Case Law Update
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Supreme Court of Florida

Blanco v. State, SC17-330 (July 19, 2018)

Blanco was sentenced to death for first-degree murder in 1982, and the instant appeal was from the denial of his fifth postconviction motion. The Supreme Court affirmed the trial court's order.

An intellectual disability claim based on Hall v. Florida, 134 S.Ct. 1984 (2014), was found to be time-barred based upon the Supreme Court's decision in Rodriguez v. State, SC15-1278, 2016 WL 4194776 (Fla. Aug. 9, 2016) (unpublished order). "In *Rodriguez*, this Court applied the time-bar contained within 3.203 to a defendant who sought to raise an intellectual disability claim under *Atkins [v. Virginia]* for the first time in light of *Hall*."

The Court also affirmed the denial of a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016). That claim was denied on the basis of Hitchcock v. State, 226 So. 3d 216 (2016), where the "Court applied *Asay [v. State]* to mean that *Ring v. Arizona*, 536 U.S. 584 (2002), is the cutoff for any and all *Hurst*-related claims."

Rose v. State, SC17-878 (July 19, 2018)

Rose discharged court-appointed collateral counsel in a first-degree murder case in which the death sentence had been imposed. Rose then dismissed his postconviction motion, and previously discharged counsel appealed the order of dismissal.

Rose discharged his appointed counsel in 2005. A *Faretta* inquiry was conducted at that time and Rose was deemed competent to represent himself. There were no pending postconviction motions at that time. About 10 years later, Rule 3.851 was amended and prohibited capital defendants from representing themselves in postconviction proceedings. In 2017, previously discharged counsel, who had not been reappointed, filed a successive 3.851 motion, seeking relief based on Hurst v. State, 136 S.Ct. 616 (2016). The trial court dismissed this motion, pursuant to Rose's pro se request, and the order of dismissal relied on the colloquy from 2005, when

the court warned Rose that future postconviction proceedings would end and counsel would not be able to file any further motions on his behalf.

In the instant appeal, discharged counsel did not argue that Rose was incompetent to represent himself. Rather, counsel argued that the trial court did not follow the proper procedures when counsel was discharged in 2005 and Rose was permitted to represent himself. The Supreme Court disagreed.

> The record establishes that before granting Rose's motion to discharge Brunvand in 2005, the postconviction court conducted a complete *Faretta* inquiry. When the postconviction court revisited counsel's discharge in 2017 – in light of the subsequent prohibition against capital defendants' representing themselves in state court postconviction proceedings – it inquired as to whether Rose understood the consequences of waiving postconviction counsel and proceedings. As the postconviction court explained in that order on appeal, during the colloquy, Rose expressed his beliefs that the federal courts will eventually recognize that *Hurst v. Florida* overturned his conviction and sentence and that future death warrant litigation in his case will allow him to revisit the issue of his guilt. Critically, however, the postconviction court explained, and Rose acknowledged, that he is betting his life on beliefs that are contrary to the law and that his postconviction waiver would abandon the *Hurst* claim that discharged counsel filed on his behalf.

Pursuant to the Court's prior decision in Durocher v. Singletary, 623 So. 2d 482 (Fla. 1993), Rose had the right to "control his own destiny."

Phillips v. State, SC17-1150 (July 19, 2018)

An appeal from an order granting in part and denying in part a Rule 3.850 motion was dismissed "because the guilt phase issues were waived since they were not briefed by Phillips, and the penalty phase issues were mooted by the new penalty phase ordered by the trial court pursuant to *Hurst v. State* [citation omitted]. Because there will be a new penalty phase, it is inconsequential whether Phillips' trial counsel was ineffective for failing to raise the issue of intellectual disability at the previous

penalty phase. As the State argued, Phillips may raise the issue of intellectual disability at the trial court prior to his new penalty phase proceedings."

Peede v. State, SC17-1674 (July 19, 2018)

Peede appealed the denial of a Rule 3.851 motion in which he sought relief pursuant to Hurst v. Florida, 136 S.Ct. 616 (2016). Hurst did not apply retroactively; Peede's sentence of death became final in 1986.

