Case Law Update
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Eleventh Circuit Court of Appeals

United States v. McIntosh, 16-16442 (Aug. 20, 2018)

McIntosh was found not guilty by reason of insanity for possession of firearms while under felony indictment, threatening the President, and other offenses. He was civilly committed under 18 U.S.C. s. 4243(f), and he appealed the district court's order denying him unconditional release.

The Eleventh Circuit held that the district court did not err in finding the evidence sufficient that McIntosh's risk of danger to others was due to a mental disease or defect.

After the acquittal by reason of insanity in the criminal case, McIntosh was committed to a facility for evaluation. A civil bench trial was then conducted to determine whether his release would create a substantial risk of bodily injury or serious property damage due to a mental disease or defect. Because one or more of the criminal offenses for which he was acquitted by reason of insanity involved substantial risk of bodily injury, McIntosh was required to prove that such danger did not exist by clear and convincing evidence.

McIntosh was diagnosed with severe Narcissistic Personality Disorder with Borderline, Histrionic and Antisocial Traits. He argued that that did not qualify as a mental disease or defect under section 4243. He based this argument on testimony from expert witnesses that personality traits are not "typically" considered mental diseases or defects. Section 4243 did not define "mental disease or defect." The Eleventh Circuit adopted the definition of that phrase from a decision of the D.C. Circuit, McDonald v. United States, 312 F. 2d 847 (D.C. Cir. 1962), which defined that phrase as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Consistent with decisions from other circuits, the Court held that a personality disorder could constitute a mental disease or defect, even if mental health professionals disagree.

Relevant facts from the evidence in this case were that the disorder was described as "severe"; McIntosh exhibited significant symptoms that resulted in "maladapted behavior"; these symptoms included behavior reflecting "increased impulsivity and inappropriately intense anger." McIntosh further "suffered severe impairments that manifested in his perceptions of the world, emotional responses, interpersonal functioning, and impulse control."

Meders v. Warden, Georgia Diagnostic Prison, 14-14178 (Aug. 22, 2018)

In an appeal from the denial of a federal habeas corpus petition as to a state court conviction, the Eleventh Circuit reviewed one claim for which a certificate of appealability had been granted – ineffective assistance of trial counsel.

The Eleventh Circuit addressed the prejudice prong of a claim of ineffective assistance of counsel. Because the state court adjudicated the claim on the merits, the highly deferential standards of federal habeas review were implicated, and the Court set them forth at great length. "Applying AEDPA deference, when a state court decides that a petitioner has failed to establish prejudice for Strickland purposes, the question for us is whether every fairminded jurist would conclude that prejudice has been established."

Trial counsel was alleged to be ineffective for "failing to use certain pretrial statements and police reports to impeach several of the State's witnesses." These statements and reports would have weakened the credibility of four state witnesses at trial. The Eleventh Circuit detailed the points that could have been made through the use of the statements and further noted the remaining strengths of the prosecution's evidence. Ultimately, there was still "undisputed evidence in the record pointing to Meders' guilt." This included two bullets that struck the victim – the bullets were fired from a revolver that was found under Meders' waterbed, and he even confirmed that that weapon was used to kill the victim, and there was no evidence that anyone planted the gun under his bed. Meders also admitted being present at the scene of the crime and to having in his possession the money taken from the cash register.

Viewing the totality of the evidence under the deferential standards, it could not be said that "every fairminded jurist would conclude that there is a 'substantial, not just conceivable,' likelihood that the result of his trial would have been different."

First District Court of Appeal

Trussell v. State, 1D16-3673 (Aug. 24, 2018)

Trussell appealed convictions for falsely acting as a public officer in connection with a legal process. The First District addressed and rejected his arguments related to the charging document and the State's closing argument.

Trussell had been selected the foreperson of a grand jury that had been empaneled. The next day, he returned and gained early access to the courtroom, hours before the grand jury was scheduled to resume. He then assembled 25 other persons, who declared themselves the "People's Grand Jury Under Common Law." He presented a criminal conspiracy to them and they approved two "true bills" calling for the arrest and prosecution of many public officers on criminal charges. The next day, Trussell presented the Clerk of the Court with the "true bill."

Trussell argued that the State proceeded on a theory that was not charged in the indictment – i.e., his acts of gaining access to the courtroom to convene his People's Grand Jury. The information referred to him as having impersonated or falsely acted as a grand jury foreman. The First District found the information to be worded broadly enough to support the State's theory of prosecution. Trussell was charged with falsely acting as a foreperson "in connection with or relating to the filing of [true bills]."

