Case Law Update
June 25, 2018
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Supreme Court of the United States

Lozman v. Riviera Beach, 17-21 (June 18, 2018)

Lozman argued "that high-level city policymakers adopted a plan to retaliate against him for protected speech and then ordered his arrest when he attempted to make remarks during the public-comment portion of a city council meeting." While he originally challenged the legality of the arrest, in the Supreme Court he conceded that probable cause for the arrest existed. "The question here is whether the presence of probable cause bars petitioner's retaliatory arrest claim under these circumstances." The arrest related to Lozman's failure "to depart the podium after receiving a lawful order to leave." In a 1983 action, he argued that "notwithstanding the presence of probable cause, his arrest at the city council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open-meeting lawsuit and his prior public criticisms of city officials."

The Supreme Court held that the absence of probable cause under the facts of this case did not bar the First Amendment retaliation claim. "[W]hen retaliation against protected speech is elevated to the level of official policy, there is a compelling need for adequate avenues of redress."

In this case, the jury had been instructed that Lozman had to prove the absence of probable cause for the arrest. On appeal, the Eleventh Circuit assumed that that was incorrect but affirmed the verdict for the city due to the existence of probable cause. The Supreme Court remanded the case to the Eleventh Circuit for further consideration of other matters, including "(1) whether any reasonable juror could find that the City actually formed a retaliatory policy to intimidate Lozman during its June 2006 closed-door session; (2) whether any reasonable juror could find that the November 2006 arrest constituted an official act by the City; and (3) whether . . . the City has proved that it would have arrested Lozman regardless of any retaliatory animus -for example, if Lozman's conduct during prior city council meetings had also violated rules as to proper subjects of discussion, thus explaining his arrest here."

Currier v. Virginia, 16-1348 (June 22, 2018)

Currier was indicted on charges of burglary, grand theft, and possession of a firearm by a convicted felon. Due to concerns about the introduction of evidence of prior convictions, the parties agreed to sever the burglary and theft charges from the firearm possession charge. The burglary and theft charges proceeded to trial first, and Currier was acquitted. He then objected to the firearm possession charge proceeding to trial on double jeopardy grounds. The state court ruled against him and he was convicted on that charge. He alternatively sought to preclude the jury in the second trial from reconsidering any matters as to which he was acquitted at the first trial.

At the first trial, the prosecution presented evidence of Currier's involvement in the burglary and theft from two witnesses; Currier's defense challenged the credibility of those witnesses.

The Supreme Court addressed the collateral estoppel doctrine of Ashe v. Swenson, but found the facts of this case to be distinguishable. "Even assuming without deciding that Mr. Currier's second trial qualified as a retrial of the same offense under *Ashe*, he consented to it. Nor does anyone doubt that trying all three trials in one trial would have prevented any possible *Ashe* complaint Mr. Currier might have had."

Carpenter v. United States, 16-402 (June 22, 2018)

In this case, the Supreme Court held that government acquisition of "cell-site" records was a search under the Fourth Amendment for which a warrant predicated on probable cause was required. Reliance by the government on the Stored Communications Act, which required a demonstration only of reasonable grounds to believe the records were relevant and material to an ongoing criminal investigation was not sufficient.

The cell-site date provided the government with evidence of 12,898 location points reflecting where Carpenter had been, and this evidence was subsequently used at a criminal trial to show that Carpenter's phone was near the locations of four robberies at the times of those robberies.

Eleventh Circuit Court of Appeals

United States v. Johnson, 16-15690 (June 19, 2018)

The Court, in its order of June 19th, vacated the Court's prior opinion dated March 12, 2018, and granted rehearing en banc. The Court's panel opinion of March 22, 2018, addressed the issue of "whether the pat down of a burglary suspect and the identification of a round of ammunition in the suspect's pocket constitutionally allowed the officer to retrieve the round and another item from the suspect's pocket." After reviewing the totality of the facts, the panel opinion had concluded that the pat down of the suspect was proper, but "the presence of a single round of ammunition – without facts supporting the presence, or reasonable expectation of the presence, of a firearm – was insufficient to justify the seizure of the bullet and the holster from Mr. Johnson's pocket."

