Case Law Update
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Supreme Court of Florida

Jimenez v. State, SC17-1963 (June 28, 2018)

Relying on Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), the Supreme Court held that Hurst v. Florida, 136 S.Ct. 616 (2016), did not apply retroactively to Jimenez. Jimenez was sentenced to death in 1998 pursuant to a unanimous jury recommendation.

Eleventh Circuit Court of Appeals

United States v. Noel, 17-10529 (June 26, 2018)

Noel appealed convictions for hostage taking under 18 U.S.C. s. 1203 and conspiracy to engage in hostage taking. The defendant and his co-conspirator "approached the victim and took her hostage by brandishing a firearm. Noel and his co-conspirator took from her two cellular telephones, her wedding rings, her Haitian driver's license and some Haitian and United States currency. They called the victim's family members, also located in Haiti, and demanded a ransom of $150,000 for her safe release." In subsequent phone calls, there were threats to kill the victim and her children if the ransom was not paid. The victim was an adult citizen of the United States, but the acts described took place in Haiti.

Noel first argued that the government was required to prove that he knew that the victim was an American citizen. The Eleventh Circuit disagreed: "the requirement of s. 1203 that the victim be an American is purely jurisdictional." The "requirement that the victim be American is set forth in a different subsection of the statute than the elements that are designated as punishable."

Noel next argued that Congress intended to limit the application of section 1203 to crimes of terrorism and that it did not apply to the facts of this case. The Eleventh Circuit disagreed, as "the conduct of which Noel was convicted clearly falls within the plain meaning of the statutory language." The statute provides: "'Whoever, whether inside or outside of the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel

a third person . . . to do . . . any act as an explicit . . . condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life. . . .'"

Noel further argued that it was a violation of due process to prosecute him in an American court, as he could not be expected to know that he would be so prosecuted when he did not know that his victim was a United States citizen. For a statute to have extraterritorial effect, Congress must clearly state its intent for such effect and the "extraterritorial application of the law must comport with due process, meaning that the application of the law must not be arbitrary or fundamentally unfair." Congressional intent was clearly stated in the statute. The Eleventh Circuit concluded that the fair notice requirement of due process was satisfied because the International Convention Against the Taking of Hostages provided notice that a prosecution such as this could be undertaken by any party to the treaty.

The Court also rejected arguments that Congress lacked constitutional authority to enact the Hostage Taking Act.

United States v. Suarez, 17-11906 (June 27, 2018)

Suarez appealed convictions for attempting to use a weapon of mass destruction and attempting to provide material support to a foreign terrorist organization. He challenged the sufficiency of evidence as to those convictions. The Eleventh Circuit affirmed.

As to the conviction for attempting to use a weapon of mass destruction, Suarez argued that the government was required "prove a substantial effect on interstate commerce" based on the jurisdictional language in 18 U.S.C. s. 2332a. The Court disagreed; the government need only establish a minimal effect on interstate commerce. The low bar of that requirement was satisfied in this case through testimony regarding the effect that such an offense would have on the tourism industry of Key West.

As to the second offense at issue, the government proved that Suarez provided material support to ISIS. "Through his Facebook account, Suarez posted ISIS propaganda, requested help in building bombs, attempted to recruit others to join him in attacks, and filmed a recruitment video to this end. . . . He coordinated directly with individuals whom he believed to be members of ISIS in order to acquire a bomb. He provided money and materials for the bomb, and he accepted the bomb while reiterating his plan to detonate it on a crowded beach." Nor did it matter that

he had contact only with government informants and undercover agents, as this offense was for an attempt.

Sentencing issues argued on appeal were not raised in the district court and were therefore reviewed for plain error. The life sentence imposed did not violate the Eighth Amendment. The sentence was not grossly disproportionate to the offense committed.

