Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Duenas, 15-1059 (June 11, 2018)

Duenas appealed convictions for conspiring to exchange counterfeit currency and dealing in counterfeit currency. He argued on appeal that the evidence was insufficient because the "government failed to prove he knew the transaction involved counterfeit United States currency." The Eleventh Circuit disagreed and affirmed.

In reaching this conclusion the Court discussed and applied to the facts of the case the "prudent smuggler doctrine," which reasons "that because 'a prudent smuggler is not likely to suffer the presence of unaffiliated bystanders,' when the orchestrator of a conspiracy vests substantial trust in an associate to contribute to the scheme, a jury may infer the associate's knowing participation."

Facts which the Court deemed significant included: "Duenas had ample opportunity to discover that he was dealing in counterfeit money" – this included dozens of phone calls with a collaborator and additional time that they spent together; Duenas demonstrated "awareness of the transaction's unlawful nature" – he texted a girlfriend "that he was 'going to do a special work,' which he suggested would be lucrative for him," and the response he received, "'Good luck. God protect you and guide you,'" implied "knowing assumption of a palpable risk." Duenas further participated by carrying and displaying his $5,000 courier fee, and, during a part of the transaction, urged an undercover detective to "count the $5,000 'faster.'"

Lastly, "under the prudent smuggler doctrine, the jury in this case could reasonably infer that Cabeza would not entrust Cobena Duenas to close a deal for $632,000 in counterfeit currency without telling Cobena Duenas not only that he was buying counterfeit currency but also how much he was to receive in exchange for $5,000 in non-counterfeit currency. Without Cobena Duenas knowing that he was buying that much counterfeit currency, the sellers could have ripped off Cabeza and deprived him of the full benefit of his bargain."

First District Court of Appeal

Mock v. State, 1D16-2038, et al. (June 8, 2018)

The First District agreed with the defendant's claim that sentences imposed on multiple offenses after a plea agreement resulted in a double jeopardy violation.

Plea negotiations, including involvement by the trial court, took place over several months and entailed changes in counsel for both the defense and prosecution. The significant fact was that the agreement called for concurrent sentences for all counts to which the defendant was entering the plea. Ultimately, the judge imposed one of the sentences consecutive to the others, resulting in sentences of 10 plus five years. On a motion to correct sentence, the judge then imposed concurrent sentences of 15 years, stating that it had always been the intent of the court to impose the total of up to 15 years. The sentences at issue in this appeal had thus been increased by five years.

The First District rejected the State's argument that the defendant waived any double jeopardy violation. The State further argued that there was no double jeopardy violation because the defendant had no expectation of finality in his sentences. This was predicated on defense counsel's alleged misrepresentation of facts to the trial court when counsel "failed to correct the trial court's error concerning the terms of his plea agreement." The Court rejected the State's argument:

> The only possible information the appellant could have withheld from the trial court was his knowledge of the trial court's misunderstanding about the plea agreement. In order for this Court to find that the appellant withheld this knowledge, this Court has to know that the appellant possessed this knowledge. There are multiple instances in which the trial court stated that the State had agreed to run the minimum mandatory sentences concurrently. Those statements can be interpreted as containing the entirety of the trial court's understanding of the plea, or as the trial court emphasizing that specific portion of the plea agreement because that portion required the trial court to sentence the appellant to at least ten years in prison. Because the trial court's statements can be interpreted differently, this Court cannot assume that the appellant

possessed the knowledge that the trial court was confused about the plea agreement.

Jacobson v. State, 1D17-774 (June 8, 2018)

The defendant appealed a conviction for second-degree murder and argued that the State failed to prove that he acted with "ill will, hatred, spite or evil intent and that the shooting was an accident." The First District disagreed and affirmed the conviction.

Jacobson had been purchasing marijuana from the victim, Edwards, but Edwards cut off the supply when Jacobson fell behind in payments for the marijuana. Jacobson subsequently made statements about preparing for a robbery, and later that day, he was smoking marijuana with others, when they ran out. He said that he was going to go to his supplier, Edwards, to get some more in exchange for a sawed-off shotgun that he was bringing with him. After Jacobson arrived at Edwards's apartment, Edwards was shot in the face at close range with the same shotgun that Jacobson brought. Jacobson did not call 911 for assistance and proceeded to ransack the apartment, taking marijuana and several other items belonging to Edwards. Jacobson later made statements to his acquaintances, saying that the shooting was an accident that occurred when he pulled the shotgun from its bag.

