

**In Defense of Unlicensed Drivers:
Florida Statute §322.34(2)**

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INTRODUCTION

The charge of driving on a suspended, revoked, canceled or disqualified license (DWLS)¹ is probably one of the most common criminal charges faced by a traffic attorney. With millions of residents and countless reasons for which your license can be suspended, the Florida legislature has insured that the court system, the jail and our clientele will be filled with unlicensed drivers. It is the simplicity of the statute which makes it so difficult to defend and so seemingly easy to prosecute. However, the elevation to a third degree felony upon a third conviction and the possibility that a client could lose his license for five years under the Habitual Traffic Offender Statute makes it an offense that every attorney must be prepared to fight.

While the legal ramifications of a suspended license are serious, the multitude of reasons for which one's license can be suspended is comical. The typical client will have had his license suspended for a variety of reasons ranging from too many points, failure to appear, failure to pay fines, failure to maintain proper insurance, child support delinquency, drug possession, a DUI suspension or a previous DWLS offense.

Essentially there are three elements to the charge of DWLS². The State must prove that (1) your client's license was suspended at the time of the offense, (2) your client knew of the suspension and (3) your client was driving a motor vehicle on the highways of the State of Florida. To elevate the charge a first-degree misdemeanor the State would also have to prove a prior conviction of the same charge and to raise it to the level of a third-degree felony the State would have to prove the existence of two prior convictions.

LICENSE WAS SUSPENDED

This element proves to be the least susceptible to attack and the easiest to prove for the State Attorney. To prove that a client's license was suspended the State need only introduce a

certified copy of your client's driving record from the Department of Highway Safety and Motor Vehicles (DMV) that shows that the license was suspended on the date of the alleged offense. The certified copy will be self-authenticating under F.S. §90.902 and thus admissible. However if there is a real dispute as to the authenticity of the driving record you always retain the right to contest the authenticity of the certified copy.³ The self-authentication and thus admissibility of a client's driving record maintained by the DMV should under no circumstances be used to prove prior convictions. As will be discussed infra, prior convictions are a separate element that must be proven beyond a reasonable doubt and cannot be proven from a driving record alone.⁴

Also of importance when dealing with the introduction of a client's driving record is the information contained within it. Many times a license will be suspended by the DMV based on information provided from a non-law enforcement related agency, such as the Department of Revenue in child support cases. It is my opinion suspensions caused by data provided from a non-law enforcement related agency should be treated as double hearsay.⁵ Therefore, absent an independent exception to the hearsay rule, that information and any suspension based on it should be redacted and excluded as proof of a license suspension. Moreover, there are always certain instances where the DMV makes a mistake in its record keeping and incorrectly shows a license as being suspended. Therefore, under no circumstances should an erroneous driving record that falsely reflects the status of a client's driving record be the basis for a DWLS conviction.

Importantly, an erroneous driving record also supplies a fertile basis for suppression. Commonly a search incident to an arrest for DWLS results in the discovery of other illegal activity or contraband. If the arrest for DWLS was made in error due to poor record keeping by a law enforcement agency⁶ or the DMV⁷ the exclusionary rule acts to prohibit the governmental

use of that evidence. Important to the charge of DWLS, the Supreme Court of Florida clarified the relationship between Florida law enforcement agencies, DMV, the executive branch and the judicial branch in *Shadler v. State*, 761 So. 2d 279 (Fla. 2000). The Court held that if a mistake on a person's driving record results in his license being suspended and the mistake is attributable to the DMV or law enforcement personnel, then any evidence seized as a result of an arrest based on that erroneous information will be suppressed. However, if a mistake on a person's driving record results in his license being suspended and the mistake is attributable to court personnel, then any evidence seized as a result of an arrest based on the erroneous information will be admissible under the good faith exception to the exclusionary rule.⁸

Finally, while the status of someone's license is relatively easy to prove for the State, the collateral consequence of your client's license being suspended for five years under the habitual traffic Offender Statute may make going to trial unavoidable. In this case it is incumbent on you to ask for the lesser-included offense of driving a motor vehicle without a valid license, which is commonly referred to as No Valid Driver License (NVDL).⁹ This was first recognized as a lesser-included offense by the Fifth DCA in *Roedel v. State*, 773 So.2d 1280 (Fla. 5th DCA 2000) when they found that "both of the driving offenses appear to be different degrees of the same core offense--unlawfully driving a motor vehicle without a valid driver's license." It is likely that a jury would be willing to latch on to the nebulous definition of NVDL rather than the more damaging DWLS, thus saving your client the possibility of their license being revoked as a HTO.

