Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Castillo, 17-10830 (Aug. 14, 2018)

Castillo appealed a conviction and sentence for drug trafficking under the Maritime Drug Law Enforcement Act.

Castillo moved to dismiss the indictment, arguing that the Maritime Act was unconstitutional. After that motion was dismissed, he pled guilty and was sentenced to 132 months of imprisonment. The district court rejected his argument that he was entitled to judicial relief from the statutory mandatory minimum sentence, which was 120 months.

Castillo argued that the was entitled to the benefit of a statutory safety valve, under 18 U.S.C. §3553(f), which permits relief from the mandatory minimum sentence for other kinds of drug offenses. First time offenders under the Maritime Drug Law Enforcement Act are subject to a 10-year mandatory minimum sentence for a violation that involves five kilograms or more of a mixture or substance containing cocaine.

Other federal drug laws for domestic drug offenses have similar mandatory minimums, but "a statutory safety valve grants courts the authority to impose sentence below the statutory minimum for certain less-culpable defendants." "This safety vale does not apply to offenses under the [Maritime] Act."

Castillo challenged this dichotomy through an equal protection argument, arguing that it was either a congressional oversight or an irrational and arbitrary distinction. The classification at issue here did not involve either fundamental rights or a suspect class, and was therefore subject to the "rational basis test," which asks whether the classifications are "'rationally related to a legitimate governmental purpose.'" The Eleventh Circuit found that Congress had legitimate reasons "to craft strict sentences" for violations under the Maritime Act. "[I]nternational drug trafficking raises pressing concerns about foreign relations and global obligations."

The Court also rejected Castillo's argument that Congress exceeded its enumerated powers and violated due process "'by subjecting foreign nationals to prosecution for offenses bearing no nexus to the United States.'" Prior precedents of the Eleventh Circuit have held that Congress had such power under the Felonies Clause, "'to proscribe drug trafficking on the high seas.'"

Last, by entering a guilty plea, Castillo waived the right to argue that his pretrial detention violated the due process clause of the fifth amendment. Castillo tried to circumvent that by couching his argument as a facial challenge to the Maritime Act, claiming the Act "'violates substantive due process because the pretrial detention it authorizes . . . constitutes impermissible punishment before trial.'" That challenge failed because Castillo did not establish that "no set of circumstances existed under which the Act would be valid." One judge concurred in the judgment but concluded that Castillo did not waive the issue of the challenge to his pretrial detention.

United States v. Joyner, 17-10289 (Aug. 14, 2018)

Joyner and a codefendant appealed convictions and sentences for multiple counts of Hobbs Act robbery and brandishing a firearm during a crime of violence. The Eleventh Circuit vacated and remanded Joyner's sentence for resentencing and affirmed in all other respects.

The district court did not commit reversible error "by declining to repeat a jury instruction when it provided the indictment to the jury." During deliberations, the jury requested a "list of the dates and locations of each robbery, as well as a list of times that each robbery took place." The court then realized that although the jury had been instructed that it would be provided with a copy of the indictment, the court had neglected to do that. When the judge suggested providing the indictment to the jury in response to the questions, one defense counsel objected based on the context of the question that had been asked. Another attorney just asked that the judge give a cautionary instruction that the indictment was not evidence, and Joyner's counsel then accepted that suggestion. The judge rejected that request and then provided the jury with a copy of the indictment, explaining that each of the 10 counts contained the date and location of the alleged robbery.

The Eleventh Circuit held: "While it would have been prudent for the trial court to have reminded the jurors that the indictment is not evidence when the indictment was belatedly provided to them during their deliberations, the trial court

did not abuse its discretion in handling the jury's question as it did." Prior instructions had covered that point twice.

The district court denied a motion to suppress cell site data. The relevant statute provided that a governmental entity may require the provider to disclose certain records based upon "reasonable grounds to believe that . . . the records or other information sought [] are relevant and material to an ongoing criminal investigation." That showing was less than the probable cause that would be needed for a search warrant.