In Re: Amendments to the Florida Rules of Criminal Procedure – 2018 Regular-Cycle Report, SC18-118(July 19, 2018)

The Supreme Court adopted extensive amendments to rules 3.010, 3.025, 3.030, 3.131, 3.180, 3.19-, 3.191, 3.203, 3.213, 3.217, 3.218, 3.219, 3.220, 3.240, 3.330, 3.470, 3.590, 3.600, 3.610, 3.692, 3.704, 3.710, 3.810, 3.850, 3.986, 3.989, and 3.130 (the latter rule being amended with modifications to the Rules Committee's proposed amendment). The Court rejected the Rules Committee's proposal to amend rule 3.172.

The amendment to Rule 3.130 applies to cases where defendants are advised of their rights by a pre-recorded video, and under the Court's modification, "greater personal interaction between the judge and each individual defendant will be encouraged." Rule 3.130(b)(2) will now provide: "If the defendant was advised of the rights listed in subdivisions (b)(1)(A)-(b)(1)(C) by pre-recorded video, the judge shall confirm separately with each individual defendant that such defendant had an opportunity to view and understands the rights explained in the video recording."

Rule 3.131(k) (Summons on Misdemeanor Charge) "is amended to require that the summons state 'the title of the hearing to be conducted' after 'the nature of the offense.' This change will assist defendants who may have multiple cases that are proceeding know the type of hearing for which he or she is summoned."

The amendment to Rule 3.180 (Presence of Defendant) amends a conflict with Rule 3.130 (First Appearance), and Rule 3.180 now permits "a defendant to appear at the first appearance either physically or be electronic audiovisual device, as contemplated under rule 3.130."

The amendment to Rule 3.191(l)(5) (Speedy Trial), corrects "the conjunction from 'and' to 'or' in the list of 'exceptional circumstances' for which the trial court

may order an extension of the time period for bringing a defendant to trial, as the trial court does not have to find more than one circumstance to grant an extension."

Rule 3.213 was amended to reorganize the rule for clarity. Additionally, Rule 3.213(a)(3) was created to add "the provision for dismissal after three years if the charge is not listed in section 916.145(1), Florida Statutes (Dismissal of charges), as enacted in chapter 2016-135, section 3, Laws of Florida."

Rule 3.704 was amended, in addition to technical changes, "to provide that sentence points be multiplied by 2.0 for specified sex offenses committed by an adult upon a minor under certain circumstances, unless application of the multiplier results in the lowest permissible sentence exceeding the statutory maximum."

Rule 3.710(a) (Presentence Report), was "amended to clarify the rule by adding that in addition to probation, a statutorily required mandatory minimum sentence may be imposed without a presentence investigation upon a defendant found guilty of a first felony offense or found guilty of a felony while under eighteen."

In Re: Amendments to the Florida Rules of Juvenile Procedure – 2018 Fast-Track Report, SC18-1047 (July 19, 2018)

The Supreme Court adopted amendments to Rules 8.305, 8.340, 8.400, 8.415, 8.420 and 8.425. "The amendments implement changes to chapter 39, Florida Statutes (2017), made by chapters 2018-45, 2018-103, and 2018-108, Laws of Florida, which became effective July 1, 2018."

Rule 8.305(b)(12) adds "the child's child care records and early education program records to the list of records that the court, at the shelter hearing, must request the parents to consent to provide access to." Rule 8.340(c)(9) "requires the disposition order to include requirements to preserve the stability of the child's child care, early education program, or any other educational placement."

Rule 8.415(i)(1) now requires the court to consider, "at the judicial review hearing [in dependency cases], 'the level of the parent or legal custodian's compliance with the case plan and demonstrate change in protective capacities compared to that necessary to achieve timely reunification within 12 months after the removal of the child from the home' and 'the frequency, duration, manner, and level of engagement of the parent or legal custodian's visitation with the child in compliance with the case plan.'"