Ironically, the Fourth DCA found in *State v. Cooke*, 767 So.2d 468 (Fla. 4th DCA 2000) that DWLS is not a lesser included offense of Driving While License Suspended as a Habitual Traffic Offender (DWLSHTO) and a person could be convicted of both. However, based on the reasoning in *Roedel*, it is highly unlikely that the Fifth DCA would follow the Fourth DCA's

holding in *Janos*. Therefore, in a District other than the Fourth I would make it a point to ask that both DWLS and NVDL be given as lesser-included offenses for a trial based on Driving While License Suspended as a habitual Traffic Offender.

DRIVING A MOTOR VEHICLE ON THE HIGHWAYS OF THE STATE OF FLORIDA

At first glance the element of driving a motor vehicle would seem to be the most susceptible element to litigation. Unfortunately this is not the case, and just as in a DUI, the State only need prove that a defendant was in actual physical control of a vehicle.¹⁰ Actual Physical Control of a vehicle means the defendant must be physically in or on the vehicle and have the capability to operate the vehicle, *regardless* [emphasis added] of whether [he or she] is actually operating the vehicle at the time.¹¹ Seemingly, the last sentence was inserted to insure that our clients could be found to have driven in a multitude of illogical ways not conceived of by the general public. Nevertheless, the definition does leave open a few rare openings from which to litigate.

First, the person must drive a motor vehicle *upon the highways of the state of Florida*. The term “Highways” has been defined as “the entire width between the boundary lines of a way or place if any of that way or place is open to public use for purposes of vehicular traffic.”¹² In *State v. Lopez*, 633 So. 2d 1150 (Fla. 5th DCA 1994), the Fifth District Court of Appeals concluded that a parking lot open to the public, but not publicly maintained, was within the statutory definition of streets and highways, subjecting vehicular traffic to police regulation. While this leaves very few areas that would not be open to the public there does exist a reasonable argument that farms, construction zones, and possibly clearly marked private parking lots are not within the definition of a highway because they are not intended to be open to the general public, but rather are only intended to be open to select invitees.

Second, the person must have been driving a *motor vehicle* to be guilty of a criminal DWLS. A motor vehicle is defined as “any self-propelled vehicle, including a motor vehicle combination, not operated without rails or guideway, excluding vehicles moved solely by human power, motorized wheelchairs, and motorized bicycles as defined in s. 316.003.”¹³ While this definition includes such traditional motor vehicles as cars, trucks and vans, it has also been held to include an all terrain vehicle (ATV),¹⁴ a two-wheeled scooter known as a Go-Ped,¹⁵ and a Moped.¹⁶ Ironically, it is also likely that the newly conceived Segway HT would be found to be a motor vehicle within the meaning of the Statute due to its similarity to a Go-Ped. The only other traditional modes of transportation that clearly do not meet the definition of a motor vehicle are horse drawn carriages, skateboards¹⁷ and bicycles.¹⁸

Interestingly, in *Jones v. State*, 510 So. 2d 1147 (Fla. 1st DCA 1987), the First District Court of Appeals found that while a motor vehicle must be capable of self powered mobility, “if the vehicle...was found to be inoperable so that it could not be moved except by an outside agency, we cannot say that she had actual physical control of a vehicle as defined by § 316.003, Fla.Stat. (1985).”¹⁹ The Decision in *Jones* has very little practical effect but would seem to exclude certain rare circumstances from falling under the jurisdiction of F.S. §322.34(2). The most common situation being when a person is steering a mechanically inoperable vehicle²⁰ that is being towed by another vehicle. However, a mechanically operable vehicle²¹ that is being towed by another vehicle would meet the statutory definition of a motor vehicle combination found in F.S. §322.01(27) and thus would be excluded from such a rare exception.