Suarez further presented arguments based on his age, mental immaturity, and gullibility, based on Graham v. Florida, 560 U.S. 48 (2010). He was not entitled to relief based on Graham, since that decision applied only to life sentences for offenses committed by juveniles. Indeed, the Eleventh Circuit found that the rationale of Graham compelled the contrary conclusion as to adult offenders making arguments based on the factors set forth by Suarez.

The Court also rejected Suarez's argument that the terrorism enhancement of section 3A1.4 of the Sentencing Guidelines did not result in double counting. "Section 2M6.1 addresses the attempted use of dangerous materials with the intent to injure the United States or to aid a foreign nation or a foreign terrorist organization. Section 3A1.4 enhances the sentence for an offense that involved, or was intended to promote, a federal crime of terrorism." These were distinct considerations addressed to different harms.

United States v. Henderson, 16-16984 (June 27, 2018)

Henderson appealed convictions for making false statements in connection with the delivery of health services under 18 U.S.C. s. 1035, and making a false statement to a federal agent under 18 U.S.C. s. 1001. On appeal, he challenged the sufficiency of evidence as to the convictions. He contested the materiality of the statements at issue, as well as the proof of the requisite intent. The Eleventh Circuit affirmed the convictions.

Henderson argued that the statements at issue were ambiguous and "would have confused medical professionals and would not have influenced their substantive decisionmaking. As the claim was not raised in the district court, it was reviewed under the plain error standard. At trial, however, the Government presented evidence that the false statement could have misled a medical professional into thinking that the services actually had been rendered." "The Government also presented witnesses who testified that the comment entered into CPRS (that services were rendered or the patient had refused services) were 'internally inconsistent.'

Because a patient cannot both *receive* and *refuse* services, a medical provider would have had to take the time to figure out what actually had happened before proceeding with patient care."

The sufficiency of evidence as to intent for the section 1035 conviction was reviewed de novo; the government had to establish that the defendant acted knowingly and willfully. The opinion presents details as to the evidence adduced by the Government that entitled the jury to find the requisite intent.

As to the false statement conviction under section 1001, one of the defendant's claims was that his statement to an investigator was simply that he did not "remember any other statement." He further argued that his statement that his instruction to administratively close a consult was merely an explanation to staff and not an instruction as to what comment to enter into the system. Had the defendant's argument been factually accurate, the Court would have agreed that a false statement had not been made. The Court, however, provided a detailed review of the testimony and rejected the factual premise of the defendant's argument. The Court further rejected the defendant's argument that the statement in question was not material because the federal agent already knew what instructions the defendant had given employees. A false statement can be material even if the decision maker knew or should have known that it was false.

United States v. Morales, 16-16507 (June 29, 2018)

Morales challenged his conviction for possession of a firearm by a convicted felon. He argued that officers did not enter his residence with his voluntary consent and that his statements and the firearm should therefore have been suppressed.

The district court had found that officers did not enter with voluntary consent, but that the written consent of a co-occupant (Lang, the mother of the defendant's girlfriend) of the residence was sufficient thereafter. The consent from the co-occupant was not coerced. Only two officers were present; they did not threaten or intimidate and they did not draw their guns. The co-occupant was advised that she had the right to refuse consent. Before entering the residence, an officer had observed and spoken to Morales outside and learned that he lived in the residence with his girlfriend and her mother. The mother had appeared briefly at the door but then went in again. After officers knocked at the door and announced their presence, the mother initially responded that they could not enter unless they had a warrant. She subsequently permitted the officers to enter, and, during further discussions, explained that she lived there with her daughter and Morales and that she was the

leaseholder and that she had access to the entire house, including the bedroom that Morales shared with her daughter. She then gave both verbal and written consent to a search of the residence. After firearms were found during the search, Morales was arrested and taken to the station for questioning.

