Case Law Update
September 10, 2018
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Williams, 15-12130 (Sept. 4, 2018)

Williams appealed a narcotics conspiracy conviction. His attorney was also representing Tyree Bennett, "a government witness who was then appealing his own sentence after pleading guilty to federal narcotics charges." Williams argued that his defense counsel, "due to his simultaneous representation, passed up a valuable opportunity to cross-examine and impeach Mr. Bennett." A third individual, Toombs, was jointly tried with Williams. The Eleventh Circuit concluded that defense counsel was operating under a conflict and that Williams was "entitled to an evidentiary hearing to explore whether this conflict adversely affected Mr. Minix's performance."

A colloquy was held when the government called Bennett as a witness. Williams' counsel advised the court of his representation of Bennett and the status of Bennett's case, which Minix was handling on appeal. The prosecutor represented that there would not be any questions about Mr. Williams, and further agreed that the government was not going to ask Bennett about anything that Minix represented him on. On direct examination, Bennett did not mention Williams by name, "but he supported the government's case against both Mr. Williams and Mr. Toombs by directly describing (and by corroborating other witnesses' testimony concerning) the drug-distribution conspiracy alleged in the indictment." Attorney Minix did not engage in any cross-examination.

"A defendant claiming that his counsel rendered ineffective assistance due to a conflict of interest must, except in rare cases, establish an 'actual conflict,' i.e., a 'conflict [that] adversely affected his counsel's performance,'" "To demonstrate adverse effect, Mr. Williams must point to some 'plausible alternative defense strategy or tactic that might have been pursued.'" He need not "'show that the defense would necessarily have been successful [if the alternative strategy or tactic] had been used[;] rather he only need prove that the alternative possessed sufficient substance to be a viable alternative.'"

Here, it was significant that attorney Minix was faced with the choice of whether to cross-examine one of his clients, Bennett, while representing Williams. Such concurrent representation of two clients established a conflict of interest. The adverse effect as a result of such a conflict differs from the prejudice prong of the typical claim of ineffective assistance of counsel, as the adverse effect does not require proof that the outcome of the trial would probably have differed. The Eleventh Circuit felt the best remedy was to remand for an evidentiary hearing to "flesh out all of the relevant facts relating to Mr. Williams' conflict of interest claim." The record before the Eleventh Circuit did not shed light on whether Minix advised Williams about the simultaneous representation or whether Williams, "having been so informed, was afforded a hearing under *United States v. Garcia*, 517 F. 2d 272, 278 (5th Cir. 1975), or given the opportunity to seek independent legal advice about the conflict. We do not know the specifics of the agreement or understanding amongst the parties and the district court to limit Mr. Bennett's testimony at trial. We do not know if there were any discussions between Mr. Minix and Mr. Bennett concerning the latter's testimony at Mr. Williams' trial. And we do not know what other reasons Mr. Minix might have had – aside from the divided loyalties resulting from his simultaneous representation – to forgo cross-examination of Mr. Bennett."

First District Court of Appeal

Rosier v. State, 1D16-2327 (Sept. 5, 2018)

A conviction after a jury trial was reversed and remanded due to an inadequate competency hearing to determine whether competency had been restored prior to trial.

Rosier had been adjudicated incompetent and, after a report deeming him competent to stand trial, a hearing was set and rescheduled. At the ultimate hearing, "the parties stipulated to the evaluation report and Rosier's counsel agreed that Rosier was competent and wanted to proceed to trial." The competency hearing itself was "perfunctory," as the court asked "only whether Rosier felt well" and "whether he was taking any medications or psychotropic drugs." There was "no indication that sufficient judicial review was done to form an 'independent determination that the defendant's competency has been restored,' as required. This is particularly so when the prosecutor and public defender both mistakenly believed and had agreed the day before the hearing (without Rosier present) – that a competency determination could be done by stipulation (the prosecutor suggesting that they do it that day)."

The reversal permitted the trial court, if possible, to conduct a nunc pro tunc competency evaluation. One judge dissented with respect to the competency issue.

Johnson v. State, 1D17-933 (Sept. 5, 2018)

A violation of probation, based upon absconding and possessing a firearm was appealed, and Johnson challenged the finding as to absconding. The First District found the evidence was sufficient as it included both hearsay and sufficient non-hearsay. "Georgia and Florida officers both provided non-hearsay testimony regarding their unsuccessful attempts to contact Johnson by phone and in person." "Second, the person Johnson reported he would be living with testified that Johnson would spend nights with his mother and his girlfriend."

Jackson v. State, 1D17-3470 (Sept. 5, 2018)

Jackson's scoresheet totaled 19 points, which required a nonstate prison sanction absent written findings to support a greater sentence. The judge made such findings – that "Jackson could present a danger to the public if subject only to a nonprison sanction."