The First District emphasized that Jacobson was in desperate financial straits, that he made prior plans to commit a robbery hours before the shooting, and that Edwards had previously told him that he would not sell any more marijuana until the prior debt of $250 was paid. Additionally, he failed to call 911 for assistance and the ransacked the apartment and stole several items. He subsequently attempted to intimidate his own girlfriend, with whom he had been using the marijuana and who was aware that Jacobson was going to Edwards' apartment with the shotgun. He threatened to kill her, while making statements to the effect that that would help him get away with the prior shooting. The Court treated this statement as an admission that Jacobson shot Edwards intentionally.

Williams v. State, 1D17-1347 (June 8, 2018)

Williams appealed a conviction for attempted second-degree murder and argued that the evidence was insufficient to prove that he acted with ill will, hatred, spite or evil intent. The First District disagreed and affirmed the conviction and sentence.

Williams and Chandler knew each other and had been friends. Williams enlisted Chandler to help him purchase a new firearm and ammunition. The accounts of the two men differed significantly, but both led to some kind of disagreement or argument resulting from either the effort to purchase ammunition or from the alleged disappearance of the new gun. Williams argued that even accepting the State's evidence in the light most favorable to the State, Williams, at most, overreacted to his observation of Chandler fidgeting while inside a vehicle. The First District explained its conclusion as to the sufficiency of the evidence:

> In this case, the evidence – taken in a light most favorable to the State – showed that Appellant decided ahead of time to arm himself because, in his experience, any good will behind firearm deals could easily dissolve into distrust, or worse. From this it is reasonable to assume that Appellant was suspicious and primed for a fight even before he left with Chandler. Next, once at Walmart [for the purchase of ammunition after the new firearm had been purchased elsewhere], when Appellant claimed he noticed the gun he had allegedly purchased was missing from his book bag, his suspicion caused him to assume that Chandler was the culprit. Chandler testified that once they returned to Appellant's house, Appellant became increasingly hostile. At that point, the jury could have found that Appellant bore a distinct grudge against Chandler. That grudge, or sense of "enmity," intensified once a search of Chandler's car did not produce the gun.
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> In addition, Appellant admitted to Investigator Tatum that he had been upset over the earlier theft of his dirt bike and that he had not wanted to suffer anymore "losses" – . . . . Thus, the most reasonable view of the evidence taken in a light favorable to the State, establishes that when Appellant walked around to the driver's side of the car and shot Chandler, sufficient ill will, hatred, spite, or evil intent had already taken root in Appellant's mind.

Pope v. State, 1D17-2487 (June 8, 2018)

The 911 Good Samaritan Act, section 893.21(1), Florida Statutes, provides that anyone "'acting in good faith who seeks medical assistance for an individual

experiencing a drug-related overdose' is immune from prosecution for drug possession if the evidence 'was obtained as a result of the person's seeking medical assistance." In this case, Pope sought medical help for a woman overdosing on heroin. When authorities arrived at Pope's residence in response to the 911 call, drugs were found in Pope's residence. The issue in this case was whether Pope acted in "good faith" under the statute and was therefore entitled to immunity from prosecution.

It was undisputed that Pope contacted 911 for medical assistance of the woman and that the evidence of drug possession resulted from that 911 call. Subsequent to the 911 call, Pope tried to hide the heroin and, according to the State, did not do as much as he could have to assist the woman. Pope, however, was still entitled to immunity and satisfied the good faith requirement of the statute: "Regardless of whether Pope should have behaved better, his purpose in contacting 911 was to save his friend. That was a good-faith purpose. Under a plain reading of the 911 Good Samaritan Act, we conclude Pope was '[a] person acting in good faith who [sought] medical assistance.'" He was therefore entitled to immunity from prosecution for the possession of the drugs that were found in his residence.

McCloud v. State, 1D17-4167 (June 8, 2018)

McCloud's probation was properly revoked on the basis of new law violations committed while on probation. The new law violations were for convictions for attempted manslaughter. The affidavit of violation of probation had specified two counts of attempted murder. McCloud therefore argued that the attempted manslaughter convictions were not charged in the affidavit of violation or probation and could not serve as the basis for the revocation of probation. The First District disagreed. The convictions for attempted manslaughter were necessarily lesser-included offenses of the original attempted murder charges and therefore served as a proper basis for violating probation based on a new law violation, even though the affidavit did not specify attempted manslaughter.