Morales further argued that even if Lang had authority to consent to the search, Morales, as a co-occupant who was present at the scene was denied his own individual right to object to the search. "When a shared dwelling is involved, co-occupants can generally give valid consent to a search if that person has 'joint access or control' over the area." "But the consent of one co-occupant to search can't trump the express objection of another physically present co-occupant." In this case, Morales was not present at the door when the officer spoke to Lang. Nor did Morales ever refuse consent. Morales was not far away from the front door when the officers were speaking to his girlfriend's mother, Lang, but, contrary to Morales' argument, the evidence did not support his assertion that officers intentionally kept him away from the door. If he had objected, the Court acknowledged that the result might have been different.

First District Court of Appeal

Catledge v. State, 1D16-2306 (June 28, 2018)

The First District concluded that the trial court did not err by wrongfully imposing a sentence on the basis of the defendant's lack of remorse and failure to accept responsibility. The judge in this case did reference the defendant's lack of remorse and failure to accept responsibility. The First District, however, distinguished between those cases where such a consideration is improper and those where it is permissible.

Consideration of lack of remorse is permissible when it is a reason for the court to reject a request by the defense for mitigation of the sentence, and that is what occurred in this case. "Once Catledge made his arguments in support of mitigation, including his statement of apology, the State was permitted to rebut them," and, "[i]n this context, the trial court's comments . . . were made in rejection of Catledge's arguments for mitigation, including his characterization that he was not a violent person and that the incident was an accident."

The Court further distinguished this case from those in which a defendant remained silent at sentencing, and those in which the trial court rejected the sincerity of a defendant's professed apology.

Pearce v. State, 1D16-3750 (June 28, 2018)

The trial court ordered a competency evaluation and conducted a hearing at which the defendant was orally declared competent. Prior to trial, the court ordered a third evaluation. After the filing of the written report finding competency, there was no further competency proceeding or independent finding of competency by the court. Once the court has reasonable grounds to question the defendant's competency, as evidenced by the appointment of the third expert after the initial finding of competency, the court must conduct a further competency hearing and make the requisite finding. As that was not done, this case was reversed and remanded for a nunc pro tunc competency determination, if possible; otherwise the defendant would receive a new trial once competency was found to exist.

Robinson v. State, 1d16-3758 (June 28, 2018)

As in the preceding case, the First District reversed and remanded for a nunc pro tunc competency determination where the trial court failed to issue a written order as to the original competency finding, and further failed to conduct a hearing and make an independent determination after competency was later questioned.

Frazier v. State, 1D16-4248 (June 28, 2018)

Frazier appealed convictions for sexual battery and tampering with a victim. He argued that the court erred in admitting child hearsay from a 14-year-old declarant without "first analyzing whether or not the child was in need of the protection offered by section 90.803(23), Florida Statutes (2014) (protecting children from the emotional harm associated with testifying in court)." The First District disagreed. The Court found that the statutory language was clear and there was "no statement in the statute that a trial court must determine whether a child victim declarant needs the protection offered by the statute." Additionally, the defendant's rights under the Confrontation Clause were not at issue since the child victim testified at trial.

The Court also found that the evidence was sufficient to support the tampering conviction. Frazier argued that the First District's prior case law required "the State to prove that a defendant has directly inhibited a person's ability to contact law enforcement." The Court distinguished the cases that Frazier relied on - McCray v. State, 171 So. 3d 831 (Fla. 1st DCA 2015); Thompson v. State, 153 So. 3d 996 (Fla. 1st DCA 2015); Longwell v. State, 123 So. 3d 1197 (Fla. 1st DCA 2013) - from the

facts of his own case. "[T]he only evidence the State offered in those cases that tended to support the elements of the tampering crime was that each of the victims' cell phones was broken during the course of other crimes." Under those circumstances, the State "needed to show that the victims were attempting to call law enforcement at the time the phones were broken." The First District found that efforts of other district courts of appeal to "extrapolate" the holdings of those prior decisions into a general rule was "dicta at best."

In this case, the evidence showed "that the appellant told the victim 'not to tell nobody or he'll come back and he'll hurt [her]."