At the time that this case was pending in the district court and the records were obtained, the Supreme Court had not yet rendered its decision in Carpenter v. United States, 138 S.Ct. 2206 (2018), which held that the "acquisition of the cell-site records was a search within the meaning of the Fourth Amendment" and that a warrant supported by probable cause was generally required. The Eleventh Circuit had previously held, and the district court abided by the holding, that the statutory reasonable suspicion requirement satisfied the Fourth Amendment. United States v. Davis, 785 F. 3d 498 (11th Cir. 2015) (en banc).

Although Carpenter applied when the argument was raised on direct appeal, the defendants were still not entitled to relief, as an alternative holding in Davis was "that the prosecutors and officers . . . acted in good faith and therefore, under the well-established *Leon* exception [to the warrant requirement], the district court's denial of the motion to suppress did not constitute reversible error."

Arguments by Joyner, in the district court, "that there was a complete breakdown in communication between him and his appointed counsel," did not require the appointment of new counsel for the indigent defendant. "'A defendant's general loss of confidence or trust in his counsel, standing alone, is not sufficient [for good cause to demand new appointed counsel].'"

During the joint trial of the two codefendants, an FBI agent testified as to a statement made by defendant Sturgis, that he had his own apartment but had been staying with Joyner for a few nights. Joyner argued that this violated Bruton v. United States, 391 U.S. 123 91968). The Eleventh Circuit disagreed. Bruton excludes "'only those statements by a non-testifying defendant which directly inculpate a co-defendant.'" No error exists when the statement "'was not incriminating on its face, and became so only when linked with evidence introduced later at trial.'" The statements at issue were not clearly inculpatory standing alone,

and Joyner's linkage argument described "precisely the kind of statement that poses '[n]o Bruton problem.'"

Joyner's sentence was vacated due to an error in applying section 3D1.4 of the Sentencing Guidelines. The Probation Office, when making its calculations, determined that there were five "units" under the applicable guideline and that the five units resulted in an additional five levels to Joyner's offense level. However, section 3D1.4 prescribes only a 4-level increase for five units.

Colon v. United States, 17-15357 (Aug. 16, 2018)

The Court held that an Indiana state court conviction qualified as a violent felony under the Armed Career Criminal Act's elements clause. A conviction under the Indiana statute required proof of "bodily injury," which meant "any impairment of physical condition, including physical pain." "Impairment" was synonymous with injury. Based on the statutory definitions, the Indiana offense required "physical force," and that qualified it as a violent felony under the ACCA's elements clause.

Weeks v. United States, 17-10049 (Aug. 17, 2018)

On rehearing, the Court vacated its prior opinion which affirmed the dismissal of a second motion to vacate sentence under 28 U.S.C. s. 2255. The case was placed on a calendar for oral argument.

First District Court of Appeal

Ammons v. State, 1D16-2084 (Aug. 16, 2018)

The First District reversed a conviction for trafficking in methamphetamine as a principal. The conviction required proof that the defendant "'intend[ed] that the crime be committed and *do some act* to assist the other person in actually committing the crime.'" The evidence included the defendant's post- arrest "admission that he and the other suspects should not have completed the drug transaction. But there was not sufficient evidence that Appellant did some act to assist in the commission of the crime."

Williams v. State, 1D17-731 (Aug. 16, 2018)

On appeal from a conviction for drug offenses, the defendant argued that the trial court erred in denying a cause challenge to a juror "who once worked as a prosecutor for the state attorney's office and whose husband is an investigator for that office."

The juror had worked as an attorney in that office for eight years, and subsequently worked for several years as a criminal defense attorney and then a family law attorney. The juror, during voir dire, stated that she could be fair and impartial. There were no equivocal answers during voir dire.

The juror's "employment with the state attorney's office nearly twenty-seven years earlier, and her husband's employment as an investigator with the state attorney's office, standing on its own, does not establish that Juror Gilbreath was partial to the State."

One judge dissented. The dissent focused on the juror's close relationship to a current employee in the State Attorney's Office (her husband), as well as statements made by the trial court judge during voir dire based on the judge's own personal knowledge of the juror.

Wiggins v. State, 1D17-739 (Aug. 16, 2018)

Wiggins appealed his conviction for possession of a concealed weapon by a convicted felon. The First District reversed because the defendant was convicted of a nonexistent crime, and that was fundamental error. There is no such offense as possession of a concealed weapon by a convicted felon.