First District Court of Appeal

West v. State, 1D16-5379 (June 20, 2018)

Section 938.08, Florida Statutes, requires the imposition of a $201 domestic-violence-related surcharge. The trial court's imposition of a charge of $151 under that statutory provision was unauthorized. The State argued on appeal that the court was authorized to "levy an optional fine for causing injury to another person," but the trial court did not purport to rely on that statutory provision and did not make findings to support it.

Gonzalez v. State, 1D16-4926 (June 22, 2018)

Gonzalez was convicted of two counts of capital sexual battery. In subsequent proceedings on a 3.850 motion, with an evidentiary hearing, the trial court found, that counsel was deficient in representing Gonzalez, but that Gonzalez failed to prove that the deficient conduct probably affected the outcome of the trial. The First District agreed that there was no prejudice but did not make any finding as to whether it agreed with the finding as to counsel's deficiency.

Trial counsel did not take depositions of key witnesses and therefore failed to discover that an officer illegally entered the defendant's home without a warrant; the officer, at trial, testified as to matters observed within the residence. The trial court also found that even if counsel was deficient as to two other matters regarding

additional DNA testing and potential testimony by another witness about sexual contact with the defendant, prejudice was not established.

The First District's agreement as to the lack of prejudice was based on the following factors:

> This is not a case where a victim delayed in reporting her victimization for years (which is not uncommon), or where there is no expert testimony confirming that sexual abuse likely occurred. Rather, this is a case where the young child let her mother know immediately that something very wrong had occurred. The child knew the difference between "good" and "bad" touches, the mother confirmed signs of sexual abuse immediately, and those observations were promptly confirmed by an Advanced Nurse Practitioner who was an expert in physical symptoms of child sexual abuse.

Smith v. State, 1D17-717 (June 22, 2018)

The First District affirmed the trial court's summary denial of a pro se motion to withdraw plea under Rule 3.170(l). The motion alleged that the defendant scored 19.3 months for a sentence and his attorney failed to inform him that he would receive a three-year prison sentence.

> Here, nothing in the record shows that Appellant's counsel withdrew before the court considered his motion, "so he was not 'completely denied representation and assistance with regard to his motion to withdraw plea.'" [citation omitted]. As in *Flemming*, the court here conducted an extensive colloquy, where Appellant stated that he understood that he did not know what his sentence would be, that the charges against him carried a maximum sentence of five years, and, based his scoresheet [sic], he faced a minimum of 19 months in prison. Therefore, Appellant's allegations that he was misadvised that he might receive a three-year prison sentence are conclusively refuted by the record.

Thus, Appellant was not entitled to an evidentiary hearing.

Second District Court of Appeal

McClelland v. State, 2D15-3762 (June 20, 2018)

McClelland appealed multiple convictions – two counts of sexual battery, six counts of lewd molestation, battery on a child, 60 counts of possession of child pornography, and an offense against computer users.

He argued on appeal that "his Fourth Amendment rights were violated when an officer used a Yagi antenna to locate and identify signals emanating from his computer which was located inside his motorhome." "'This type of antenna is a 'highly directional and selective shortwave antenna.'" There was no dispute that the defendant was using a similar type of antenna for internet access. The Second District affirmed the convictions based on its conclusion that the defendant lacked a subjective expectation of privacy.

During an investigation regarding child pornography, officers were led to a residence and the devices within it. Those devices did not result in the discovery of any child pornography. The officers learned that the network used in that residence was not protected and could be used by others outside the residence. They then obtained permission to set up a computer in that residence to allow them to monitor the Wi-Fi network. They then used the Yagi antenna from outside the residence to "determine where the signal that was broadcasting the MAC address was physically located." This led them to McClelland's motorhome which was parked close to the residence. "While performing the signal strength test, the detectives did not enter onto McClelland's property. Once the detectives determined that the signal was emanating from within McClelland's motorhome, they obtained a search warrant. During a search of the motorhome, images of child pornography were located on McClelland's computer, and McClelland made several statements and admissions."

