Case Law Update
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Prepared by
Richard L. Polin

First District Court of Appeal

Lai v. State, 1D16-1882 (Aug. 1, 2018)

Lai appealed his convictions and sentence for first-degree murder and armed robbery. The First District affirmed and addressed an issue regarding a comment made by the prosecutor during closing argument.

During the trial, counsel for both Lai and a codefendant suggested that police officer witnesses were untruthful and that "the prosecutor pressured witnesses to testify in the State's favor, and the police and prosecutor may have concealed evidence." During closing argument, the prosecutor then stated:

> I'm hoping that maybe by what you saw with Jennifer Masters and how that whole scenario went down, you might see that cops and the government and the State Attorneys we really don't lie. . . .

The trial court sustained the defense objection to the comment, but denied a request for a curative instruction.

On appeal, the First District rejected the State's argument that the comment in question was invited by defense counsel's prior questioning. The comment "constituted improper bolstering." "While the prosecutor could have pointed to facts in evidence to suggest that the officers in the case were credible or that he was not pressuring witnesses to testify, he could not suggest that State Attorneys, police officers, or other government officials do not lie based on the nature of their positions."

The denial of the motion for mistrial was reviewed under the abuse-of-discretion standard. The First District found no abuse of discretion and emphasized that the prosecutor pointed to specific evidence in the testimony to demonstrate that neither he nor the police were lying. The Court also detailed the strong evidence adduced as to Lai.

Fiacre v. State, 1D16-2116 (Aug. 1, 2018)

Fiacre was the codefendant of Lai (the opinion addressed above), and the First District affirmed on the basis of its opinion in Lai.

Washington v. State, 1D16-5447 (Aug. 1, 2018)

On appeal from a conviction for first-degree murder, Washington argued that his incriminating statement to police should have been suppressed based on his requests for counsel and the downplaying of the significance of Miranda warnings by officers. The First District disagreed and affirmed the conviction.

While a detective was reviewing a Miranda waiver form with the defendant, the defendant was inquiring as to whether he was a suspect and whether he needed an attorney. The First District concluded that the references to counsel were not unequivocal requests for counsel; rather, they "amounted to requests for advice about his rights." The detective temporarily stopped "the interrogation to explain to Washington that he was not an attorney and could not advise Washington about whether an attorney was needed." Washington, at that time, did not invoke his right to counsel, and "he indicated his continued willingness to talk to the detectives after being fully advised of his rights."

About 15 minutes after signing the waiver form, "Washington asked if he was a suspect and inquired, 'do I need to call my lawyer.?' Detective Monroe informed Washington that he wanted to hear what Washington had to say." Again, the First District found that Washington's question was not an unequivocal request for counsel." "Rather, it was a prefatory question about his rights." The detectives again responded appropriately by "informing Washington that he could not provide legal advice."

About 90 minutes into the questioning, Washington asked if he would be able to leave the station if he told his story. The detectives did not provide such a guarantee, saying that they did not know what he was going to say, and that questions regarding "the legality of his actions" would be referred to the State Attorney's Office. When Washington asked if he could call his lawyer, the detective responded, "'We can't tell you no.'" A detective then "suggested that Washington should consider how he could set a good example for his son by doing the right thing." When Washington started talking about the night in question, the interview was briefly stopped, and soon after, a detective told Washington that he could call his lawyer. After some similar back-and-forth between Washington and the detectives,

Washington proceeded to make incriminating statements. With respect to the query as to whether he could call his lawyer during this portion of the questioning, the First District stated that "considering the context surrounding the question, we conclude that Washington did not unequivocally invoke his right to counsel." The question as to whether he could call his lawyer "was reasonably interpreted by the detectives to be an inquiry by Washington about whether he *could* contact an attorney as opposed to expressing a desire to terminate the interview and speak with counsel at that precise moment."

Clayton v. State, 1D17-263 (Aug. 1, 2018)

On appeal from convictions for manufacturing marijuana and possession of drug paraphernalia, the First District found that the trial court erred in denying a suppression motion and reversed.

The trial court erroneously relied on the doctrine of inevitable discovery, which "supports admission of illegally obtained evidence only when police actively sought to obtain a search warrant before searching a home." The mere fact that the police were conducting an active investigation does not support resort to the inevitable discovery; the police must have been in the process of obtaining a warrant prior to the misconduct.

In this case, the trial court found that the defendant's consent to search his home was coerced. As the police were not previously in the process of obtaining a search warrant, the inevitable discovery doctrine did not apply and the suppression motion should have been granted.