Eleventh Circuit Court of Appeal

Hylor v. State, 17-10856 (July 18, 2018)

The Eleventh Circuit addressed the issue of "whether Florida['s] attempted first-degree murder is a 'violent felony' within the meaning of the elements clause of the Armed Career Criminal Act, 18 U.S.C. s. 924(e)(2)(B)(i)." Hylor was convicted for being a felon in possession of a firearm and received an enhanced sentence because of three prior convictions for violent felonies under Florida state law: attempted first-degree murder, aggravated assault, and strong-arm robbery.

Attempted-first degree murder "is a violent felony because it requires the attempted use of physical force that is capable of causing pain or injury." The two other Florida convictions were properly deemed prior violent felonies based on previous precedent from the Eleventh Circuit.

In an effort to convince the Court that attempted first-degree murder did not qualify as a violent felony, Hylor argued that an unsuccessful attempt to kill someone by poisoning them would be attempted first-degree murder under Florida law even though it did not involve the use of violent force. The Eleventh Circuit disagreed with that reasoning, as poisoning would involve "force 'exerted by and through concrete bodies,'" and "administering poison to kill someone is an intentional act that is 'capable of causing physical pain or injury.'"

Second District Court of Appeal

Catalano v. State, 2D16-3307 (July 18, 2018)

The trial court conducted a Stand Your Ground pretrial evidentiary hearing and applied the burden of proof that was in effect at the time. The Second District has previously concluded, in Martin v. State, 43 Fla. L. Weekly D1016 (Fla. 2d DCA May 4, 2018), that the statutory amendment to the burden of proof applied retroactively. The case was therefore reversed and remanded with directions to conduct a new hearing. If, on remand and application of the new statutory burden of proof the trial court still concludes that the defendant is not entitled to immunity the trial court can reinstate the conviction; if the trial court concludes, under the amended burden of proof, that the defendant is entitled to immunity, the information will be dismissed with prejudice.

As the Second District has done in prior cases, conflict was certified with the Third District decision which held that the amendment to the burden of proof did not apply retroactively. Love v. State, 43 Fla. L. Weekly D1065 (Fla. 3d DCA May 11, 2018).

Fountain v. State, 2D17-3933 (July 20, 2018)

Upon revocation of probation, the trial court entered a second judgment. That judgment should not have been entered, as it was duplicative of the original judgment of guilt entered when the defendant was placed on probation. A judgment upon a revocation of probation is needed only when the trial court originally withheld adjudication when the defendant was placed on probation.

Fourth District Court of Appeal

Thomany v. State, 4D17-755 (4th DCA July 18, 2018)

In a first-degree murder case, the Fourth District held that the trial court did not abuse its discretion in limiting the amount of time given for voir dire.

The Court observed that the amount of time for voir dire is not unlimited. In this case, the Court noted that "the defendant's trial counsel spent an extraordinary amount of time asking questions not reasonably intended to elicit useful information in deciding whether to exercise cause or peremptory challenges. Rather, it appears counsel's questions primarily were intended to plant seeds in the jury's mind about the defendant's theory of the case, to be argued later during trial. Such 'pre-trying' of the case is not the purpose of voir dire, nor is it an appropriate use of the amount of time provided for voir dire."

The Court further noted that trial courts should not be inflexible, however, as a brief extension of time "would have been far less than the many hours which both sides' appellate counsel spent on tis appeal, and many days less than the amount of time which would have been necessary to try this case again if we decided to reverse."

Third, there is no mathematical formula for determining the proper amount of time. The appellate court applies a case-by-case standard on appeal.

Fourth, the limit on voir dire was raised again in a motion for new trial, and the Fourth District was critical of the trial court's disposition of that motion. The

trial court stated, when denying the motion for new trial, that trial counsel asked numerous irrelevant and time consuming questions, and that "[b]ased on this premeditated conduct, it is patently obvious that counsel conducted his voir dire in a manner to attempt to preserve this issue for appeal without ever attempting to conform his conduct to the reasonable time limitations set forth nearly a month before trial in [the] Amended Scheduling Order." The Fourth District, while deferential to the trial court's ability to observe such matters, saw "nothing, at least in the written record, supporting the trial court's finding" as to this. While the Fourth District remained critical of the practice of pre-trying the case in voir dire, it viewed "such conduct as less egregious than the conduct which the trial court suspected had motivated counsel in this case."