The State's closing argument also focused on the early entry to the courtroom, and that was proper. The "initial deception in gaining access to the courtroom for himself and the members of a sham grand jury inaugurated his entire charade."

One judge dissented in part, and concluded that the information did not sufficiently charge the defendant on the basis of the early entry into the courtroom.

Charles v. State, 1D16-3860 (Aug. 24, 2018)

Charles appealed convictions for second-degree felony murder and burglary. The First District affirmed and disagreed with his argument that the evidence was insufficient under the circumstantial evidence standard of review. The argument had not been raised in the trial court and was therefore reviewed for fundamental error.

Charles argued that the evidence showed only mere presence in the victim's apartment, where the victim was shot, and from which the defendant fled.

First, an appellant can not raise, for the first time on appeal, that the special circumstantial evidence instruction standard applies. Second, the circumstantial evidence standard results in fundamental error only when the State fails to present evidence of any crime. In this case, the evidence placed the defendant in the apartment as one of the intruders. An eyewitness observed two intruders and stated that both of them were working to break down the door of the apartment. That was evidence of participation, and not mere presence. The defendant and a companion had also texted about bringing a gun.

Johnson v. State, 1D16-3986 (Aug. 24, 2018) (on rehearing)

The First District withdrew its prior opinion and issued the current one and addressed a claim that defense counsel was ineffective for failing to object to testimony from an officer who "specialized in training and utilizing dogs to track suspects and detect odors." The dog had been used to track suspects from a burglary and was raised in a Rule 3.850 motion.

The officer was testifying as a lay witness and the Court addressed the scope of opinion testimony permitted from a lay witness under section 90.701, Florida Statutes. The requirements of that statute for lay opinion testimony are that "the witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences and opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party," and "the opinions and inferences do not require a special knowledge, skill, experience, or training."

In this case, the officer's opinion could not be intelligently presented without testimony as to the dog's "asserted abilities." Jurors have basic understandings of the usages of dogs trained to detect odors. The officer was not attempting to testify that the dog could smell a burglary; rather, that the dog could detect physiological phenomena of a person in flight. The testimony did not cause undue prejudice as it was readily subject to adequate cross-examination.

The Court, on the basis of several federal appellate court opinions, further rejected the argument that the officer's testimony was based on special knowledge, skill, experience or training.

McKire v. State, 1D16-5158 (Aug. 24, 2018)

The First District reversed convictions for possession of cocaine and marijuana. The First District reversed the conviction for possession of marijuana because the State "failed to prove that he actually or constructively possessed the marijuana found on the gas station's property."

The State's evidence came solely from the gas station's security video and showed McKire "running and dropping things near the gas pumps during the shootout. Mr. McKire dropped these things in the same general area where officers later found marijuana."

The First District reviewed the video and noted problems: It did not show what McKire dropped; it could have been another item. There was also a "location discrepancy," as the items McKire dropped "didn't appear to fall in the grass strip next to the fence, where the officers found the marijuana." Proximity to the area where the items were found was discounted because of a gap in time, and McKire "wasn't found with, near, or making moves toward the marijuana."

Baugh v. State, 1D16-5652 (Aug. 24, 2018)

Baugh challenged the imposition of a sentence as an habitual felony offender for two reasons. First, he argued that "the HFO portion of his sentence must be reversed because the court abandoned neutrality by sua sponte continuing the sentencing hearing after the State withdrew its notice of HFO classification and requested the mandatory fifteen-year PRR term." This became an issue because the victim had indicated a desire to be present for sentencing and the prosecutor had been unable to reach the victim. The court continued the sentencing hearing to enable the victim to appear. At the continuation of the sentencing hearing, the victim was unable to appear, but the prosecutor read into the record the victim's statement regarding sentencing. The prosecutor, at the continuation of the sentencing, reasserted its intent to seek HFO sentencing.

Because Baugh did not object to the continuance, the Court reviewed the issue for "fundamental error." While an abandonment of neutrality by a judge will constitute fundamental error, the First District did not believe "the court crossed the line between neutral arbiter and prosecutor by continuing the sentencing hearing to give the victim another opportunity to be heard."