Hawthorne v. State, 1D16-3793 (June 13, 2018)

Hawthorne appealed from a conviction for driving under the influence causing death and other charges arising out of a traffic accident. An expert for the State testified that the defendant was driving approximately 79 miles per hour when he drove into the victims' car. The First District affirmed the conviction and addressed three evidentiary issues, including one arising under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

First, there was no abuse of discretion in allowing the State's expert to testify on the basis of hypothetical questions posed by the prosecution. This qualified as expert testimony and was not "pure opinion" testimony. The "expert witness relied on ample data – 'more than a century' of medical data and observation – regarding the impact of methamphetamine on human beings; thus, the first statutory factor was met. Further, the expert witness' opinion was based on sufficient facts or data, as the blood tests, crash data, lay testimony and other evidence provided that foundation. Thus, the third statutory factor was met, in our view." Finally, the testimony satisfied the second statutory factor, that it was the "product of reliable principles and methods." "Dr. Goldberger testified that his methodology of determining whether a set of facts was consistent with methamphetamine impairment was commonly accepted in his field, and testified that his method was based on published studies by him and other professionals in his field, and at trial he applied those methods to the facts of this case."

In the second evidentiary issue, the First District found that evidence of "Appellant's release from jail twelve hours before the accident was relevant to prove a material fact – that he recently ingested methamphetamine and was impaired when he ran into the victim's car at a high rate of speed."

In the final issue, the Court found that "evidence of [the defendant's] driving record, which contained multiple license suspensions," was relevant to proving that "he knowingly drove without a license on the day of the accident."

Brutus v. State, 1D16-4144 (June 13, 2018)

Brutus appealed multiple convictions for armed robbery and armed burglary and argued that the trial court erred in denying a motion to suppress photos found on an iPod. Brutus argued that a reference in a search warrant to an "Apple iPod" was too general and should have included the color, model or other defining characteristics of the device. The First District affirmed the convictions without reaching the merits of this issue, based on its conclusion that any error was harmless.

Graham v. State, 1D17-0938 (June 13, 2018)

After Graham was found incompetent to proceed to trial, a new psychological evaluation concluded that he was now competent and the case proceeded to trial. The First District remanded for further competency proceedings because the record

did not include any written order or transcript reflecting that the trial court made an independent determination that the defendant was competent.

Foster v. State, 1D17-3819 (June 13, 2018)

Foster appealed a conviction for possession of marijuana and challenged the seizure of nine pounds of marijuana that were found in the common area of her residence. Officers entered the residence to serve arrest warrants on two brothers whom the officers believed to be staying at that residence. The belief that the two brothers were present at that residence authorized the entry of the officers into the residence and the marijuana was thereafter discovered pursuant to a valid protective sweep. [The opinion of the Court does not include additional facts.].

Third District Court of Appeal

Jackson v. State, 3D16-2371 (June 13, 2018)

The Third District affirmed convictions for trespass and misdemeanor battery, both of which were lesser included offenses of the original charges presented to the jury. The Court found that arguments made by the prosecutor were not improper "golden rule" arguments and were relevant to the evidence and were made in fair response to the defense's trial theory.

The theory of the defense was that the incident in question did not even happen, as there were no visible injuries on the victim which would be consistent with her testimony. The prosecutor then argued as follows:

> But now the defense is trying to say that at the end part of all this beating, after it all takes places because there's certain things she said – that the Rescue gave her an ice pack instead of cleaning her up. Oh, she wasn't bleeding; she was lying.
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> Think about what state of mind she's in. You heard the officer. He said trying communicating with her, and she was hyperventilating like she couldn't breathe. She was having a hard time.
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> Think about the state of mind she's in at that point in time that all these questions were asked to her. What

> happened? What happened? And she's trying to deal with her own health issues while trying to interact with police.

In finding that there was no golden rule violation, the Court stated: "The State's closing arguments did not ask or invite the jurors to place themselves in the shoes of the victim to imagine her pain and suffering. Rather, the State pointed to the trial testimony and other evidence in an effort to rebut the defense theory (as argued in the defense closing) that the incident did not even happen, or at least did not happen in the manner and to the extent contended by the State." The State's arguments further went to the credibility of the victim and supported the "State's contention that any inconsistencies between the victim's statements on the scene and her trial testimony could be explained by the victim's mental and physical state at the time she first spoke with Officer Michel."

Fourth District Court of Appeal

Exantus v. State, 4D16-3937, et al. (June 13, 2018)

On appeal from a revocation of probation, Exantus argued, the State conceded, and the Fourth District agreed, that the trial court erred by failing to sentence him as a youthful offender. "Even if a youthful offender commits a substantive violation of probation, a 'court must maintain the defendant's youthful offender status upon resentencing for a violation of probation.'"