THE ELEMENT OF KNOWLEDGE

The element of knowledge is one of the most important and most litigated issues surrounding the charge of DWLS. Importantly, F.S. §322.34(2)²² provides that:

“the element of knowledge is satisfied if the person has been previously cited as provided in subsection (1); or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice as provided in subsection (4). There shall be a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in subsection (4) appears in the department's records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation.”

Based on this paragraph the element of knowledge seems to fall into one of three categories depending on the predicate established by the State. They are (1) where the element of knowledge is satisfied, (2) where the element of knowledge is presumed to have been satisfied, but the Defendant retains the right to rebut that presumption, and (3) where the element of knowledge must be established by independent proof and no presumption applies. However, for practical purposes the first category is treated exactly the same as the second category due to constitutional limitations.

On its face, the first category seems to eliminate the need to prove the element of knowledge altogether if the State can establish that the Defendant (1) has been previously cited for a DWLS pursuant to F.S. 322.34(1),²³ (2) admitted knowledge of the suspension, or (3) the defendant *received notice*²⁴ [emphasis added] pursuant to F.S. §322.34(4). While many people would disagree with this interpretation, they would nevertheless agree with its practical effect. If the State presents evidence as to a previous citation, an admission, or actual notice, then a mandatory presumption of knowledge appears to be created by the plain reading of the clause “[t]he element of knowledge is satisfied if ...” However, a mandatory presumption violates due

process by relieving the prosecution of its burden of proving guilt beyond a reasonable doubt.²⁵ Therefore, the phrase “[t]he element of knowledge is satisfied if ...” must be interpreted to create a rebuttable presumption which would allow the jury to find the presumed element of knowledge once the State has established the predicate facts giving rise to the presumption, however the Defendant would always be free to rebut the presumption. Therefore, the practical effect makes the first category no different than the second category.

The second category creates a “rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in [F.S. §322.34(4)] appears in the department’s records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation.”²⁶ This second situation would occur where the State could not produce proof that the Defendant received actual notice²⁷ at the court or adjudicatory proceeding of his license suspension. In all likelihood this situation would arise where a Defendant license was suspended after a court or adjudicatory hearing and the Defendant was not told that his license would be suspended at the court or adjudicatory proceeding *and* [emphasis added] it was not in any court orders or papers that the Defendant signed for. If such a situation were to occur the Defendant would be presumed to know that his license was suspended and would need to present evidence on his behalf that he did not know of the suspension. This could be done in the form of the defendant’s own testimony, introduction of certified transcripts of the court or adjudicatory hearing supporting the lack of notice, introduction of the court minutes or order showing the absence of entry of the license suspension, or introduction of the traffic citation showing the absence of notice of the license suspension. Interestingly, a failure to appear for a court hearing would fall in this category because most uniform traffic citations have a disclaimer on the back that states that failure to appear for the

scheduled court date will result in the suspension of your license. However, the State would need to enter a copy of the citation into evidence to lay the proper predicate.

The final situation is where a Defendant's license was suspended for a failure to pay a traffic fine, a financial responsibility violation or some other issue un-addressed by the Statute. In these situations no presumption of knowledge applies and absent an admission it would seem almost impossible for the State to prove the Defendant had knowledge of his suspension. "In the absence of the presumption, the plain language [of F.S. §322.34(2)] requires the State to prove that the defendant *received* notice of the suspension."²⁸ It would seem that the only way the State could overcome this hurdle and prove that the defendant received notice of the suspension would be to send notice of suspensions by some form of certified courier.

While failure to pay a traffic fine is self-defining, Chapter 322 of the Florida Statutes is silent as to what constitutes a financial responsibility violation (FRV). Many attorneys seem to think that child support is an FRV, being that it is the ultimate form of a financial responsibility. Unfortunately the answer is clarified by Chapter 324 of the Florida Statutes (2001), which defines a Financial Responsibility as the amount and type of motor vehicle insurance a driver is required to carry in order to be licensed to drive in the State of Florida.