Baugh also challenged the trial court's reliance on the victim's unsworn statement. This, too, absent objection, was reviewed for fundamental error. The First District, based on one of its prior opinions, concluded that it was error to permit the prosecutor to read an unsworn statement from a victim at sentencing, but the error did not constitute fundamental error. It was "not apparent from the record that the court relied on the victim's unsworn statement in sentencing Baugh to twenty years in prison, rather than the fifteen years mandated by the PRR statute. "[N]or did the court give any indication that it was influenced by the statement. Additionally, the twenty-year sentence was well within the court's discretion to impose and far less than the maximum of thirty years allowed by the sentencing statute and recommended by the victim."

Wallace v. State, 1D17-836 (Aug. 24, 2018) (on motion for written opinion)

In an appeal from the denial of a motion for post-conviction relief, the First District granted a motion for written opinion and addressed the lower court's "decision regarding a claim of fraud on the court."

Wallace challenged actions and statements by his counsel at the sentencing hearing and asserted they constituted fraud on the court. The First District viewed the attorney's statements as "a policy argument offered to get the best possible sentencing for Appellant." The statements made by counsel did not indicate that he "misunderstood the PRR notice requirement." At an evidentiary hearing on the post-conviction motion, counsel from the sentencing hearing had observed that he may have made a statement at sentencing to the effect that the PRR should not apply because the notice was not timely filed, but that he knew the case law was to the contrary and may have made the argument anyway.

Gonzalez v. State, 1D17-1254 (Aug. 24, 2018)

Gonzalez received a life sentence for a first-degree murder committed when he was almost 17 years old. His sentence was imposed pursuant to sections 775.082(1)(b)1. and 921.1402(2)(a), Florida Statutes.

Pursuant to Copeland v. State, 240 So. 3d 58 (Fla. 1st DCA 2018) and Beckman v. State, 230 So. 3d 77 (Fla. 3d DCA 2017), the Court rejected Gonzalez's argument that a "jury, rather than a circuit judge, must pass on the factors set forth in section 921.1401(2)."

Second District Court of Appeal

Martinez v. State, 2D17-560 (Aug. 24, 2018)

The Second District reversed a trial court order granting the State's motion to clarify his sex offender probation. The "trial court lacked jurisdiction to rule on the State's motion." At the original sentencing hearing, three years earlier, the trial court did not pronounce certain oral conditions of sex offender probation. The State's motion had asked the trial court to make the oral pronouncements three years after the sentencing. "There was no legal authority for the State to file its motion . . . and there was no jurisdictional basis for the court to consider the State's motion to clarify in 2016."

Franklin v. State, 2D17-2958 (Aug. 24, 2018)

The Second District granted a petition alleging ineffective assistance of appellate counsel for failing to argue on direct appeal that the jury instruction on attempted manslaughter by act was fundamentally erroneous.

As of the time of Franklin's direct appeal, the Second District had already held that the language in the instruction, pursuant to State v. Montgomery, 39 So. 3d 252 (Fla. 2010), constituted fundamental error when the jury returned a verdict for attempted manslaughter when that offense was one-step removed from the offense for which there was a conviction. Franklin was charged with attempted first-degree murder, but acquitted of that offense and convicted of attempted second-degree murder. As a result, attempted manslaughter by voluntary act became a one-step removed lesser included offense of the resulting conviction for attempted second-degree murder.

Fourth District Court of Appeal

Johnson v. State, 4D15-4452, et al. (Aug. 22, 2018)

The Fourth District reversed convictions because the court failed to conduct proper analysis with respect to a peremptory challenge by the State, under Melbourne v. State, 679 So. 2d 759 (Fla. 1996).

"The ultimate question we answer in this case is whether the *Melbourne* procedure is *always* a three-step process, or a three-step process *if requested. We determine that the* Melbourne procedure is indeed always a three-step process."

After defense counsel made an objection to the State's peremptory challenge, the court asked for a race-neutral reason. The State asserted its reason and noted that the defense had stricken two black females. The court cut off the State and found the existence of a race-neutral reason and upheld the peremptory challenge. Defense counsel did not make any further argument.

The issue in this case related to the third step, a finding that the race-neutral reason was genuine. The Fourth District reviewed all of the case law developed in the Florida Supreme Court and noted that the Supreme Court, in Spencer v. State, 238 So. 3d 708 (Fla. 2018), resulted in a plurality opinion of a divided court "on the issue of the preservation requirements for a *Melbourne* noncompliance claim." As Spencer did not result in a majority opinion of the Supreme Court regarding the need to preserve an objection as to the third-step/genuineness prong of Melbourne, the Fourth District held that "[u]ntil a majority opinion by our supreme court says otherwise, in this District," "the *Melbourne* procedure is indeed a three-step process, and the intent of our supreme court, in adopting the procedure, was to require that all the steps be followed. We reject the notion that the three-steps are required only 'if requested.'"