Edwards v. State, 4D16-3965 (June 13, 2018)

Edwards was convicted for the offense of aggravated battery. At trial, he argued that he was acting in self-defense during a fight with the alleged victim. The Fourth District reversed because the trial court erred in admitting testimony from a detective, who testified that, "based on his training and experience in conducting interviews, certain body language and mannerisms [of Edwards during a post-arrest interview] indicate deception." This was an "inadmissible opinion on credibility and invaded the province of the jury."

The Fourth District first stated the general principle that a "'witness' opinion as to the credibility, guilt, or innocence of the accused is inadmissible." Next, "[i]t is also improper for a prosecutor to advise the jury to apply an officer's lay testimony on the topic of body language in evaluating the defendant's credibility." "A jury ordinarily needs no assistance in deciding whether a particular witness or defendant is to be believed." The problem in this case was exacerbated when, "[i]mmediately

thereafter, the jury saw an interrogation video in which appellant exhibited those exact mannerisms. Thus, the effect of the detective' testimony was to offer a back door opinion as to appellant's credibility." Furthermore, it was irrelevant whether the opinion of the detective was characterized as lay opinion or expert opinion; it was irrelevant in either event and improperly invaded the province of the jury.

Palmer v. State, 4D17-72 (June 13, 2018)

Dual convictions for armed carjacking and grand theft auto were barred by double jeopardy principles. Grand theft of a motor vehicle is a lesser included offense of carjacking. "While the police found the defendant with the vehicle two days after the carjacking occurred, the defendant only took **one** vehicle on **one** occasion." Thus, the charges resulted from a single act and could not support multiple convictions for distinct acts.

Augustin v. State, 4D17-685 (June 13, 2018)

After the defendant was evaluated for competency upon motion of defense counsel, evaluations were done and defense counsel "'notified all parties that they are formally moving to withdraw their motion to evaluate the Defendant for competency to proceed.'" There was no motion to withdraw in the record and the trial court did not appear to have held a competency hearing or entered a written order as to competency to proceed. The case was therefore reversed and remanded for, if possible, a nunc pro tunc determination of competency, or, failing that, for vacating the conviction and sentence and a new trial (after the defendant is found competent).

The trial court was also found to have erred in giving a heat of passion instruction where the evidence did not support it. The defendant was charged with premeditated murder and found guilty of second degree murder. The Fourth District could not "see how the defendant was prejudiced by the inclusion of the heat of passion instruction. The state argued that this was a case of premeditated murder and told the jury 'this is not a heat of passion case.' Defense counsel argued that the stabbing was an 'impulsive act done by a teenager in a heated moment with no real motive,' and 'not an act done upon reflection.' If the giving of the instruction muddied the waters, it was to the defendant's benefit. However, if there is a retrial in this case, the instruction should not be given."

Brewster v. State, 4D17-1980 (June 13, 2018)

Eight years after one of the defendant's three convictions (which were all part of a negotiated plea) was vacated, the defendant sought restitution pursuant to the Wrongful Conviction Act. The Fourth District agreed with the trial court that the motion was untimely filed, as section 916.03, Florida Statutes, requires the motion to be filed within 90 days of the vacating of the conviction.

The Court further rejected the argument that the defendant was entitled to the retroactive application of the decision of the United States Supreme Court in Nelson v. Colorado, 137 S.Ct. 1249 (2017). In that case, the Supreme Court held that a state could not require a defendant to prove actual innocence in order to secure return of property. "'To comport with due process, a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated.'" The Fourth District analyzed the question of whether Nelson applied retroactively under the framework of Witt v. State, 387 So. 2d 922 (Fla. 1980), and set forth the reasons why Nelson was not such a "major jurisdictional upheaval in the law" so as to require retroactive application. Rather, Nelson was viewed as "an evolutionary refinement of the law, not a major jurisdictional upheaval." Additionally, the 90-day time limit for filing the motion for restitution was deemed to qualify as part of the "minimal procedures" that the Supreme Court authorized as a matter of due process.

Carter v. State, 4D17-2485 (June 13, 2018)

The Fourth District reversed a trial court's third sentencing order issued upon revocation of probation. The trial court lacked jurisdiction to enter that order.

The original sentencing order provided for 72 months imprisonment and credit for 790 days previously served. The second order, entered 12 days later, increased the imprisonment to 84 months. The defendant, without filing any motion to correct sentence, immediately appealed the second order on double jeopardy grounds. While that appeal was pending, the trial court entered a third order, reinstating the original 72 months, but decreasing the credit from 790 days to 471 days.