Thompson v. State, 1D16-1916 (Aug. 3, 2018)

Thompson appealed convictions for first-degree murder and other offenses. He argued that a blood-stained wallet and shoes, taken from him when he was booked into the county jail, were not properly authenticated, because the State "could not produce a witness to testify definitively that he or she removed each item from Thompson." The witness testifying for the State, who was the first to acknowledge receipt of the items, "did not know precisely where the items came from," other than that they came from either Thompson or a coperpetrator during booking.

The First District disagreed with Thompson's argument. "But to any extent Thompson's authenticity arguments rely on the State's inability to establish a precise

chain of custody, that reliance is misplaced. The only time admissibility turns on the State's ability to demonstrate chain of custody is when the opposing party has demonstrated a probability that the item has been tampered with." No evidence of tampering was adduced.

And, "[t]o the extent Thompson argues the State did not present sufficient evidence for a prima facie showing of authenticity, we again disagree. The . . . custodian testified that the wallet contained credit cards in Thompson's name, his Florida Driver's License, and his Social Security card. These contents suggest that the wallet was owned by Thompson."

As to the shoes, an agent "testified that he removed the shoes from Thompson during booking but forgot to record that on the evidence receipt." There was also testimony that the shoes could not have been mixed up with those of the other person being booked at the same time, because the two men were placed in separate cells, and Thompson's shoes had laces, the other shoes did not.

Mars v. State, 1D16-2811 (Aug. 3, 2018)

In an appeal from a conviction for sexual battery, the defendant argued that the trial court erred in "failing to *sua sponte* conduct a formal competency hearing and in deciding Appellant could waive his right to counsel. In addition, he argues that it can be determined on the face of the record that standby counsel was ineffective by refusing to share information with Appellant."

The trial court did not abuse its discretion with respect to competency:

> Defense counsel informed the court that, while the expert was unable to conduct a complete examination, it appeared that Appellant had an ability to understand the adversarial nature of the proceedings. The evaluator further noted that Appellant did not have mental health history and that Appellant might be refusing to be evaluated to "postpone going to trial to avoid the potential consequences of his alleged behavior." As to Appellant's silence during the *Faretta* inquiry and the first part of the trial, the court found that this behavior reflected Appellant's obstinacy, rather than an inability to understand the proceedings. We note furthermore that Appellant only became silent *after* the court ruled that there were no grounds to discharge

> Appellant's counsel. Later, Appellant meaningfully and intelligently participated in his defense.

Communications with the defendant and a deputy who escorted the defendant in court corroborated the above conclusions.

The defendant acknowledged that a complete *Faretta* inquiry was conducted, but argued that "when he refused to answer questions, the trial court was obligated to require counsel to continue representing Appellant, conduct a competency hearing, and delay proceedings until the court could ensure Appellant was knowingly and intelligently waiving his right to appointed counsel." There was no error in this case:

> Appellant engaged with the court and discussed issues relating to the quality of his representation and the evidence in the case just before the *Faretta* inquiry. The competency expert indicated that Appellant generally understood the proceedings, and appointed counsel stated that Appellant could communicate with counsel about the case. We further recognize that Appellant's reticence to speak began when the court ruled against his request for new counsel. Therefore, we hold that competent and substantial evidence supports the trial court's ruling to allow Appellant to proceed pro se with standby counsel.

The claim of ineffective assistance of standby counsel was rejected because the appellate court could not find any prejudice, even if standby counsel were deficient. This was based on the overwhelming evidence of guilt. In this case, the defendant chose to have standby counsel take over the case during the trial.

Randall v. State, 1D16-3735 (Aug. 3, 2018)

Randall was convicted of possession of cocaine, as a lesser included offense of the original trafficking charge. His sentence of five years, the maximum for the offense for which he was convicted, was reversed because the trial court erroneously relied on the premise that Randall was trafficking. The court could not rely on trafficking as a sentencing factor where the jury had acquitted him on the trafficking charge.

Courmier v. State, 1D17-0691 (Aug. 3, 2018)

Courmier was convicted of first-degree murder. In an appeal from the summary denial of a Rule 3.850 motion, the First District addressed some of the claims.

Courmier argued counsel was ineffective for failing to investigate and present evidence of his participation in poker tournaments, to refute the notion that he would have committed the murder for pecuniary gain. The First District details evidence that trial counsel did present regarding the defendant's income, which included some evidence of the poker tournaments, including the defendant's own testimony as to how he did extremely well in the tournaments. Similar testimony had been presented through the defendant's father. Additional evidence of poker winnings would not have changed the outcome of the case. The defendant had quit his job before the murder and was unemployed. He did not own a car at the time, and there was testimony that near the time of the murder, he had to sell some of the victim's trading cards in order to pay for a few modest items at Wal-Mart.