McClelland lacked a reasonable expectation of privacy regarding the monitoring of the computer signals through the Yagi antenna:

> Rather, McClelland was illegally accessing (i.e., stealing) a third-party's Wi-Fi network by attaching an antenna similar to the one used by the detectives to his motorhome in order to capture the Wi-Fi signal and thereafter connecting his computer to the stolen Wi-Fi signal. By illegally accessing the Wi-Fi network, he was

> able to hide his identity while downloading the child pornography.

State v. Kwitowski, 2D17-0757 (June 20, 2018)

The defendant was charged with three counts of perjury under section 837.02(2), Florida Statutes, which applies to perjury in "an official proceeding related to the prosecution of a capital felony." The defendant was alleged to have committed perjury in a prosecution for capital sexual battery. The trial court granted a motion to dismiss the perjury charges, finding that capital sexual battery was not a capital felony since the sentence of death could not be imposed. The Second District reversed the order of dismissal.

Although the sentence of death could no longer be imposed for capital sexual battery, the phrase "capital felony" "unambiguously refers to an offense that the legislature has by statute classified as a capital felony without regard to whether the death penalty may constitutionally be imposed for an offense so classified."

Holt v. Keetley and State, 2D17-2157 (June 20, 2018)

In a first-degree murder prosecution, the defendant was represented by private counsel. Private counsel engaged in several efforts to obtain the appointment of the Office of the Public Defender as additional counsel for penalty-phase proceedings, and, after several denials of the request, the trial court eventually granted the request. The Office of the Public Defender did not participate in the proceedings that resulted in the written order of its appointment. It filed a motion for reconsideration, based on the premise that its office could not be appointed as co-counsel where a defendant was already represented by other counsel. That motion was denied, but it did not result in a written order. The Public Defender then sought certiorari review, which the Second District denied.

First, the order on motion for reconsideration could not be reviewed in certiorari proceedings because it was not a written order. Second, as to the prior order granting the appointment of the Public Defender, the Public Defender did not preserve the arguments it was asserting in the appellate court due to its non-appearance. Similarly, the State, which supported the Public Defender's position in the Second District, did not assert any arguments in the trial court and its arguments, as well, could not be raised for the first time in the certiorari proceeding.

Last, even if the Second District reached the argument of the certiorari petition, the Public Defender would not prevail. Its office had initially been appointed to represent the defendant before private counsel, paid by the defendant's parents, appeared. The Public Defender had also represented the defendant in a prior certiorari proceeding in the Second District. The Public Defender "did not dispute that she routinely assigns two attorneys to represent an indigent defendant facing the death penalty, while here she had been ordered to assign only one." "And although plainly on notice of Keetley's renewed motion for appointment of penalty-phase counsel, she did not object to it until after she had been appointed. Under these circumstances, we would be hard-pressed to hold that her appointment as cocounsel will result in material injury so as to invoke this court's certiorari jurisdiction."

Third District Court of Appeal

Hernandez v. State, 3D16-2684 (June 20, 2018)

The trial court "committed fundamental error in its determination of Hernandez's competency to proceed," as it "failed to make an independent assessment and independent finding of Hernandez's competency." The Third District therefore reversed and remanded "for the trial court to hold a hearing in an effort to make a retrospective determination of Hernandez's competency at the time of trial."

At the competency hearing in this case, the parties stipulated to the expert's written report, no evidence was introduced, and the parties agreed that, "if called to testify at the hearing, the expert would testify consistently with his report." The judge then stated: "All right. So we'll make that finding at this time."

