

**STATE ATTORNEY'S OFFICE
TWELFTH JUDICIAL CIRCUIT OF FLORIDA**

INTERDEPARTMENTAL MEMORANDUM

TO: NORTH PORT POLICE DEPARTMENT
ATTENTION: OFC. CASSELLI, #200; SGT. SIRIANNI, #55;
RECORDS/CID
FROM: ERIC WERBECK
RE: STEPHEN PHILLIPS HORRIGAN
CHARGE: RESISTING, OBSTRUCTING OR OPPOSING AN OFFICER
WITHOUT VIOLENCE; INTERCEPTION OF WIRE OR ORAL COMMUNICATION
AGENCY #: 12-01-1732 ARREST DATE: 01/25/2012

CLERK #: 2012CF001253NC

CASE #:12CF001708AS

This office has made the following decision concerning the charges against the above-named defendant:

(+) **No Action** will be taken on the charge(s) listed above.
(See Comments below)

COMMENT SECTION: Officers initiated a roadside traffic stop of individuals known to be armed. Several officers were on scene, including five patrol cars (later four). The defendant started video taping this encounter from the outside lane (opposite the traffic stop) of a divided highway in North Port. The defendant was on foot. At the start of the video, there are a number of officers at the subject car's door indicative of the officers speaking with the car's occupants. Audio is not heard in relation to the conversation between the car's occupants and the officers. The first audible recording is an officer approaching the defendant asking him to stand out of the roadway and across the intersection. During this encounter, the defendant acknowledges taping the officer, and the officer is heard telling the defendant "you can take video or pictures if you really feel necessary... it's a free world.. but I'm concerned for your safety to be honest." The defendant initially complies and moves down the street. The only further audio recorded is the conversation between the officer and the defendant himself. The defendant then moves down the roadway as directed, and continues to video tape. Subsequently, the defendant moves across the street (to the same side as the traffic stop) and onto the sidewalk beyond the intersection. Still, no audio is heard pertaining to the traffic stop or LEO conversations. The defendant is standing approximately 15-20 feet behind the last police vehicle, which is parked behind another police vehicle, which is parked behind the subjects of the traffic stop. The defendant is then approached and asked his name. The defendant gives his name and date of birth. He is then asked for his

Drivers License, which he does not provide. He refuses to answer further questions and is arrested for interception of communications and obstruction.

To prove the crime of interception of oral communications, it must be shown that oral communication was intercepted and that there was an expectation of privacy. See *Migut v. Flynn*, 2005 WL 1130373 (11th Cir. 2011). Florida Statute § 934.02(2) defines "oral communications" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."

In this case, unknown to the officers at the time of the stop, no audio regarding the traffic stop, be it conversation between officers and those detained or conversations between fellow officers, is audible on the recording seized from the defendant. That being the case, we must determine whether the recording his own conversation between himself and the officer constitutes a violation of the statute. The key question here is whether the State can prove the officer had a reasonable expectation of privacy given the circumstances, which is "an intensely fact-specific inquiry." See *Migut* at 267, *supra*. Given the nature and method of operation of the recording device (a cell phone held with arm extended between the defendant and the officer), as well as the location of the encounter (roadside with traffic at times with voices raised), the State would be unable to prove the officer enjoyed an expectation of privacy with the defendant. Therefore, that charge is declined.

The second count is resisting, obstructing, or opposing an officer without violence. Florida Statutes § 843.02 requires (1) an officer be engaged in the lawful execution of a legal duty and (2) that the defendant's action constituted obstruction or resistance of that lawful duty. The legal duty at issue here is making an arrest or conducting an investigation related to a traffic stop. Provided the first prong is met, the State must prove the defendant's conduct obstructed that legal duty. In *D.A.W. v. State*, 945 So. 2d 624 (Fla. 2d DCA 2002), the defendant stood between 15-30 feet away from an arrest location, "harassing...making threats...and antagonizing" the individual being arrested. The defendant in *D.A.W.* was told to leave several times, but he did not. Similar to our case, there was no indication the defendant threatened harm to the officer, tried to convince others to harm the officer, or planned to come any closer than his distance of 15-30 feet. Citing *H.A.P. v. State*, the court concluded that *D.A.W.*'s mere presence at a distance of fifteen to thirty feet away was not impeding the officer's arrest of his suspect. 945 So. 2d 624, 627 (Fla. 2d DCA 2006). When obstruction is not based on words, the statute operates to "proscribe only acts or conduct that operate to physically oppose an officer in the performance of lawful duties." *Wilkerson v. State*, 556 So. 2d 453, 455-56 (Fla. 1st DCA 1990).

In this case, the defendant moved from the roadway and down the street when requested. Subsequent to that, the defendant then remained at least 15-30 feet from the back of the patrol vehicles, which were at least two car lengths behind the vehicle subject to the traffic stop. At no time did the defendant communicate with the subjects being arrested, incite other civilians on the scene, nor did he verbally threaten the officers.

Officer safety is recognized as an important issue to be considered regarding the detention of individuals during traffic stop situations, and well-established case law recognizes an officer's need to take certain precautions for his or her own safety. In this case, officers were put in a potentially dangerous situation in having to divert their attention away from detained individuals to investigate the defendant's actions and determine his intentions. However, based on the totality of circumstances, it does not appear that the State can prove beyond a reasonable doubt that the officer's duties were obstructed by the defendant's conduct. Therefore, this charge is declined.



ERIC WERBECK
Assistant State Attorney



ART JACKMAN
Division Chief

Date

3/29/12

Should there be any questions concerning this matter, please contact the Assistant State Attorney named in the "FROM" portion of this memorandum.