon initiated a traffic stop for the violation. The parties do not dispute that Officer Hilsdon made a valid traffic stop.

When Officer Hilsdon asked Martissa for his driver's license and registration, Martissa informed the officer that his license was suspended and that "he was still trying to pay some fines to get it back again." Officer Hilsdon testified that he had to go back to his patrol car to confirm that Martissa's license was suspended before he could arrest him. He did not handcuff Martissa, but he was keeping Martissa there until he confirmed whether the license was suspended. He acknowledged that Martissa was being detained on the basis of the traffic stop.

Before Officer Hilsdon returned to his patrol car, he asked Martissa to exit the vehicle. Officer Hilsdon testified, "And as he was exiting the vehicle I *advised* him that he was observed leaving an area known for the sale of illegal narcotics, and I *asked* him if he had any illegal narcotics on him." Martissa responded that he did and told the officer that he had crack cocaine in the vehicle. Officer Hilsdon further explained that he asked Martissa like he asked every person he stopped as part of the street crimes unit if the person had anything illegal on him or in the vehicle.

Officer Hilsdon confirmed that Martissa's license was suspended, so the officer believed he had probable cause to arrest Martissa on the suspended license and on his statement that he had cocaine in the vehicle. Officer Hilsdon searched the vehicle based on both of those grounds and recovered crack cocaine. Martissa was charged with possession of cocaine and the second-degree misdemeanor of driving while license suspended or revoked.

Issue:

The trial court found that the detention regarding the suspended license "was pursuant to an ongoing criminal investigation and that the Defendant was in custody for practical purposes." The court further found that without reading Martissa his *Miranda* rights, Officer Hilsdon "confronted the Defendant with the information that he had been seen in a known drug area and asked him if he was in possession of any illegal drugs." The trial court found that Martissa was subjected to custodial interrogation without the benefit of *Miranda* warnings.

It will be helpful to examine this issue as two separate questions: 1. Is a temporary detention for the purpose of investigating a traffic violation sufficiently custodial to trigger *Miranda* warnings? 2. If not, must all questioning be limited to the purpose of the stop?

Nature of a Traffic Stop:

The 2nd D.C.A. answered the first question in the opening scenario, *State v. Marissa,* as follows:

"In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the United States Supreme Court likened a routine traffic stop to an investigatory detention under *Terry v. Ohio*. The Court explained that in a *Terry* stop the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly non-coercive aspect of ordinary traffic stops prompts us to hold that *persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda."*

Custody for *Miranda*:

The dictates of *Miranda* apply exclusively to "in-custody interrogation." Or stated alternatively, "*Miranda* only applies when a defendant is subject to custodial interrogation." "We mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*.

"Clearly the Supreme Court meant that something more than official interrogation must be shown…In the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so."

In *Berkemer*, the Court held that *Miranda* did not apply to typical traffic stops, which it assumed to be brief, non-interrogative events. However, the Court cautioned that "if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*."

"Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Rigterink v. State*, 2 So.3d 221 (Fla. 2009).

Fowler v. State:

The 2nd D.C.A. was confronted with similar facts in *Fowler v. State*, 782 So.2d 461 (2DCA 2001), and found the traffic stop had become sufficiently coercive to require *Miranda* warnings. Specifically, after receiving information that the defendant had been selling drugs, the police officer directed the defendant out of the car and moved him to the rear of the car. In the presence of two other officers, the officer confronted the defendant with allegations that he had been seen selling drugs. At this point, the officer asked the defendant if he had any drugs in his possession. The DCA found that a reasonable person in Fowler's position would have believed he was in custody.

Questioning Motorist:

In simplest terms the U.S. Supreme Court has stated that posing questions to an individual does not constitute a search nor seizure, and is thus not subject to 4th Amendment scrutiny. A more complete discussion can be found in Legal Eagle, June 2009, "Automobile Stop and Investigation, " *D.A. v. State*.

In the recent U.S. Supreme Court case, *Arizona v. Johnson* (decided 1/26/09), the court ruled that a lawful automobile stop begins when a vehicle is pulled over for investigation of a traffic violation. The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. An officer's inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop's duration.

Court's Ruling:

The 2nd D.C.A.'s ruling in *Marissa* combined both of these issues. The court found that the present case was similar to *Fowler*, but here, "Officer Hilsdon did not directly *confront* Martissa with an allegation that he had actually committed a drug crime. Rather, while conducting an investigatory detention on the suspended license, Officer Hilsdon told Martissa that 'he was observed leaving an area known for the sale of illegal narcotics' and asked if Martissa 'had any illegal narcotics on him.' While in *Fowler* the officer specifically confronted Fowler with committing a drug crime, based on calls the police had received about Fowler selling drugs."

"During a traffic stop an officer may ask if a person is in possession of a weapon or drugs. See, *State v. Stone*, 889 So.2d 999 (5DCA 2004) (stating that a stop was not "prolonged in any meaningful sense" by an officer asking the defendant if he possessed weapons or drugs)."

"We conclude that Martissa was not in custody for *Miranda* purposes. Martissa was not subjected to

(Continued on page 6)