Williams v. State, 4D16-570 (Aug. 22, 2018)

On appeal from a conviction for first-degree murder, Williams argued that the "state did not prove that his actions caused the victim's death." The Fourth District affirmed, but addressed that issue as well as a related one regarding a requested special jury instruction.

Williams argued that the gross negligence of a hospital relieved him of criminal liability for the victim's death and that the state failed to prove causation, as opposed to some other act. The Fourth District reviewed case law addressing intervening causes of death, but ultimately found that "there was evidence that the beating the victim suffered at the hands of the defendant resulted in a subdural hematoma and, based on Dr. Shuman's testimony, the bleeding continued and ultimately resulted in the victim's death. The record reveals no evidence that the initial injury was not life threatening and that the hospital's negligence was the sole cause of death."

Defense counsel also requested a special jury instruction on causation and the court crafted on. Defense counsel objected that it told "the jury to ignore the medical malpractice." Counsel proposed alternative language – "However, notwithstanding

the above, if you find that the medical treatment of [the victim] was grossly negligen[t], you must find the Defendant not guilty." The trial court rejected that as contrary to Florida law and gave its own instruction which, in relevant part, stated: "Lack of affirmative medical treatment is not an intervening cause which would relieve a defendant from criminal responsibility for a victim's death unless the lack of affirmative medical treatment is the sole cause of death."

There was no abuse of discretion in denying the defense-requested instruction which "contained a misstatement of Florida law, which requires the intervening force to be the sole cause of death."

Coleman v. State, 4D17-644 (Aug. 22, 2018)

On appeal from an order revoking probation, the Fourth District struck "the violations for failure to pay restitution and court costs because the record does not demonstrate that appellant had the ability to pay those costs." The revocation of probation was affirmed, however, based on the trial court's express statement that the violation of "those two counts did not warrant a prison sentence and that its sentence was based on the other violations." It was therefore clear that the court would have revoked probation and imposed the same sentence based on the remaining violations.

Granger v. State, 4D18-603 (Aug. 22, 2018)

The Fourth District wrote this opinion as a reminder that the Court's "opinions have consistently required a court to maintain a defendant's youthful offender status even when being resentenced on a substantive probation," but that the Florida Supreme Court's recent opinion in Eustache v. State, 43 Fla. L. Weekly S291a (Fla. July 12, 2018), disapproved of the Fourth District's prior opinions. Now, upon a substantive violation of probation, if the sentencing court elects to impose a sentence in excess of the six-year cap under the Youthful Offender Act, the "'sentence necessarily becomes an adult [Criminal Punishment Code] sentence such that the defendant does not retain his or her 'youthful offender status.'"

Fifth District Court of Appeal

Roe v. State, 5D17-2468 (Aug. 24, 2018)

The trial court denied a Rule 3.850 motion, after an evidentiary hearing, where the defendant alleged counsel was ineffective in a trial for sexual abuse of his minor stepdaughter, based on the failure to offer testimony of the victim's paternal grandmother and Appellant's probation officer. Those witnesses would have bolstered the defense at trial – "that the victim's mother manipulated the victim into fabricating the allegations of abuse."

The Fifth District noted that the record in the case was "unique," and reversed, based on its conclusion that the failure to present those two witnesses "undermines our confidence in the verdict." The victim's grandmother would have impeached "the victim's trial testimony that she disclosed the sexual abuse to her paternal grandmother while it was ongoing." The probation officer would have testified "that she received a call from the maternal grandmother days before the allegations of sexual abuse emerged wherein the maternal grandmother reported that Appellant had physically abused the victim's brother." The trial court, in the Rule 3.850 proceeding, found counsel was not deficient as to this because it was inadmissible hearsay. That was incorrect, as it would not have been proffered to prove the truth of the matter asserted (i.e., that Appellant "actually physically abused his stepson."). Rather, it would "simply prove that the accusation was made." The Fifth District further found "that the evidence would have permitted an inference that the victim's mother and the maternal grandmother were working in concert to get Appellant arrested."