Based on the Court's recent decision in Booker v. State, 244 So. 3d 1151 (Fla. 1st DCA 2018), the Court again held that section 775.082(10), Florida Statutes (2015), was unconstitutional as applied as it enabled the court, rather than a jury, to make the required findings, contrary to the holdings in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004).

The sentence was reversed and remanded for resentencing under the prior version of section 775.082(10).

Moreland v. State, 1D17-4436 (Sept. 5, 2018)

Moreland was convicted for resisting an officer with violence and argued on appeal that the trial court used the wrong standard in denying his motion for new trial. The judge summarily denied the motion and stated: "The Court will rely on the rulings previously made in this case, and I will deny the motion for new trial at this time."

The motion alleged, inter alia, that the verdict was contrary to the weight of the evidence," and the defendant argued that the trial court erred by employing a

sufficiency of evidence standard as opposed to an "additional juror" standard to weigh the evidence.

The First District understood that the initial part of the trial court's ruling – "the court will rely on the rulings previously made" – referred to other grounds in the motion for new trial. As to the ground based on the weight of the evidence, the judge's denial was simply a denial without comment, and such a denial does not reflect that the court employed the wrong standard.

One judge dissented from this conclusion.

Knight v. State, 1D16-3027 (Sept. 7, 2018)

Knight was convicted of three counts of sexual battery on a child under 12 and argued "that he was denied the right to meaningful assistance of counsel as well as the right to confront witnesses against him." The First District affirmed.

The victim was permitted to testify through "a closed-circuit television system pursuant to section 92.54, Florida Statutes." The child would be in the State Attorney's Office, in the courthouse, along with the judge and counsel, while Knight and the jury watched live, from the courtroom. A clinical social worker testified "that the child 'would probably have significant emotional harm' if required to testify in open court." Defense counsel presented argument based on the Confrontation Clause, but did not refute that opinion. The judge granted the State's motion, but did not make the specific findings required by the statute.

The argument with respect to the case-specific findings was not preserved in the trial court and could not be argued on appeal. The argument that the trial court abused its discretion "by failing to provide [defendant] with a mechanism for communication with counsel during the child's testimony" was similarly not preserved in the trial court, as counsel 'never requested that the court supply a means of communication."

Second District Court of Appeal

Canchola v. State, 2D16-5109 (Sept. 7, 2018)

The defendant appealed the revocation of probation and argued that the trial court lacked jurisdiction because the amended affidavit of violation, alleging technical violations and absconding from supervision, "was not filed until a week

after the scheduled expiration of his probationary sentence." The Second District disagreed, finding the amended affidavit timely because the probationary term "was automatically tolled when he absconded from supervision and remained tolled for the many months that lapsed until he was once again placed under the probationary supervision of our state."

Lundquist v. State, 2D17-413 (Sept. 7, 2018)

On appeal from convictions for sale of methamphetamine and possession of drug paraphernalia, the Second District reversed the sentence and remanded for resentencing before a different judge because the court relied on impermissible sentencing factors.

During sentencing, the State presented argument based on uncharged offenses, when arguing that the defendant was a "persistent drug dealer." Having presented such improper argument to the court, it was the State's burden on appeal "'to show from the record as a whole that the trial court did not consider impermissible factors in rendering its sentence.'" The court, at sentencing, stated that it was "'taking into account everything, including the evidence here, both aggravating and mitigating.'" There was no reference to the uncharged offenses. The State did not meet its burden.

Third District Court of Appeal

Sullivan v. State, 3D16-2019 (Sept. 5, 2018)

On appeal from convictions for attempted felony murder and armed robbery after an open plea to the court, the defendant argued that the State "improperly relied on the same intentional act, the fact that the defendant shot the victim, in order to convict him for armed robbery and attempted felony murder."

First, the Third District found that there was no double jeopardy violation, as each offense included an element not found in the other. Second, the Court addressed the "intentional act" requirement of the attempted felony murder statute, which requires proof of an "intentional act that is not an essential element of the [underlying] felony."

Here, the State "did not predicate its attempted felony murder charge solely on the fact that the defendant shot the victim in the course of a robbery." The State relied on both robbery and attempted robbery as the underlying felony. The attempt

consisted of evidence of grabbing the victim's gold chain; the acts related to that grabbing were "independent from the intentional act of shooting the victim, an act which forms the predicate for the defendant's armed robbery conviction."

State v. Sisco, 3D16-2474 (Sept. 5, 2018) (on motion for clarification)

The Court withdrew its prior opinion of May 30, 2018 and issued a new opinion.

The State appealed a downward departure sentence and the Third District upheld the departure, finding that there was sufficient evidence to support the trial court's determination that there was "domination" under section 921.0026(2)(g), Florida Statutes.