Cooks v. State, 1D17-0702 (June 28, 2018)

The First District found that the evidence was insufficient to support the conviction for scheme to defraud and reversed and remanded for entry of a conviction and resentencing for the lesser-included offense of grand theft of property valued over $300 but less than $5,000.

Cooks entered a Walmart store multiple times over several days and "would place items in a shopping cart, and then would dash from the store without paying for the goods." This evidence did not establish the requisite intent for the scheme to defraud, as section 817.034(4)(a), Florida Statutes, requires "proof of more than mere theft." The statute requires proof a "(a) intent to defraud, or (b) intent to obtain property by false or fraudulent pretenses, representations, or act . . . ." Although the State argued in the trial court that the defendant "misrepresented that he was 'a lawful paying customer'" each time he left the store, and that there was therefore an "'implied representation of ownership,'" the First District disagreed with that argument. There was no evidence "that Cooks acted with such guile – in fact he openly walked out the front door with the stolen goods each time. And no case has been cited to us that shoplifting, even repeatedly, is a scheme to defraud."

Brown v. State, 1D17-905 (June 28, 2018)

In a post-conviction motion, Brown alleged that counsel was ineffective for permitting him to proceed to trial before the competency evaluation process was completed. Two of three evaluations were completed, finding the defendant competent; the third evaluation was still pending. Trial counsel at issue in this motion was new counsel and was unaware of the remaining pendency of the third evaluation.

The trial court denied the motion based on the two other reports and trial counsel's testimony that the defendant's conduct with him did not raise any concerns as to competency. The First District found that this was not an adequate substitute for the third competency report. The order denying the post-conviction motion was reversed and remanded for a nunc pro tunc determination of competency, if possible. If not, when competency is ultimately found to exist, a new trial must be held.

Roberson v. State, 1D17-1795 (June 28, 2018)

Reiterating its holding from Copeland v. State, 240 So. 3d 58 (Fla. 1st DCA 2018), and relying on the Third District's decision in Beckman v. State, 230 So. 3d 77 (Fla. 3d DCA 2017), the First District rejected the defendant's argument that the new juvenile sentencing statutes require a jury to make "findings as to the sentencing factors set forth in section 921.1401."

Thurston v. State, 1D17-2548 (June 28, 2018)

During a trial, and after two witnesses had testified, the judge realized that the predecessor judge had failed to make a necessary finding of competency as to the defendant. The presiding judge promptly appointed an expert for an evaluation, and, after that expert found the defendant competent, the presiding judge then held a competency hearing and likewise found the defendant competent. The First District held that under these circumstances, it was not fundamental error to begin the trial without the competency hearing and finding of the court. The defendant also argued that counsel was ineffective for failing to object. This argument was rejected without prejudice to the defendant raising the claim in a post-conviction motion under Rule 3.850.

Second District Court of Appeal

Johnson v. State, 2D16-1316 (June 27, 2018)

Convictions for battery on a law enforcement officer and obstructing an officer with violence were reversed because the trial court "failed to offer counsel to Johnson and failed to conduct a Faretta inquiry before permitting him to represent himself during plea negotiations, which is a critical stage" of the proceedings.

At a hearing on November 9, 2015, the court conducted competency proceedings and made its determination that Johnson was competent. The court then conducted plea negotiations and scheduled the trial, but never extended to Johnson

the assistance of counsel or conducted a Faretta hearing. Johnson had been representing himself at that time and at all prior times.

A.P. v. State, 2D16-979 (June 29, 2018)

The Second District reversed an order finding the juvenile guilty of being a minor in possession of a firearm and being a felon in possession of a firearm. The juvenile's admission was erroneously admitted into evidence where the State failed to prove the corpus delicti of the crimes charged.