A reoccurring and seldom litigated issue is the relationship of Child Support suspensions and the element of knowledge, as they are not specifically addressed by F.S. §322.34(2) and to date no district court of appeal has issued a ruling analyzing their relationship. Consequently Child Support suspensions are one of the most confusing issues surrounding the defense of a DWLS and should therefore be approached with caution. Until a ruling is issued clarifying their relationship, Child Support suspensions will remain one the hardest issues to deal with in the defense of a DWLS.

Child Support suspensions are authorized by F.S. §322.058, in the case of a Title IV-D agency,²⁹ and F.S. §322.245(2), in a non Title IV-D case. Moreover, F.S. §61.13016 is a permissive statute and states that a person's license *may be suspended* if a person is delinquent in their child support obligation. It does not say that their license will be suspended if they become delinquent in their child support obligations. Because of the permissive nature of F.S. §61.13016 the State would need to provide a court or adjudicatory order showing that the Defendant's license was suspended *and* proof that the Defendant was present for the proceedings, or received notice of the proceedings rulings, in order prove that a person knew their license was suspended due to a child support delinquency. Moreover, at least one circuit court sitting in its appellate capacity concluded that "actual knowledge is required in order to prove a violation of Section 322.34(2)" where the license suspension is due to child support delinquency.³⁰

Also of importance in a child support related DWLS is whether the State should be able to rely solely on the child support suspension entry in the client's driving record as proof of the suspension. While the driving record is admissible under the public record's exception, the child support entry should not be, as the suspension request would have been made by either the Department of Revenue or the obligee of the child support. As previously discussed, the request should be treated as double hearsay unless a representative of the Department of Revenue or the obligee established the proper predicate to allow its independent admissibility. Therefore, unless the State can prove that the request was legally justified and correctly made, the subsequent suspension should be excluded.

PRIOR CONVICTIONS

Florida Statute §322.34(2) provides that a person charged with a DWLS upon (a) a first conviction is guilty of a misdemeanor of the second degree, (b) a second conviction is guilty of a

misdemeanor of the first degree, and (c) a third or subsequent conviction is guilty of a felony of the third degree. To qualify as a prior DWLS conviction under F.S. §322.34(2) for purposes of this enhancement scheme, the requisite DWLS convictions used by the State must have occurred after October of 1997.³¹ However, in *Raulerson v. State*, 763 So. 2d 285 (Fla. 2000) the Supreme Court of Florida defined both a withhold of adjudication of guilt and an adjudication of guilt as a conviction within the meaning of F.S. §322.34(2). Therefore a withhold of adjudication can be relied on by the State as a subsequent conviction for enhancement purposes.

While the State has the burden of proving prior convictions, the State also has the burden of alleging the prior convictions in the information in order to elevate the charge from a second-degree misdemeanor to either a first-degree misdemeanor or a third-degree felony.³² Unless they wish to charge the DWLS as a felony, the State almost never files an information and instead relies on the Uniform Traffic Citation (UTC) as the information.³³ When the State relies on the UTC as the information they are also relying on the officer to allege the necessary elements of a DWLS. If the UTC fails to allege the requisite prior convictions or the proper subsection of F.S. §322.34(2) and the State attorney will not negotiate an offer of less than 60 days jail or six months probation, an attorney could simply take the offer, allow the judge to *accept the plea*, wait for sentencing and at sentencing inform the judge that the State's recommended sentence exceeds the statutory maximum allowed for by the offense as charged in the *information*. However, this tactic should be used sparingly, as the State may simply adjust their procedures and file an information in every DWLS case.