The second order was affirmed because the alleged sentencing error was not preserved by any motion to correct sentencing error. The trial court lacked jurisdiction to enter the third order due to the pending appeal. The third order was

therefore reversed, and the second was affirmed without prejudice to the defendant's right to raise the double jeopardy issue in the trial court.

Thomas v. State, 4D17-3742 (June 13, 2018)

Thomas appealed a sentencing order entered upon revocation of probation. Although the sentencing order failed to continue the prior youthful offender status, that claim could not be asserted on appeal because the defendant did not preserve the issue in the trial court either by objecting to the sentence when issued or by filing a motion to correct sentence under Rule 3.800(b) during the pendency of the appeal and prior to the filing of the brief of appellant.

Lopez v. State, 4D18-725 (June 13, 2018)

The trial court erred in granting, in part, a Rule 3.801 motion for credit for prior jail time. The motion should have been denied as facially insufficient where it did not state "all of the dates and location of incarceration, whether any other criminal charges were pending at the time of these incarceration periods, and if so, the location, case number and resolution of the charges. More importantly, the defendant's motion refers to various 'V.O.P. holds' without explanation of whether he was served with the VOP warrant for this case while incarcerated in another county. The defendant would not be entitled to jail credit for this case while incarcerated in another county if there was merely a 'V.O.P. hold,' i.e., a detainer, for this case without being served with the VOP warrant for this case."

Fifth District Court of Appeal

State v. Hollinger, 5D17-1996 (June 15, 2018)

The State appealed a downward departure sentence and the Fifth District reversed. The defendant was sentenced for second-degree grand theft ($20,000 - $100,000), 12 counts of depositing a check with intent to defraud and eight counts of uttering a forged instrument. The downward departure was granted based on the trial court's finding that the offenses were committed in an unsophisticated manner and constituted an isolated incident for which the defendant has shown remorse. The departure reason was not supported by substantial, competent evidence.

Hollinger was the victim's business office manager and engaged in a scheme whereby she wrote and obtained signatures from her bosses and then deposited them

in her personal bank account. She ultimately stole more than $50,000 over a period of several months.

The trial court found that the crimes were committed in an unsophisticated manner because the defendant took no measures to "protect herself or to hide her actions or identity." The Fifth District did not find this to suffice: "In the instant case, the victim did not accidentally deposit the money into Hollinger's bank account. Instead, for several months Hollinger used her position of trust with the company to repeatedly obtain signatures on fraudulent checks in order to take the money for her own use. This certainly involved several distinctive and deliberate steps that she repeated on numerous occasions. Although Hollinger may not have taken elaborate steps to hide her actions, the victim impact statement indicated that she made some effort to conceal her actions by taking the checkbook and copies of the cleared checks with her."

Next, the crimes here did not constitute an "isolated incident." While there is no bright-line rule as to this element of the departure reason, the fact that the defendant lacked a prior criminal history does not suffice in and of itself. The Fifth District distinguished two of its own prior decisions with factual similarities because this case entailed a span of several months as opposed to a span of several days in the earlier cases.

Ronchi v. State, et al., 5D18-194 (June 15, 2018)

A Catholic priest sought certiorari review of an order requiring him to "testify in a criminal case regarding certain communications that took place during the Sacrament of Reconciliation (commonly referred to as 'Confession')." The Fifth District granted the petition as the trial court's order "contravenes Florida's Religious Freedom Restoration Act."

In this case, the State was prosecuting Burton for multiple sex offense charges. The alleged victim was a minor at the time of the offenses and allegedly made statements to Ronchi during confession. The trial court arguments proceeded with respect to the issue of whether the privilege as to those statements was waived under section 90.505, Florida Statutes. At an evidentiary hearing, a friend of the victim's mother testified that she was privy to a conversation with the mother and Ronchi in which Ronchi disclosed the fact that the victim had made statements to him about the conduct of Burton. The mother also testified, but her testimony was ambiguous as to this, stating that nothing explicit was said, but that it could be inferred from the conversation. Ronchi did not testify.

The Fifth District, however, found that the case was controlled by the FRFRA rather than section 90.505. Under the FRFRA, the state had a compelling interest in prosecuting sex offenses committed on minor victims. However, the Court disagreed with the State's contention that coercing Ronchi to testify would be the least restrictive means to further that compelling interest. Ronchi was, at most, a witness to evidence that would come in as child hearsay; he was not an observer as to any offense himself. Second, the child victim was now an adult and was capable of testifying. "Third, pursuant to section 90.803(23), the State could seek to have the alleged victim testify as to her purported prior disclosure of sexual abuse to Ronchi."