Case Law Update
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Second District Court of Appeal

Elkin v. State, 2D17-1750 (July 6, 2018)

Elkin pled no contest to second-degree murder in 2004, for an offense committed when he was 16 years old; he received a sentence of 25 years in prison. In 2017, when he had served almost 15 years of that sentence, he filed a Rule 3.850 motion, alleging that he was entitled to a judicial review of the sentencing, pursuant to section 921.1402, Florida Statutes. The trial court denied the motion, finding that Elkin was not entitled to the benefit of the statute which became effective in 2014, after the commission of his offense.

The Second District reversed and remanded to the trial court, directing that court to entertain the merits of Elkin's motion, pursuant to Falcon v. State, 162 So. 3d 954, 962 (Fla. 2015).

Third District Court of Appeal

George v. State, 3D16-423 (July 5, 2018)

George appealed convictions for first-degree murder, kidnapping, attempted armed robbery, falsely impersonating an officer, giving a false name/identification after arrest, discharging a firearm from a vehicle, and aggravated assault. The offenses related to the attempted robbery of Velez, a drug supplier.

George first argued that the trial court abused its discretion in denying a motion for mistrial based upon the prosecutor's alleged pre-trying of the case during voir dire. The prosecutor's voir dire included the following subjects: "(1) notifying the jury that law enforcement did not recover a gun, and thus, no gun would be produced at trial, and asking the prospective jurors if they could still convict without the gun being introduced; (2) informing the prospective jurors that Ms. Lewis, who participated in the crimes with the defendant, had pled guilty and would be testifying as a State witness; and (3) telling the prospective jurors that they were going to hear from the surviving victim, and that he is a drug dealer." The controlling general principle, quoted by the Third District, was that "the State is prohibited from

questioning '**prospective jurors as to the kind of verdict they would render under any given state of facts or circumstances**.'"

The following question by the prosecutor was deemed to be improper, but the trial court did not abuse its discretion when it denied the motion for mistrial: "'If the State proves to you beyond a reasonable doubt that a firearm was, in fact, used but we don't have to show to you **would you still come back with a conviction**?'" "By asking this question, the prosecutor improperly **attempted** to question the prospective jurors as to the verdict they would render based on certain facts relevant to the defendant's case – law enforcement's failure to recover the gun. This was improper." The trial court sustained defense counsel's objection to the question; the prosecutor's attempt to obtain a commitment from the jurors was unsuccessful; and the trial court gave a defense-requested curative instruction.

Next, when the prosecutor told the venire that a witness, Ms. Lewis, had participated in the crime and then cooperated with the State and entered a plea, the prosecutor continued, by asking "if they would automatically not believe her because she is a convicted felon or if they would be willing to evaluate her testimony as they would any other witness." The prosecutor "did not ask the prospective jurors if they could or would convict the defendant based on the testimony of a cooperating witness or a convicted felon if the State proved its case beyond a reasonable doubt." The prosecutor's questioning here was "a permissible attempt to determine if the prospective jurors had any latent or concealed prejudgments as to cooperating witnesses and/or a witness who is a convicted felon."

After the prosecutor referred to the State's impending witness as a surviving victim who was a drug dealer, the judge immediately called counsel to the bench and instructed the prospective jurors as to how to weigh the credibility of a witness. The judge then asked if any prospective jurors had any concerns. The Third District commended "the trial court in the close attention it paid to the questioning, its quick and proactive responses, and its textbook-perfect handling of this issue thereby thwarting any possible attempt by the prosecutor to pre-try the case. Based on the trial court's quick reaction, the prosecutor was never given an opportunity to ask the prospective jurors for any sort of commitment, and based on the trial court's immediate instructions as to the law, the complained-of statement did not prejudice the defendant or require a mistrial."

The defendant also argued that the trial court erred in precluding defense counsel from "cross-examining the lead detective regarding his pending criminal charges." The lead detective had pending criminal charges for sexual battery on a

minor; the charges were filed about two years after the arrest of the defendant in this case, and the charges against the detective were unrelated to the defendant's case. The trial court's ruling in this case was erroneous, as the possibility existed that the detective could be seeking to curry favor with the State with respect to his own legal difficulties by providing the State with favorable testimony in the instant case. The error, however, was deemed harmless beyond a reasonable doubt based upon "the overwhelming strength of the prosecution's case," and other factors in the record.

The next argument by the defendant was that the court erred "by allowing the State to introduce a statement made by the homicide victim just before he died." "Within three minutes of Velez being shot, Detective Reid arrived at the scene of the shooting and asked Velez who had shot him. In response, Velez stated: 'A Black man with dreads.'" The trial court admitted this statement as both an excited utterance and a dying declaration.

The Third District found that the statement was properly admitted under both of the hearsay exceptions. With respect to the excited utterance, the statement was preceded by a sufficiently startling event – "Velez had been shot three times." The statement was also made "before there was time for Velez to contrive or misrepresent." A prior 911 call indicated that Velez was in agony, struggling to move. And, "given Velez's physical and mental condition at the time he made the Statement, . . . it is clear that Velez made the statement while under the stress of excitement caused by the event."

The statement was also admissible as a dying declaration because Velez, after being shot three times, was in agony, was struggling to move and was bleeding profusely. He therefore would have appreciated the imminence of death; he did, in fact, die within minutes of being shot.