In a similar claim, the defendant argued that counsel should have developed and presented evidence that he paid his father for the rental car. For the same reasons, the First District concluded that there was no probability that such testimony would have affected the outcome of the trial.

Courmier further argued counsel failed to present testimony from a nephew, who would have testified that the defendant was asked to dig a hole in the backyard where the victim's body was ultimately discovered. Courmier claimed this would create reasonable doubt as to his involvement in the murder. The defendant could not establish prejudice from this omission. There was already evidence in the case suggesting that his brother, Christopher, was involved in the murder. That evidence also established that the defendant was the only one who took actions to conceal the victim's death and dispose of the victim's property.

In another claim, it was found that counsel was not ineffective for failing to object to autopsy photographs, as the photos were relevant and would have been admitted notwithstanding any objection.

Jones v. State, 1D17-1111 (Aug. 3, 2018)

A 20-year mandatory minimum sentence for aggravated assault was reversed because the evidence did not "support a finding that [the defendant] discharged a firearm during the commission of the felony."

Multiple offenses were presented to the jury. The State presented evidence and argument, matching the discharge of a firearm to the attempted second-degree murder charge. As to the aggravated assault, the State argued at trial that it was the possession of the firearm that supported that charge, not the discharge.

Second District Court of Appeal

Sullivan v. State, 2D16-5065 (Aug. 1, 2018)

Relying on the Second District's own recent opinion in Martin v. State, 2018 WL 2074171 (Fla. 2d DCA May 4, 2018), review pending, No. SC18-789, the Second District again held that the 2017 amendment to section 776.032, Florida Statutes, the Stand Your Ground law, was procedural and thus applied retroactively to pending cases.

Vasseur v. State, 2D17-1778 (Aug. 3, 2018)

The defendant appealed the denial of a Rule 3.800(a) motion. She had pled guilty to grand theft and making false entries on corporate books and a plea agreement with the State required her to pay restitution of over $20,000 to victims. The State agreed to recommend six months in jail plus seven years' probation if she paid the restitution; otherwise, the plea was an "open" plea and the court could sentence her up to twenty years in prison. When she failed to pay all of the restitution because she could not raise the amount, the court sentenced her to seven years' incarceration plus five years' probation on one count, and five years' probation on the other.

The sentences imposed were illegal pursuant to Noel v. State, 191 So. 3d 370 (Fla. 2016). A longer sentence may not be imposed because a defendant cannot pay restitution. The fact that this was done pursuant to a plea agreement did not matter; the parties cannot agree to an illegal sentence. The claim was one which was also viable in a Rule 3.800(a) motion.

Roberts v. State, 2D17-3015 (Aug. 3, 2018)

The trial court summarily denied a Rule 3.850 motion, and the Second District remanded for further proceedings as to two of the claims.

As to one of the claims, the trial court concluded that the transcript clearly showed that the defendant voluntarily agreed with counsel not to testify. While that conclusion was correct, the trial court's analysis did not go far enough, as the claim in the Rule 3.850 motion raised the issue of whether a reasonable attorney would have discouraged the client from testifying; the trial court did not address that question, and that could not be ascertained from the portions of the record that were attached to the trial court's order.

Similarly, as to the prejudice prong of the test for ineffective assistance of counsel, in a case which posited the credibility of the victim and other Williams rule witnesses against the credibility of the defendant, the decision not to testify raised factual issues that would be relevant to the prejudice inquiry.

In another claim, the defendant alleged that counsel was ineffective in the investigation of a Williams rule witness, and if he had testified, he would have contested and disputed the testimony of that witness. This claim was not conclusively refuted by the record attachments to the trial court's order, and further proceedings were required.

Third District Court of Appeal

Arroyo v. State, 3D16-2775 (Aug. 1, 2018)

The Third District affirmed a conviction and sentence for sexual battery with specified circumstances by multiple perpetrators.

The Court concluded that the trial court did not err by precluding the defendant "from inquiring into the victim's prior sexual history with her boyfriend and by prohibiting defense counsel from introducing certain text messages exchanged between one of his co-defendants and the victim."