The relevant facts were set forth by the Court:

> The evidence at trial showed that A.P. was driving a car in which his two brothers were passengers when police officers conducted a traffic stop because they believed they smelled marijuana coming from the car. Once the car was stopped, an officer approached A.P., told him why they had stopped the car, and then handcuffed A.P. and placed him in the back seat of his patrol car. A second officer searched the passengers and the car and found a marijuana blunt on one passenger and a holstered firearm under the floor mat of the front passenger seat. Over objection, one of the officers testified that when A.P. learned the officers had found a firearm in the car, A.P. stated it belonged to him. Based on his admission, the officers arrested A.P. on the firearm charges and released his brothers.

The State had the burden "of offering direct or circumstantial evidence independent of the admission that establishes the corpus delicti of the crime charged." That evidence must show the existence of each element of the crime charged. Here, the State failed to prove constructive possession of the firearm, as it was hidden under a mat and in close proximity to two other individuals in the car.

Brady v. State, 2D16-4972 (June 29, 2018)

During the pendency of a direct appeal, Brady filed a motion under Rule 3.800(b)(2) seeking correction of the credit for prior jail time served. The trial court denied the motion based on the court's belief that such a claim was premature and would have to be raised in a Rule 3.801 motion after the appeal. That was incorrect;

the Rule 3.800(b)(2) motion was an authorized means for raising such a claim during the pendency of the direct appeal.

Howell v. State, 2D17-1319 (June 29, 2018)

Howell entered an open plea to the court and in exchange for a one year and one day sentence, he requested a 10-day furlough prior to the sentencing hearing in order to make arrangements for required restitution. He was warned that if he failed to appear for the sentencing, he would receive the maximum sentence for the offenses.

Howell failed to appear and was sentenced to five years for each offense. Six days later, he turned himself in and apologized to the court. His employer had requested that he work during that period in Orlando, and he was dependent upon transportation arrangements from his employer. His employer was ultimately unable to get him back in time for his sentencing hearing. When Howell realized that his employer's transportation would not be available, he contacted both his bondsman and his mother in an attempt to contact his lawyer. Since he was not paid for the job until its completion, he was stranded in Orlando without funds to arrange for his own transportation. Upon his return from Orlando, he promptly paid the required restitution.

Based on the foregoing evidence and supporting documentation, the trial court erred in imposing the harsher sentence since the failure to appear was not willful. The State argued that the issue was not preserved because Howell did not file a motion to withdraw the plea. That, however, was not required in this case because it was an open plea to the court, not a negotiated plea. The objection at the time of sentencing was sufficient.

Fourth District Court of Appeal

Joseph v. State, 4D16-2120 (June 27, 2018) (on motion for clarification)

Joseph appealed his conviction and sentence for aggravated battery. The Fourth District reversed, finding that the trial court erred in admitting the victim's recorded statements.

In the first recorded statement, a few hours after being hospitalized following the incident, the victim described the events that occurred. This recorded statement included references to statements made by a codefendant. The victim also described

the nature of his injuries and identified the defendant as one of his assailants through a photo lineup. Subsequently, a second photo lineup was conducted and the victim identified the co-defendant and gave a second recorded statement explaining the identification of the co-defendant and again explaining the incident and the injuries sustained.

The State sought the introduction of the recorded statements of the victim based on the assertion that the victim was unavailable for trial and that the recorded statements could be admitted under the doctrine of forfeiture-by-wrongdoing. The State's motion was based on affidavits from the victim's girlfriend regarding efforts to induce the victim not to testify; an affidavit from a detective regarding difficulties in serving the victim with a subpoena and the victim's noncompliance with the subpoena once served; and recordings of phone calls made by the defendant from jail.

"[T]he admissibility under the forfeiture-by-wrongdoing exception depends on two evidentiary showings: (1) the statement was made by a witness who is unavailable to testify at trial, and (2) the party against whom the statement is being used intentionally caused or intentionally acquiesced in wrongfully causing the unavailability of the witness." The Fourth District accepted the trial court's ruling that the victim was unavailable to testify but disagreed with the trial court as to the second element of admissibility.