The defendant lastly argued that the instruction of premediated murder was not supported by legally sufficient evidence. The Third District disagreed. Although this was a scheme to rob Velez of drugs, the evidence demonstrated "that the defendant intended to obtain the drugs at all costs – even murdering unwilling participants. "The defendant held Martinez at gunpoint at the hotel room, threatened to kill him and his family, beat him, and, at one point, put the gun inside or Martinez's mouth and threatened to kill him. The defendant continued to threaten to kill Martinez during the drive to Velez's home. . . . After Velez entered the vehicle, the defendant told Velez: '[Y]ou're not going to get out of this one even if you want to get out of this one'" When Velez attempted to exit the car, and then ignored the defendant's warning not to do so, the defendant shot Velez three times.

J.B., et al. v. State, 3D18-256 (July 5, 2018)

The Third District granted a certiorari petition in which J.B., a minor, sought to "quash the trial court's order compelling the release of J.B.'s mental health records for use by" Barahona in Barahona's death penalty trial. J.B. was the adopted child of the Barahonas, who were both charged with multiple offenses, including the murder of another adopted child and the child abuse of yet another. J.B. was not listed as a victim of any of the charged offenses. Barahona sought the mental health records, alleging "that J.B. is an eyewitness to the events in question and may have evidence relevant to her defense. Importantly, neither the State nor the defense have listed J.B. as a witness. Further, there has been no attempt to depose J.B. during the seven years that this prosecution has been pending."

The trial court's order compelling disclosure made findings that J.B. was an eyewitness to many of the relevant events; that both the State and defense needed to review the records to prepare for trial; that the need for the information outweighed any possible harm of disclosure; that the court was aware of J.B.'s mental fragility; and that disclosure of potentially relevant records would potentially safeguard J.B. from "the trauma of a competency hearing, deposition, and testifying."

The Third District held that for purposes of a certiorari petition, the trial court departed from the essential requirements of law by ordering disclosure without first finding that an exception existed to the statutory privilege set forth in section 90.503, Florida Statutes. Under that section, a patient-psychotherapist privilege exists, subject to exceptions set forth in section 90.503(4), for "(a) involuntary commitment proceedings; (b) court-ordered mental examinations, and (c) where the patient raises his or her own mental condition during the litigation. Importantly, however, the last exception applies when *the patient*, not the party seeking the information, places his or her mental health at issue."

Barahona argued that notwithstanding the failure to demonstrate such an exception, she was still entitled to the records under sections 456.057 and 395.3025, Florida Statutes, which govern general medical records and patient and personnel records. The Third District disagreed. Section 395.3025 expressly provided that it did not apply to "records of treatment for any mental or emotional condition at" designated facilities. Section 456.057 includes similar language.

The Third District further characterized the request for disclosure as "exactly the type of fishing expedition that this Court, the United States Supreme Court, and our sister courts have strongly cautioned against."

Snell v. Junior, et al., 3D18-1316 (July 5, 2018)

The Third District denied a habeas corpus petition in which the defendant challenged the trial court's order to detain the defendant, after the posting of the bond set at the first appearance, for the purpose of making an inquiry into the source of funds that would be used to post the bond.

The defendant was arrested for multiple drug offenses, and a search of his residence resulted in the finding of a shoebox containing $18,000 cash. In an affidavit, the defendant listed his occupation as "landscaper." When the trial court set the amount of the bond at $40,500, it "placed a Nebbia hold on the bond to verify the source of the funds that would be used to post that bond." Snell argued that this constituted pretrial detention and that it was not authorized. Snell's arguments were based on Casiano v. State, 241 So. 3d 219 (Fla. 2d DCA 2018), which the Third District addressed found inapplicable, as follows:

> The instant petition does not involve a situation where the court is "continuing to hold an accused who has posted bail set at the first appearance" without the State having filed a motion for pretrial detention. See Casiano, 241 So. 3d at 220. Here, the first appearance judge set the bond at $40,500 conditioned on a Nebbia inquiry. Mr. Snell has neither tendered nor proffered that he could post the $40,500 bond but for the Nebbia hold. And, Mr. Snell has not presented any information to the trial court as to the source of any funds he might use to post a bond. Thus, Mr. Snell is in no worse position than if no Nebbia hold had been put in place in the first instance. Rather, he remains incarcerated, apparently, because he is unable to post the bond set at the first appearance hearing, irrespective of the Nebbia hold.

Fourth District Court of Appeal

Manor v. State, 4D17-2034 (July 5, 2018)

The Fourth District affirmed convictions for burglary, grand theft, criminal mischief, and possession of burglary tools, and agreed with the defendant's argument that the prosecutor erred by commenting on his silence but found that the error did not rise to the level of fundamental error where the claims had not been raised in the trial court.

During direct examination of an officer, the "prosecutor asked the officer whether Appellant had an explanation for his presence in the parking lot that night. The officer responded, without objection, that when he approached Appellant and asked if everything was okay, Appellant did not respond or otherwise explain what he was doing in the parking lot. In closing argument, the prosecutor commented on Appellant's failure to explain his presence in the parking lot that night and specifically asked the jury to take that failure into consideration." The Appellant did not testify at trial, and there was not objection to the foregoing comments at trial.

Fifth District Court of Appeal

State v. Rivera, 5D17-4016 (July 6, 2016)

The State appealed the imposition of an allegedly illegal sentence. The Fifth District agreed with the State's arguments that the trial court erred in complying with section 775.08435, Florida Statutes, when it withheld adjudication of guilt for a defendant who had two prior felony adjudications, and, alternatively, by failing to comply with section 921.187, Florida Statutes (2017), by withholding adjudication without placing the defendant on probation. The Court, however, concluded that the issues were not preserved by proper objection in the trial court, and as the errors did not rise to the level of fundamental error, the sentence imposed was affirmed.