ADMINISTRATIVE DISPOSITION

The administrative disposition³⁴ of a DWLS is probably one of the most underutilized and least understood options in disposing of a DWLS charge. Specifically, F.S. §318.14(10)(a)

allows a person to enter a plea of no contest to the clerk of the court if their license was suspended for failing to pay a fine, failure to appear or failure to display proof of insurance. The clerk is authorized to enter a withhold of adjudication if the client makes an election under F.S. §318.14(10) before their scheduled court date, shows compliance with the violation and presents a valid license. More importantly, F.S. §318.14(11) states that "if adjudication is withheld for any person charged or cited under this section, such action is not a conviction."³⁵ Therefore DMV cannot use a withhold of adjudication given under F.S. §318.14(11) as a conviction towards Habitual Traffic Offender status. Furthermore, a disposition of a DWLS under F.S. §318.14 acts to bar prosecution against a defendant based on the same DWLS,³⁶ even if it is a felony DWLS pending in circuit court. However, in order to qualify for the administrative disposition, the defendant's license can only be suspended for one of the reasons listed in F.S. §318.14 and the defendant can only make the election once every 12 months for a maximum of 3 times.

DRUG SUSPENSIONS

While knowledge of the drug suspensions statute, F.S. §322.055, is not needed to fight a DWLS, knowledge of the statute can help to prevent a future DWLS on the part of your client. Many attorneys seem to believe that if a person is convicted of a controlled substance offense their license *must* be suspended immediately and their client would be ineligible for a Business Purposes Only (BPO) license until completion of a DMV approved substance abuse education course. Fortunately this is not the case and in *State v. Litsch*, 664 So. 2d 25 (Fla. 4th DCA 1996) the Fourth District Court of Appeals found that while a judge cannot waive the completion of the substance abuse course altogether, F.S. §322.055(1) does allow a judge to authorize a BPO license before such conditions are met.³⁷ While a motion pursuant to this rule could always be

made after sentencing, a prudent attorney should make an oral motion at the time of sentencing asking the judge to authorize a BPO. This simple step could save your client legal trouble in the future.

CONCLUSION

While this discussion of the charge of DWLS was exhausting, it is by no means complete. The case law interpreting the statute is in constant flux and the cautious attorney will keep abreast of the new cases surrounding the charge of DWLS. As the legislature constantly makes the suspension of a client's license a penalty for a growing range of offenses unrelated to the ability to drive, the knowledgeable traffic attorney will become increasingly valuable. Moreover, while the ability to drive is described as a privilege by the Florida Legislature, it is in reality a necessity to the twenty-first century American and should be defended as such.

¹ For simplicities sake I will use the word suspended interchangeably with the words revocation, cancellation or disqualification unless a specific designation is needed.

² Florida Statute §322.34(2)

³ Charles W. Ehrhardt, Florida Evidence § 902.1 (2000 ed.)

⁴ See *Sylvester v. State*, 770 So. 2d 249 (Fla. 5th DCA 2000)

⁵ See generally Florida Statute §90.805.

⁶ See *State v. White*, 660 So. 2d 664 (Fla. 1995); *Bruno v. State*, 704 So. 2d 134 (Fla. 1st DCA)

⁷ See *Shadler v. State*, 761 So. 2d 279 (Fla. 2000)

⁸ See generally *Id.*

⁹ Florida Statute §322.03(1)

¹⁰ See *Bostick v. State*, 751 So. 2d 780 (Fla. 5th DCA 2000); *Florida v. Tucker* 761 So. 2d 1248 (Fla. 2d DCA 2000).

¹¹ *In re Florida Standard Jury Instructions in Criminal Cases*, 765 So. 2d 692 (Fla. 2000).

¹² Florida Statute §322.01(38)

¹³ Florida Statute §322.01(26)

¹⁴ See *Hinson v. State*, 710 So. 2d 678 (Fla. 1st DCA 1998)

¹⁵ See *State v. Riley*, 698 So. 2d 374 (Fla. 2nd DCA 1997)

¹⁶ See *Soto v. State*, 711 So. 2d 1275 (Fla. 4th DCA 1998); *But see State v. Riley*, 698 So. 2d 374 (Fla. 2nd DCA 1998)

¹⁷ *But see State v. Riley*, 698 So. 2d 374 (Fla. 2nd DCA 1997) for the proposition that if you stick a motor on a skateboard it becomes a Go-Ped and necessitates a driver license.