Although the girlfriend's affidavit referred to conduct on the part of the co-defendant, it did not "state that Appellant himself ever bribed or threatened the Victim or direct anyone to make such bribes or threats." "The most that can be concluded from the Girlfriend's statement is that her impression was that the Victim felt Appellant and the Co-defendant would carry out threats of harm, but the Victim never clearly indicated that Appellant made any statements regarding harm." Similarly, in the jail calls, excerpts of which are included in the Court's opinion, "Appellant does not mention the Victim by name or mention any plan or scheme to keep him away from trial." While the State alleged that some of the calls were between the defendant and co-defendant, it did not specify which calls were to the co-defendant and no testimony was presented at the hearing on the motion in limine as to the admissibility of the statements of the victim. While the State argued that the jail calls had to be assessed in the context of other circumstances, the Court found that "[e]ven assuming Appellant was referring to the Victim in the call that discusses sending someone to the hospital, that call does not indicate that Appellant acted with the purpose of sending the Victim to the hospital to prevent him from testifying."

The conduct described by the State, moreover, did not qualify as "acquiescence" on the part of the defendant, as "it would seem that the evidence must at least show that Appellant knew of a plan by one or more persons to engage in conduct or facilitate conduct that would cause the Victim to be unavailable for trial, and Appellant either encouraged the plan or did nothing to dissuade others from such conduct or distance himself from the plan." The Court rejected the argument that such an inference existed from the fact that "Appellant was communicating with the Co-Defendant in the same time frame that both the Co-Defendant and his sister were attempting to bribe the Victim and the Girlfriend, and the threats made to the Victim. . . ."

Santos v. State, 4D17-1064 (June 27, 2018)

During the course of a murder investigation, the defendant was interviewed three times; only the third interview was custodial. The defendant confessed during the second interview. During the third interview, the defendant's father contacted a detective involved in the investigation, one who was not conducting the third interview, and told the detective that he had retained an attorney for his son and that the attorney had advised him, the father, that the son should not talk to the police. Minutes later, the newly-hired attorney left a voicemail message with that same detective, attempting to invoke the defendant's right to remain silent.

The defendant argued that the trial court erred in denying suppression based on the failure to advise the defendant of his attorney's efforts to assist him. The Fourth District observed that it is error not to advise a suspect that an attorney retained by the family is attempting to assist him. However, the failure to suppress was harmless in light of the defendant's prior confession.

During closing argument, the prosecutor argued that the defendant murdered the victim, a Haitian woman, to conceal his relationship with her from his girlfriend. A prior testimonial reference to the victim being Haitian had been stricken. The defense objected to the prosecutor's comment based on the reference to the woman being Haitian; the court sustained the objection but denied a request for a curative instruction. The Fourth District found that even if the trial court should have granted the curative instruction, the reference, which did have some other support in the evidence, was harmless, not just due to some other testimonial support for it, but due to the defendant's confession, other evidence, and the fact that the prosecutor's reference to the victim being Haitian occurred only once.

Gabriel v. State, 4D17-1363 (June 27, 2018)

The Fourth District reversed a conviction for grand theft based on multiple improper comments by the prosecutor during closing argument.

After defense counsel argued that there was nothing more than "mere presence" at the scene of the offense, the prosecutor responded that mere presence was enough to support a guilty verdict. In addition to that being erroneous, the court had further erred when it denied the defendant's request for a jury instruction stating that mere presence alone was not sufficient. The prosecutor, in the rebuttal argument, exploited the absence of that instruction when the prosecutor argued to the jury that it would not hear in the jury instructions anything saying that mere presence was not enough. The Fourth District did not hold that the initial refusal to give the requested instruction was error; but the failure to give that instruction became error when the prosecutor attempted to make use of the absence of that instruction to suggest that defense counsel was misleading the jury when arguing that mere presence was not enough. Defense counsel renewed the request for the instruction after the prosecutor made the noted comments in rebuttal.