First, the court rejected Wiggins' argument that a "firearm" did not qualify as a "concealed weapon" under section 790.001(3)(a), Florida Statutes. The Court's opinion goes through the relevant statutory definitions of firearm, concealed firearm, and concealed weapon.

As to the nonexistent offense, section 790.23(1) "makes it unlawful for a convicted felon 'to have in his or her care, custody, possession, or control any firearm . . . or to carry a concealed weapon[.]'" While "possession" modifies "any firearm," 'possession" does not modify "concealed weapon," and there is no statutory offense of possessing a concealed weapon. The term "carrying" is narrower than the definition of possession.

Koroly v. State, 1D17-1381 (Aug. 16, 2018)

Several years after entering a plea to charges of DUI manslaughter and DUI with serious bodily injury, Koroly moved to withdraw his plea "on grounds that his counsel was ineffective for failing to retain an accident reconstruction expert to evaluate the road conditions that existed at the time of the crash. Koroly argued that had his counsel retained an expert, the expert would have discovered defective signage on the interstate and hazardous weather conditions, both of which could have contributed to the crash." The trial court denied the motion after an evidentiary hearing, and the First District affirmed the trial court's order.

Koroly's counsel who advised him with respect to the plea, had contacted an accident reconstruction expert and obtained a "preliminary evaluation." The expert opined "that the circumstances of Koroly's crash did not warrant a more comprehensive accident reconstruction analysis. Couch [defense counsel] had no reason to disbelieve or challenge Bloomberg's expert opinion." Thus, Koroly could not demonstrate that trial counsel was deficient in counsel's performance.

With respect to the prejudice prong of ineffective assistance of counsel, both Koroly and Couch testified that if a more comprehensive report from an expert had been obtained and provided the information that now existed, Koroly would have elected to go to trial. That, however, was not the end of the inquiry regarding prejudice. Other factors undermined that assertion. Koroly received a much lower sentence than what he would have been subjected to if he had gone to trial. He also signed an agreement indicating that he understood the consequences of the plea and that he knew he was forfeiting the right to go to trial and present a defense. Most importantly, there was little likelihood of succeeding at trial even with the new expert. Evidence "of poor road conditions and inadequate signage would have had very little probative value in light of the overwhelming evidence of Koroly's intoxication and the extremely low threshold for proving causation under the DUI manslaughter statute."

Miller v. State, 1D17-4094 (Aug. 16, 2018)

On appeal from a conviction for robbery with a firearm, Miller argued that it was fundamental error when the court failed to instruct the jury that a BB gun was not a firearm. The First District disagreed.

The jury was fully instructed on armed robbery. When the jury presented the question of "whether a BB gun is 'a firearm because it expels a projectile" the court "referred the jury back to the instructions, which defined the terms firearm, deadly weapon, and weapon." In this case, the issue of whether the weapon was, in fact, a BB gun was in dispute.

Second District Court of Appeal

Crenshaw v. State, 2D17-4187 (Aug. 15, 2018)

The Second District treated Crenshaw's appeal of an order denying a Rule 3.850 motion as an original petition for writ of habeas corpus alleging a manifest injustice. Crenshaw sought relief based on the State v. Montgomery, 39 So. 3d 252 (Fla. 2010), based on the giving of the erroneous instruction on manslaughter by act as a lesser included offense of second-degree murder.

Crenshaw had presented this argument in his past proceedings but had been denied relief. It "would be manifestly unjust to deny him relief under these circumstances where this court and other district courts have given similarly situated appellants the benefit of Montgomery and have reversed for a new trial."

Gorman v. State, 2D17-4268 (Aug. 15, 2018)

In an appeal from the denial of a Rule 3.800(a) motion, Gorman argued that his concurrent 45-year sentences, imposed while he was a juvenile, were illegal under Graham v. Florida, 560 U.S. 48 (2010), and Florida Supreme Court cases which have applied Graham. The State conceded error and the Second District agreed.