The defendant contended "that he had the right to cross examine the victim about her prior consensual sexual activity with Tyler because such activity demonstrated that she wanted to resume her prior girlfriend/boyfriend relationship with Tyler, and therefore she had a motive to lie about having consensual sex with

the defendant later that evening." Under Florida's Rape Shield Statute, such evidence is generally inadmissible. The Sixth Amendment right of confrontation may be implicated by such arguments, and the court must balance the protections of the Rape Shield Statute with the defendant's Sixth Amendment right. In this case, the defense was able to develop relevant facts regarding the relationship between the victim and Tyler, including Tyler's testimony that the "victim was 'signaling' to him that she wanted to get back together with him." The testimony that came in through Tyler was deemed adequate to enable the defendant to present his defense without eliciting the prior consensual intercourse between Tyler and the victim.

The text messages were properly excluded from evidence because they were deemed "marginally relevant" based on the facts of the case. Most importantly, they were not between the victim and the defendant. Additionally, time frames were lacking; there was no indication of any interest on the part of the victim when one of the other perpetrators sent sexually graphic messages; and the messages between the coperpetrator and victim were not relevant to the defendant's theory of the case.

Ayesh v. State, 3D17-2597 (Aug. 1, 2018)

A claim of ineffective assistance of counsel was summarily denied and the Third District affirmed. The defendant alleged that counsel misadvised Ayesh "regarding the impact of his plea on future employment." "It is well-established that a defendant must only be made aware of the direct consequences of his or her plea." As an effect on future employment was a collateral consequence, because "it does not affect a defendant's range of punishment in any manner," the summary denial of the claim was proper.

Mendez v. State, 3D17-2746 (Aug. 1, 2018)

On appeal from a conviction for two counts of simple battery, one a lesser included offense of the original charge of aggravated battery, the defendant argued that the trial court erred in reading back to the jury a specific portion of the victim's trial testimony.

During deliberations, the jury sent a note to the judge, asking: "What was Luísa's answer when asked who had stabbed her?" The note did not use the words "testimony" or "read back," but the judge therefore concluded that the jury was requesting a read-back of the specific portion of the testimony. The court reporter was able to locate the relevant portion of the testimony. Defense counsel then

objected and argued that the jury should be told to rely on its recollection of the testimony.

The Third District found no error in reading back the limited response of the victim, as that was what the jury requested, even though it did not use the words "testimony" or "read back."

Morris v. State, 3D18-73 (Aug. 1, 2018)

Morris was charged with second degree murder with a firearm and possession of a firearm by a convicted felon. Morris moved to sever the charges, and, at the first trial, Morris was acquitted. He then moved to dismiss the possession charge based on collateral estoppel principles, because the ultimate issue regarding possession of a firearm was adjudicated in his favor at the first trial on murder.

The Third District disagreed on the basis of the recent decision of the United States Supreme Court in Currier v. Virginia, 138 S.Ct. 2144 (2018). "The analysis in Currier holds that the defendant's consent to the severance (including a second trial on the severed count) obviates any concern or claim that the second trial violates the Double Jeopardy Clause, receding from Ashe to that extent."

Morris, in supplemental briefing, agreed that Currier was dispositive as to the federal constitutional double jeopardy/collateral estoppel claim, but argued that the second prosecution would violate the double jeopardy clause of the Florida Constitution. The Third District concurred with the State's argument that "the scope of double jeopardy protection is the same in both the United States and Florida Constitutions," and that Currier "appears to overrule or abrogate previously-controlling Florida Supreme Court precedent . . . ."

Fourth District Court of Appeal

Walker v. State, 4D17-2179 (Aug. 1, 2018)

The trial court erred in considering the defendant's jailhouse behavior at sentencing. The trial court took into consideration that the defendant had engaged in "constant misbehavior in the jail," including "victimizing the deputies, throwing urine on them and striking them, which leads to these other charges." The Florida Supreme Court previously held, in Norvil v. State, 191 So. 3d 406 (Fla. 2016), that the trial court may not consider, as a sentencing factor, either a "subsequent arrest

without a conviction." Alleged misbehavior in jail was deemed to fall into the same category.

Jackson v. State, 4D16-2157 (Aug. 1, 2018)

Appellant was jointly tried with a codefendant, and the trial court excluded photographic evidence from which the appellant's mother had identified the codefendant. During cross-examination of a detective, the codefendant asked questions regarding the prior identifications, and the trial court found that the cross-examination opened the door to the previously inadmissible evidence.

On appeal, the defendant argued that the opening-the-door doctrine does not apply when testimony has been elicited by codefendants. The Fourth District did not reach the issue because it was not preserved for appellate review. A "hearsay" objection was insufficient to alert the trial court judge as to the nature of the argument being raised on appeal.