¹⁸ Interestingly, F.S. 322.34(1) uses the more expansive definition of vehicle, rather than the limiting definition of motor vehicle used in F.S. §322.34(2). Though ludicrous in thought, it would seem that a very bitter police officer could issue a civil DWLS to a person for riding a bicycle while their license is suspended.

¹⁹ See *Jones v. State*, 510 So. 2d 1147, 1149 (Fla. 1st DCA 1987); *But see State v. Botnton*, 556 So. 2d 428 (Fla. 4th DCA 1989).

²⁰ Meaning that the vehicle is not capable of self-propulsion.

²¹ Meaning that the vehicle is technically capable of self-propulsion, but is being towed due to a flat tire or some other cosmetic problem.

²² Florida Statute §322.34(2) states that “[t]he element of knowledge is satisfied if the person has been previously cited as provided in subsection (1); or the person admits to knowledge of the cancellation, suspension, or revocation; or the person received notice as provided in subsection (4). There shall be a rebuttable presumption that the knowledge requirement is satisfied if a judgment or order as provided in subsection (4) appears in the department’s records for any case except for one involving a suspension by the department for failure to pay a traffic fine or for a financial responsibility violation.”

²³ Presumably the State would also have to present evidence that the Defendant’s license was not reinstated between the date of the prior citation and the current pending charge.

²⁴ In order to meet this burden the State would have to provide a certified copy from the clerk of the court or from the adjudicatory body showing that the Defendant signed for a copy of a court order or adjudicatory judgment that suspended the Defendant’s license. This would seem to be the only manner in which the State could satisfy the element of knowledge of whether he received notice as provided in subsection F.S. 322.34(4).

²⁵ See generally *State v. Rolle*, 560 So. 2d 1154 (Fla. 1990)

²⁶ Florida Statute §322.34(2)

²⁷ Actual proof would likely be in the form of signed court documents indicating receipt of the order or disposition.

²⁸ *Brown v. State*, 764 So. 2d 741, 744 (Fla. 5th DCA 2000) “The State’s circumstantial evidence that appellant had knowledge of the suspension because notice of such was mailed to him simply was not inconsistent with the appellant’s theory that he never received the notice and had no knowledge of the suspension.”

²⁹ Florida Statute §§409.2554 and 409.2557 define the Florida Department of Revenue as the designated Title IV-D agency.

³⁰ See *State v. Orłowski*, 6 Fla. L. Weekly Supp. 792c (Fla. 14th Cir. 1999)

³¹ See *Huss v. State*, 771 So. 2d 591 (Fla. 1st DCA 2000)

³² See *Dixon v. State*, 8 Fla. L. Weekly Supp. 481 (Fla. 13th Cir. 2001); See also *State v. Haddix*, 668 So.2d 1064 (Fla. 4th DCA 1996) which held that “the charging document must allege the essential facts against which the defendant must defend” and that the “existence of three or more prior DUI convictions is an essential fact constituting the substantive offense of felony DUI, and therefore must be alleged in the charging document;” See also *Lewellen v. State*, 682 So. 2d 186 (Fla. 2nd DCA 1996) which held that it was “fundamental error to classify defendant’s petit theft as first-degree misdemeanor where information did not refer to any prior theft convictions, as required to elevate petit theft conviction to first-degree misdemeanor.”

³³ In *Hurley v. State*, 322 So. 2d 506 (Fla. 1975) the Supreme Court of Florida upheld the constitutionality of prosecuting a motorist by a traffic ticket as opposed to an information.

³⁴ Florida Statute §318.14(10)

³⁵ See also *Raulerson v. State*, 763 So. 2d 285 (Fla. 2000)

³⁶ See *Janos v. State*, 763 So. 2d 1094 (Fla. 4th DCA 1999)

³⁷ Florida Statute 322.055(1) states that “[...] the court may, in its sound discretion, direct the department to issue a license for driving privileges restricted to business or employment purposes only, as defined in s. 322.271, if the person is otherwise qualified for such a license.”