The Court noted that Gorman had raised the same claim in an earlier motion and appeal and that the Second District had rejected the argument at that time based upon decisions which held that such a sentence was not a de facto life sentence and was therefore not unconstitutional under Graham. The prior decision the Second District preceded the Florida Supreme Court's decision in Kelsey v. State, 206 So. 3d 5 (Fla. 2016).

The "law of the case" doctrine was not absolute, and the appellate court had "'the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice.'"

The Court further emphasized that it had afforded relief to "other similarly situated juvenile offenders."

State v. Rogers, 2D16-3470 (Aug. 17, 2018)

The trial court granted a motion by Rogers to correct an illegal sentence and issued an amended sentence. The amended sentence only imposed a sentence for one of three offenses. The State argued on appeal that the trial court erred in refusing to sentence the defendant to the other two counts for which he had entered a plea of no contest. Several years earlier, the defendant had been sentenced to time served for the two other counts. In the most recent amended sentence, the trial court "incorrectly 'recommends/orders' that Mr. Rogers was previously sentenced verbally for counts two and three on February 13, 2008."

The Second District concluded from what it deemed a confusing record, that Rogers had not been sentenced for the two counts and that it was an error to do that. Merely noting that prior sentence to time served did not suffice. A written sentence on those counts was required.

Cannon v. State, 2D18-229 (Aug. 17, 2018)

Cannon filed a mandamus petition to compel the trial court "to accept his written waiver of appearance for a pretrial conference and quashing the capias issued on January 16, 2018." The Second District treated the petition as a habeas corpus petition and granted relief.

A defendant has the right to waive appearance at all pretrial conferences under Rule 3.180(a)(3), subject to good cause for the trial court to reject such a waiver. "Although we understand the trial court's frustration that Cannon did not personally appear for the hearings, based on the record before us we conclude that adequate notice was not provided to Cannon that he had to personally appear at the January 16, 2018, hearing despite his waiver of appearance. At the preceding hearing, on December 20th, the court had noted discrepancies regarding Cannon's address; and that notice would have been sent to the address provided by the Department of Corrections, not to the address provided by Cannon. The court ultimate told defense counsel to "'take whatever steps you need to notify him that he needs to be in Court on January16th and 8:30.'"

Third District Court of Appeal

Kendle v. State, 3D16-243 (Aug. 15, 2018)

In an appeal from convictions for second-degree murder and attempted second-degree murder, the Third District rejected Kendle's arguments that the trial court failed to conduct a sufficient Faretta inquiry, and that the court and state "made inappropriate comments on his exercise of his fundamental rights to remain silent and to represent himself."

After determining that Kendle had been restored to competency, the trial court conducted an extensive Faretta inquiry, which is quoted in its entirety in the Court's opinion. At the conclusion, the judge rescheduled the matter to allow for further review of the evaluations and to make an informed decision. Kendle then withdrew his request to represent himself and the court ordered additional competency evaluations. The court also permitted Kendle to discharge privately retained counsel and appointed an attorney from the Office of Regional Counsel. After a new determination that Kendle was incompetent, five months later, competency was again restored.

After this restoration of competency, the court conducted another substantial Faretta inquiry, which included a discussion for the possibility of a sentence of life imprisonment with mandatory minimum penalties. Kendle reiterated his request to represent himself, the court found his waiver to be knowing and intelligent, and, over Kendle's objection, new standby counsel was appointed after Kendle expressed a desire to discharge the most recent counsel.

Over the next several months, due, in part, to concerns about competency, further evaluations and Faretta inquiries were conducted. Kendle ended up representing himself at trial. "At all times during the proceedings, Kendle reaffirmed his understanding of his right to counsel after being carefully colloquied regarding the difficulties of self-representation and the valuable services provided by counsel. Kendle knew and understood the severity of the charges, and he insisted that his constitutional right to self-representation be honored. Because the trial court's determination that Kendle made a knowing, intelligent, and voluntary waiver of his right to counsel is supported by competent substantial evidence, we affirm on the issue of Kendle's self-representation."

During voir dire, the trial court spoke to the jurors about the State's burden of proof and the defendant's right to remain silent. The Third District disagreed with

the defendant's argument that these statements demeaned or devalued his right to not testify. Some of the noted comments were: "So, the defendant may choose to participate in this trial by questioning or he may choose to not participate."; "he also has no burden to testify, present evidence [or] tell his side of the story. He has every right to remain silent and just sit there at the table."' "The fact that a defendant does not take the witness stand must not influence your verdict or your discussions in any manner whatsoever."