Twigg v. State, 4D17-1694 (Aug. 1, 2018)

Twigg appealed convictions for battery on an emergency medical care provider and battery. The Fourth District held that the evidence was insufficient as to the offense of battery on an emergency medical care provider.

One of the elements of this offense is that the victim is an "emergency medical care provider." The statutory definition of that phrase includes a "registered nurse." The phrase "registered nurse," in turn, is defined several provisions in chapters 401 and 464 as one licensed to practice "professional nursing." "Professional nursing" is distinguished in the statutory scheme for "practical nursing." The victim in this case was a "licensed practical nurse" (LPN), and therefore did not qualify as a registered nurse, as used in the definition of "emergency medical care provider."

The victim likewise did not fall under an alternative definition of "emergency medical care provider," as "any person authorized by an emergency medical license under chapter 401." Chapter 401 "provides for the licensure of emergency medical transportation services such as ambulances and air ambulances. . . . the nurse victim was working for a hospital, not a medical transportation service."

The defense did not move for judgment of acquittal, and this error did not qualify as fundamental error on appeal, because the fundamental error doctrine does not apply to sufficiency of evidence claims when there is evidence that the defendant

committed some crime. However, it was apparent on the face of the record that trial counsel was ineffective for not moving for judgment of acquittal, as that would have reduced the charge from a felony to a misdemeanor. It would also have constituted a waste of judicial resources to postpone litigation of this issue until it was presented in a motion for post-conviction relief in the trial court.

The defendant further argued that counsel was ineffective for failing to present a defense of self-defense – that the defendant was protecting himself from being unlawfully detained under the Baker Act. The defense at trial was one of insanity, and there could have been strategic reasons as to why self-defense would undermine the insanity defense. The issue of ineffective assistance could not be ascertained on the face of the appellate record and was therefore left for the trial court to resolve after it was presented in a motion for postconviction relief.

Peynado v. State, 4D17-3367 (Aug. 1, 2018)

The trial court erred in denying a motion to suppress crack cocaine that the police found in a food container held by the defendant.

The trial court first found that officers had reasonable suspicion to detain the defendant. One of the officers observed the defendant "holding an open white food container in one hand and a fork in the other." The defendant was observed dropping his fork and a "large, yellow, chunky item, into the food container," and pushing that item down with the fork. An officer testified that based on his experience, "he immediately recognized the item dropped into the food container as crack cocaine."

The trial court relied on the plain view doctrine to support the seizure of the container with the crack cocaine. The trial court expressly found that it did not believe the officer was able to immediately identify the item as cocaine by visual observation. Rather, the trial court relied on surrounding circumstances, such as the defendant's nervous reaction upon seeing the officers and his attempt to conceal the item. Those movements, however, were insufficient to create reasonable suspicion, let alone probable cause, that the item was contraband or that the defendant was engaged in criminal activity.

Fifth District Court of Appeal

Gould v. State, 5D17-684 (Aug. 3, 2018)

The Fifth District reversed a conviction for conspiring to traffic in cocaine due to insufficient evidence.

Gould's boyfriend had been involved in selling small amounts of cocaine to a police confidential informant; Gould was not involved in those transactions. In the instant transaction, the boyfriend was trying to sell a larger amount of cocaine in a parking lot of a shopping center. The boyfriend insisted that Gould drive him to the parking lot. Gould drove to the parking lot, circled around the CI's vehicle, and eventually stopped several empty spaces away from that vehicle. The boyfriend exited, and Gould moved her car further away, but still within sight of the CI's vehicle, and she appeared to be looking at the CI's vehicle "while also repeatedly scanning the surrounding parking lot." The boyfriend was arrested after the completed transaction.

An officer testified that Gould's behaviors when driving in the parking lot and circling the CI's vehicle, "were similar to and consistent with what he described as counter-surveillance activity that he had repeatedly observed in many other drug deals." Gould testified that she was unaware of her boyfriend's plan to sell cocaine. Defense counsel did not move for a judgment of acquittal on the conspiracy charge.

The evidence of a conspiracy was insufficient. There was no evidence that "Gould participated in the planning of this drug deal." "The only evidence relevant to Gould's participation were her actions of providing transportation and counter-surveillance as well as the paper bag containing cocaine in her boyfriend's side of the car." Thus, there was insufficient evidence of Gould being a party to any agreement.

Her conviction for trafficking in cocaine was affirmed. One judge dissented as to the holding of insufficient evidence of a conspiracy.