Bruce v. State, 3D17-1436 (June 20, 2018)

In 1972, Bruce, a juvenile at the time of his offenses, was convicted and sentenced to life with the possibility of parole for non-homicide offenses. In April 2017, he sought a new sentencing hearing based on the imposition of his life sentence as a juvenile.

Relying on four prior district court of appeal decisions, the Third District affirmed the trial court's denial of relief because Bruce had, in fact, been released on parole in 2016 and was still at liberty.

The Third District rejected the defendant's request to place his case "in the pipeline" for Florida Supreme Court review based on the status of the earlier district court of appeal decisions. The Third District noted that the Florida Supreme Court had declined to accept jurisdiction in two of the cited cases.

Bertonatti v. State, 3D17-1647 (June 20, 2018)

The Third District affirmed the summary denial of a Rule 3.850 motion in which the defendant asserted that counsel was ineffective with respect to Bertonatti's acceptance of a guilty plea. The defendant "failed to demonstrate a reasonable probability that, but for the claimed errors, he would not have pled guilty and would have insisted on going to trial."

The defendant asserted three claims of ineffective assistance – failure to inform him that the guilty plea would result in a waiver of the right to seek postconviction DNA testing of blood samples taken from him; failure to have DNA testing of the blood samples; and failure to inform the court that DNA testing would have established the possibility of exoneration.

The record, quoted in the Court's opinion, "establish[ed] that when Bertonatti entered his plea, he was fully aware that he was giving up his right to have his blood DNA tested and to require the State to prove the accuracy and reliability of the toxicology results." As to the failure to obtain DNA testing, the Third District noted that the evidence, "even without the blood alcohol evidence, was overwhelming" as to the offense of DUI manslaughter failing to render aid. The Court further emphasized that Bertonatti's plea obtained for him the additional benefit of the State's nolle prosse of the additional charge of leaving the scene of an accident involving death, and that charge would have gone to the jury as an alternative possibility for conviction had the defendant rejected the plea offer.

Stone v. State, 3D18-278 (June 20, 2018)

The Third District reversed an upward departure sentence where the defendant's scoresheet reflected only 22 sentencing points. The court "impermissibly relied on Stone's apparent lack of remorse at sentencing." The resentencing was ordered to be conducted by a different judge.

Fourth District Court of Appeal

Strong v. State, 4D16-4226 (June 20, 2018)

The defendant was sentenced after an open plea to the court. The Fourth District reversed for a new sentencing hearing because the trial court considered crimes for which the defendant had not been arrested or charged and for which there was no evidence of his involvement. The State had presented evidence of other similar burglaries to those for which the defendant was being sentenced, but those other burglaries were not tied to the defendant. The factors which the court may consider at sentencing "are limited to the defendant's involvement in the current charges or the defendant's prior arrests or convictions, not the charges against other persons with whom the defendant may or may not have been associated." The resentencing was ordered to be conducted by a different judge.

Fifth District Court of Appeal

Sloan v. State, 5D17-1882 (June 22, 2018)

A conviction for possession of burglary tools was reversed because the evidence was insufficient. The State "failed to present evidence that Appellant committed a burglary or trespass, attempted to commit a burglary or trespass, or otherwise did some overt act toward the commission of a burglary or trespass."

Ostane v. State, 5D17-3087 (June 22, 2018) (on motion for rehearing)

Ostane was a juvenile at the time of the manslaughter for which he was sentenced in 2001 to a term of 30 years. Pursuant to a Rule 3.800(a) motion, the trial court correctly found that Ostane was entitled to judicial review of that sentence in accordance with the 2014 juvenile sentencing statutes. However, the trial court erred when it found that Ostane was not entitled to resentencing as well. A sentence can not be amended without first conducting a resentencing hearing.

Upshaw v. State, 5D17-3717 (June 22, 2018)

A Rule 3.800(a) motion to correct sentence should have been granted. The defendant received the lowest possible sentence based on a scoresheet which contained an error – one offense was scored as a primary offense when it was a prior conviction. The correction of the error would result in a lower score and would have precluded the sentence that had been imposed.