The prosecutor made comments regarding Kendle's right to self-representation, as to which there was no objection, and the Third District found that fundamental error did not exist; no error existed. The "prosecutor merely inquired as to whether the jurors would be able to evaluate the evidence, follow the law, and apply the correct burden of proof, despite the fact that Kendle was representing himself."

Kendle also challenged another exchange between himself and the judge, in front of the venire, in which the judge told him that speaking objections were not allowed and in which the judge further told him that "the way that the jury selection works, okay, which is, again, why I strongly urged you to have a lawyer," and that this was not his time to ask questions. This arose after Kendle had interrupted the judge's comments to the venire. The Third District noted that self-representation does not confer a license to "abuse the dignity of the courtroom," that the court possesses the authority to control voir dire, and that the isolated unobjected-to comment was not fundamental error.

Raimondi v. State, 3D17-583 (Aug. 15, 2018)

Raimondi appealed a revocation of community control and the Third District reversed because the record on appeal did not contain "the relevant affidavit upon which the revocation was based."

The trial court conducted a hearing regarding events that transpired on September 28, 2016, but there was no corresponding affidavit of violation for that date in the record.

Fourth District Court of Appeal

Bethel v. State, 4D17-2196, 4D17-2197 (Aug. 17, 2018)

In an appeal from a revocation of probation, the State conceded that the term of probation had expired and that the court lacked jurisdiction to revoke probation for technical violations. The concession was based on Mobley v. State, 197 So. 3d 572 (Fla. 4th DCA 2016), which held "that an affidavit of violation of probation alleging only technical violations of probation does not toll the probationary period."

T.T.S. v. State, 4D17-2821 (Aug. 15, 2018)

The Fourth District found that evidence of third degree grand theft was insufficient and remanded to the trial court to reduce the charge to petit theft.

The State had to prove that the value of the stolen items was between $300 and $20,000. The Fourth District summarized the victim's testimony as to the stolen items: "three pieces of jewelry, some prescription drugs, and a handgun were taken; the gold was fourteen karat or twenty four karat with no diamonds; she received her wedding band as a promise ring in high school from her husband; the locket was a gift from her daughter; and the jewelry might receive 300 dollars at a garage sale." This amounted to a "guesstimate" of the value and was insufficient.

The Court also found that evidence was sufficient as to burglary: "The juvenile's fingerprints were located in an area of the house where the juvenile admittedly had never been before the date of the crime. This sufficiently proved the juvenile's guilt."

Colston v. State, 4D17-1039 (Aug. 15, 2018)

Colston challenged his Palm Beach County sentence pursuant to Graham v. Florida, 560 U.S. 48 (2010), and its progeny. The Fourth District held that it was "premature" to consider the issue and affirmed the sentence.

In 2013, Colston was resentenced to 75 years for multiple offenses in Broward County, and those sentences were consecutive to a 65-year sentence previously imposed by a Palm Beach County court. In 2016, he filed motions to correct both of the sentences. The Broward Court stayed its motion to correct pending disposition of a relevant case in the Florida Supreme Court. After that opinion issued in February 2017, the Palm Beach court resentenced Colston to 50 years in prison with

judicial review after 20 years. That order did not specify whether it was consecutive or concurrent to the 75-year sentence in Broward County.

Colston then filed a Rule 3.800(b)(1) motion, seeking clarification from the Palm Beach court as to whether its sentence was consecutive or concurrent. His motion noted that silence in the sentencing order results in the sentences running consecutively, and thus creating an aggregate sentence of 125 years.

The motion to correct the 75-year sentence in Broward still remains pending in the trial court because that court had stayed its ruling pending the disposition of the Florida Supreme Court case in 2016. Although that had been resolved in February 2017, the Broward trial court had yet to take action on the 75-year Broward sentence. Since that remained pending, and its resolution could affect the Fourth District's conclusion in this appeal of the Palm Beach County sentence, the Fourth District affirmed, without prejudice to see post-conviction relief "following the imposition of a new Broward sentence."