The Fourth District affirmed the conviction and sentence.

Tibbetts v. State, 4D18-160 (July 18, 2018)

The Fourth District affirmed the summary denial of a motion to withdraw plea, through a Rule 3.850 motion, based upon newly discovered evidence.

The defendant was charged with first-degree murder, and, in 1991, he avoided the sentence of death by entering a guilty plea to second-degree murder and other offenses, and received concurrent 30-year sentences. In 2014 he "learned that one piece of evidence against him, a hair comparison analysis, which identified the defendant as the likely source of a pubic hair found on the victim, may not have been conducted according to scientifically acceptable practices, and it could not be presently determined whether support existed for the analysis."

The State conceded that the new evidence could not have been known through the use of due diligence at the time of the plea. However, the record conclusively refuted the existence of a "reasonable probability that, but for the newly discovered evidence, the defendant would not have pleaded guilty and would have insisted on going to trial." "If the defendant had decided to go to trial, his defense at trial presumably would have been that another person committed the murder. The overwhelming evidence in this case from multiple witnesses, placing the defendant at the scene of the crime, and showing his consciousness of guilt through his post-crime actions and statements, indicates that such a defense was not likely to succeed at trial." The Fourth District further emphasized that the defendant received a reduced sentence, avoiding the possible sentence of death, and further received a reduction of the charge to second-degree murder. "Given the overwhelming evidence of guilt, the record conclusively refutes any reasonable possibility that, but

for the newly discovered evidence, the defendant would not have pleaded guilty in exchange for a thirty-year sentence, and would have decided to go to trial and faced the possibility of the death penalty."

Fifth District Court of Appeal

Wall v. State, 5D16-3731 (July 20, 2018)

Wall was a juvenile at the time he committed the offenses for which he was convicted, including second-degree murder. His sentence for that offense was reversed and remanded for resentencing.

Second-degree murder with a deadly weapon, when reclassified based on the weapon, is a life felony. As it was a life felony, he should have been sentenced under section 775.082(3)(b)(2), Florida Statutes (2015), and that required a jury's factual finding as to whether he "actually killed, intended to kill, or attempted to kill" the victim.

Robinson v. State, 5D16-4227 (July 20, 2018)

An award of more than $5,700 to the State Attorney's Office as restitution was reversed and remanded to the trial court with directions to include it as part of the prosecution and investigative "costs." Additionally, an award of $300 for Public Defender's fees was reversed and remanded because it exceeded $100 and was not supported by findings after a hearing with notice to the defendant.

Hernandez v. State, 5D17-2687 (July 20, 2018)

One of two findings of a violation of community control was reversed due to insufficient evidence. The trial court found that the defendant changed residence without obtaining the consent of her community control officer. The day before leaving the hotel where she was residing, she had advised her community control officer that she could no longer afford to reside there. The officer responded that she had only to apprise him of the new residence.

State v. Upshaw, 5D17-3611, 5D17-3743 (July 20, 2018)

The trial court suppressed marijuana that was found on Upshaw, and the Fifth District reversed, concluding that the warrantless search was supported by probable cause.

Officers observed marijuana on the passenger's-side dashboard, seat and floor of a vehicle. Minutes later, they observed Upshaw enter the vehicle and take the passenger's seat, while a woman entered on the driver's side. Both of them were patted down, and the officer felt something in Upshaw's pocket which he thought was contraband; it turned out to be MDMA.

The Fifth District upheld the search based upon the inevitable discovery doctrine. At the time of the search, based upon the prior observation of what the officers believed to be marijuana, the officers already had probable cause to arrest Upshaw and to conduct a search of his person incident to that arrest.