The prosecutor also argued that a witness's testimony was consistent with a prior statement which had not been introduced into evidence. This was done solely to bolster the testimony of that witness, a key witness. And, due to the importance of that witness, the error was not harmless. The Court's ruling was based on the reference to facts not in evidence.

The prosecutor also made several references to the failure of the defendant to take responsibility. Such comments have routinely been held to deny a defendant a fair trial and to constitute comments on the right to remain silent. "While we do not hold that the prosecutor's comments constituted a structural defect in the trial, we condemn the prosecutor's pervasive use of appellant's 'refusal to take responsibility' by going to trial. Such comments denigrate the fundamental principles of the right to jury trial and presumption of innocence. When the prosecutor plans the entire theory of the case around attacking these principles, the defendant is denied a fair trial."

Morales v. State, 4D17-1376 (June 27, 2018)

On appeal from a conviction for second-degree murder, the Fourth District held that the evidence was sufficient as to second-degree murder and with respect to the claim of self-defense under the Stand Your Ground statute.

As to the sufficiency of the evidence for second-degree murder, the Court stated:

> The State presented substantial competent evidence in its case in chief of each element of the crime. The victim Colin died as a result of a gunshot to the back of his head. That fact was undisputed. Colin and Morales had an adversarial relationship, and Colin had threatened Morales and his family in the past. Such evidence shows ill will between the parties. Colin was killed in an isolated area. Later, his body was burned in his vehicle. These facts, and the inferences which may be drawn from them, establish an act imminently dangerous – shooting the victim in the head – and done will ill will, hatred or spite.

While Morales testified that Colin pointed a gun at him while he was driving and that the shot was fired during a struggle, the claim of self-defense was sufficiently refuted. The killing occurred in a remote area. The location of the gunshot wound, based on the medical examiner's testimony, was inconsistent with Morales' version of the incident. After the incident, the defendant contacted his brother and said nothing about self-defense; he then proceeded, with his brother's assistance, to burn the vehicle and the victim's body, suggesting that he wanted to eliminate evidence. When subsequently questioned by a detective, he denied any involvement in the incident.

State v. T.M., 4D17-2735 (June 27, 2018)

The trial court erred in granting a motion to suppress a clear plastic bag containing cocaine.

An officer observed T.M. and two other juveniles in front of a vacant townhouse. The officer approached them and spoke in a "soft voice." T.M. and the others then fled and ignored directions to stop. While in flight, T.M. was observed dropping the clear plastic bag in question.

The Court did not address the issue of whether reasonable suspicion existed. The Court found that the bag in question was abandoned and that the officer could therefore seize it, regardless of the existence of reasonable suspicion prior to the bag being discarded. As of the time of the seizure of the plastic bag, T.M., himself, had

not been seized, let alone unlawfully seized, since he fled, and seizure of the individual is not effectuated until the fleeing individual is apprehended.

Baker v. State, 4D17-3331 (June 27, 2018)

At sentencing, the trial court addressed the defendant's prior record and emphasized the fact that he had committed the current offense 47 days after being released from the Department of Corrections for being a minor in possession of a firearm.

On appeal Baker challenged the State's reliance on the recency of the release from the prior incarceration based on the lack of substantiation. "Appellant cites to no authority establishing that the State must offer proof of a defendant's prior release date when the underlying conviction is not in dispute and the release date is not being used to prove eligibility for an enhanced sentence."

Under section 938.29, Florida Statutes, the trial court imposed a lien for attorney's fees in favor of the Office of the Public Defender in the sum of $200. The statute authorizes amounts in excess of $100, but sums in excess of $100 must be accompanied by findings by the court to support the higher amount and the defendant must be accorded an opportunity to address the propriety of the greater amount. That was not done in this case.

Billups v. State, 4D17-3623 (June 27, 2018)

Billups' original sentence included consecutive mandatory minimum sentences based on a firearm. The mandatory nature of these had been reversed in light of recent Florida Supreme Court decisions which construed the relevant statutory provisions as limiting the circumstances under which consecutive mandatory minimum sentences could be imposed.