Amelio v. State, 4D17-3325 (Aug. 15, 2018)

Amelio appealed a conviction for sexual battery under specified circumstances under section 794.011(4)(b) and (e). The Fourth District reversed because the trial court erred "when it instructed the jury on the victim's mental incapacity."

Standard Instruction 11.3, "Sexual Battery – Under Specified Circumstances," "enumerates five elements that the State must prove beyond a reasonable doubt. The standard instruction also lists additional definitions and points of law that are read to the jury 'if applicable.'" Defense counsel objected to the giving of one of those "if applicable" instructions, the one which references section 794.022(4) and states: "Evidence of (victim's) mental incapacity or defect, if any, may be considered in determining whether there was an intelligent, knowing, and voluntary consent."

The trial court had found that if there was an allegation of consent, as there was in this case, the instruction on mental incapacity is relevant and must be given. The Fourth District disagreed: Consent is an element in every sexual battery case, which must be proven by the State. The trial court's rationale would transform the mental incapacity instruction into one which must be given in every sexual battery case, as opposed to one which is to be given only "if applicable."

Section 794.022 "is an evidentiary statute," which allows the State to introduce evidence of a mental incapacity or defect to prove that consent was not intelligent, knowing or voluntary. If, and only if, the State introduces such evidence, does the "if applicable" instruction on mental incapacity become relevant, and only then is it to be given. No such evidence was introduced by the State in this case.

Although the victim was voluntarily intoxicated, there was no evidence "that she consumed any of the drinks against her will. The State did not introduce evidence of her mental incapacity as that term is defined in the statute. So the related instruction was not appropriate."

Fifth District Court of Appeal

State v. Hollinger, 5D17-1996 (Aug. 17, 2018) (on rehearing)

The Fifth District, on rehearing, withdrew its prior opinion and substituted the current opinion.

The State appealed a downward departure sentence for the lesser-included offense of second-degree grand theft of $20,000 to $100,000, twelve counts of depositing a check with intent to defraud, and eight counts of uttering a forged instrument. The Court agreed with the State's argument that the "trial court's finding that the offenses were committed in an unsophisticated manner and constituted an isolated incident for which the defendant has shown remorse is not supported by substantial, competent evidence."

Hollinger was a "victim's business officer manager," and "wrote petty checks from the victim's Resident Trust Account, presented them to her bosses for their signatures, and then deposited them into her own bank account for her personal use."

The trial court's reason for a downward departure requires sufficient evidence as to each of three factors. The Fifth District agreed only with the trial court's finding regarding remorse.

The Fifth District rejected the trial court's finding that the "crimes were unsophisticated because Hollinger took no measures to protect herself or to hide her actions or identity." However, this was not a case of the victim accidentally depositing money into Hollinger's account. "Instead, for several months Hollinger used her position of trust with the company to repeatedly obtain signatures on fraudulent checks in order to take the money for her own use."

The trial court also erred in finding this offense to be isolated because Hollinger had no prior record. While there is "no bright-line rule for deciding whether an offense is an isolated incident, and it was "undisputed that Hollinger has no prior criminal history," that factor is not necessarily dispositive. Here, there were multiple offenses committed over a span of several months. This time span was used to distinguish earlier decisions from the same Court in which the multiple offenses had been committed over a span of several days.

Kimbrough v. State, 5D18-608 (Aug. 17, 2018)

Kimbrough filed a mandamus petition in the trial court, which alleged that he had been represented by the Public Defender's Office in his criminal prosecution, and he sought to compel that office to provide him "free copies of certain CDs and DVDs that he alleged were previously prepared at public expense." The trial court denied the petition based on its finding that the records of the Public Defender's Office were not part of the judicial branch and were therefore not subject to release by the circuit court. The Fifth District reversed.

Mandamus is an "appropriate remedy to compel the public defender to provide a former client copies of record documents prepared at public expense." Such documents must be provided to an indigent defendant without charge for copying.

The case was remanded to the trial court for further proceedings, including a response by the Public Defender's Office as to whether the requested records were obtained or prepared on the defendant's behalf at public expense.