On remand, the trial court imposed concurrent mandatory minimum sentences, but kept the consecutive status of the three counts at issue – 30 years, 30 years and 15 years. As a result of this, the concurrent mandatory minimum sentences took up the first 10 years of incarceration. One of the 30-year sentences then kicked in for another 20 years; the second 30-year sentence then kicked in for another 20 years; and the 12 remaining years of the 15-year sentence (which had a 3-year mandatory minimum), then commenced. This resulted in 62 years of consecutive sentences, including the first 10-year period which consisted of the mandatory minimum sentences.

The defendant challenged the consecutive nature of the non-mandatory sentences based on language in Segal v. Wainwright, 304 So. 2d 446, 448 (Fla. 1974), which held that "a prisoner in society is entitled to pay his debt to society in one stretch, not in bits and pieces." The Fourth District held that that language did not apply to the gaps in the commencement of the sentences at issue here. The principles of Segal related to cases where a prisoner was serving a sentence after having been released from prison, and the sentence at issue had already started during the pre-release confinement.

The Fourth District's opinion includes a chart which shows the "gap" periods as to the commencements of the individual sentences that were being addressed in this case.

Fifth District Court of Appeal

Armas v. State, 5D17-1528 (June 29, 2018)

The Fifth District held that convictions for possession of cannabis in an amount exceeding 20 grams with the intent to sell or deliver, and manufacture of cannabis did not result in a double jeopardy violation.

All of the contraband was found during a search of a residence, and it consisted of a combination of numerous marijuana plants and several baggies of loose-leaf marijuana found inside a duffle bag.

The Court applied the "same-elements" test to determine whether a double jeopardy violation existed. In this case, each offense included a statutory element which the other offense did not. One offense required proof of manufacturing; one required proof of possession. Those two elements were not the same. The Court also rejected the defendant's argument that the same-elements test did not apply when the two offenses derived from the same statute. The Court, setting forth prior case law, disagreed. Even though possession and manufacturing were alternative means of committing an offense under the same statute, the legislature intended each alternative be the subject of punishment when both were committed.

State v. Rogers, 5D17-3117 (June 29, 2018)

The Fifth District reversed the lower court's imposition of a downward departure sentence. Rogers pled guilty to dealing in stolen property and giving false

verification of ownership when conducting a transaction with a pawnbroker. The trial court cited several reasons to support the downward departure; the Fifth District reviewed each one and found all to be insufficient.

The trial court relied on the defendant's demonstration of remorse. That statutory reason for a departure, however, requires proof of two other elements, commission of the offense in an unsophisticated manner, and the offense being an isolated incident. Here, the court made no finding that the offense was committed in an unsophisticated manner.

Next, the trial court relied on the need of the victim for restitution. However, the trial court failed to make the requisite findings regarding the loss sustained by the victim.

The trial court also relied on an "undiagnosed" mental illness based upon testimony from the defendant's mother. However, the defendant failed to present any evidence as to the statutory requirements for a mental-illness departure – i.e., the requirement of "specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment."

The trial court further asserted that there was no injury or opportunity for injury to other persons during the offense. That was not a valid reason because it is one which is already factored into the scoresheet computations.

The trial court also found that the offense was a nonviolent felony involving property, purporting to rely on section 921.185, Florida Statutes. That section permits the court, for such felonies, in its discretion, to "consider any degree of restitution a mitigation of the severity of an otherwise appropriate sentence." Here, however, the trial court was not imposing a "sentence which used restitution to mitigate the severity of the defendant's 'otherwise appropriate sentence.' Instead, the court merely entered an order directing the defendant to pay $463.77 in restitution."

Finally, the reason that there was "no redeeming value in sending the defendant to prison" was not a valid reason, and the Court set forth prior case law in which the same conclusion had been reached.