The defendant was convicted of burglary of a dwelling. She was a housekeeper and blamed the burglary on her boyfriend. She had no prior criminal record. At trial, her boyfriend testified that he pressured her to let him stay at the house. He had a long criminal history and was a drug addict, looking for items to pawn to buy drugs. She tried to dissuade him from staying at the residence but he kept pressuring her until she agreed. He was the primary motivator of the criminal episode.

Fourth District Court of Appeal

Medina v. State, 4D17-358 (Sept. 5, 2018)

The Fourth District affirmed a conviction for first-degree murder and rejected arguments that the court gave an erroneous Stand Your Ground jury instruction and erred in admitting statements made at a pre-trial hearing.

The jury instruction in effect at the time of the offense, 2013, and until June 2014, included language that the defendant believed "that the force was necessary to prevent *imminent* death or great bodily harm," and that the defendant was entitled to claim self-defense if he "was not engaged in unlawful activity." There was no objection to the instructions as given. He argued that the law in effect at the time of the shooting did not require him not to be engaged in unlawful activity.

Although the instruction was erroneous, it was not fundamental error because it "did not negate Appellant's sole defense because he was not engaged in unlawful activity and was in a place where he had a right to be when he used deadly force."

He was on a public road and it was not unlawful for him to possess a firearm at the time. He was therefore not deprived of his defense.

He also contested the admission of testimony from the pre-trial immunity hearing in which he "admitted he lied to doctors during his competency exam when he said he had hallucinations." He admitted to lying to police during an interview as well as intentionally lying to doctors during a competency evaluation, believing they would help him. These statements were relevant as they showed consciousness of guilt and were further relevant to the jury's assessment of his credibility.

Hargrett v. State, 4D16-2846 (Sept. 5, 2018)

The defendant was charged with, and convicted of, robbery and the jury was instructed on that and two lesser included offenses – resisting a merchant and theft. The jury was instructed to return a verdict as to one of the three. In a Rule 3.850 motion, the defendant alleged that counsel was ineffective for not seeking an instruction that would have permitted the jury to find him guilty of both resisting a merchant and theft. The trial court summarily denied the motion. In Stuckey v. State, 972 So. 2d 918 (Fla. 5th DCA 2007), the Fifth District analyzed the "taking" element of robbery and concluded that a jury could convict a defendant of two lesser included offenses, such as 1) theft and assault or 2) theft and resisting a merchant in appropriate cases.

"Since the evidence presented at Hargrett's trial was sufficient to support his conviction for each of the lesser-included offenses, we reverse the trial court's summary denial of the claim, and remand for it to either attach records conclusively refuting Hargrett's claim, or in the alternative, to hold an evidentiary hearing during which the trial court may consider any issues regarding waiver or strategy."

State v. Sylvestre, 4D17-2116 (Sept. 5, 2018)

The State applied for a search warrant based on information "obtained from historical cell-site location information ('CSLI') and a cell-site simulator." The trial court found probable cause for the CSLI order but suppressed "evidence discovered through the State's warrantless use of the cell-site simulator." The State appealed the suppression order; the defendant cross-appealed the finding of probable cause for the CSLI order, and the Fourth District affirmed everything.

The defendant argued that the CSLI order was not supported by probable cause because the affidavit "did not establish that the cell phone's location would

lead to evidence related to the restaurant robbery. The defendant and two others were charged with first-degree murder, arising from the armed robbery of a restaurant. The Fourth District found probable cause existed. The detective "alleged that the Defendant was one of three men in surveillance video footage from the robbery. The application also alleged that a watch dealer identified the Defendant as the seller of a ladies' watch taken during the robbery. These facts, and others, were enough to establish probable cause."

The defendant further argued that section 934.42(4), Florida Statutes, upon which the CSLI order was based, does not require probable cause. The Fourth District agreed that "the statute prevents a court from imposing a stricter standard when reviewing an application for a CSLI Order." However, "the statute does not prevent a court from making additional findings to support a showing of probable cause. Absent those findings, the CSLI Order "would have violated the Fourth Amendment."

The State argued that the suppression of the result of the search of a residence based upon mobile tracking of the defendant's cell phone on the basis of a prior order was erroneous because the CSLI order permitted the use of a cell-site simulator and the State did not have to disclose its intention to use a cell-site simulator.

The simulator "is a device that locates cell phones by mimicking the service provider's cell tower (or 'cell-site') and forcing cell phones to transmit "pings" to the simulator.'" The simulators "present significant privacy concerns."

Based upon a review of several decisions of the United States Supreme Court, the Fourth District found that "without a warrant, the government cannot: use technology to view information not visible to the naked eye, attach a device to property to monitor your location, search a cell phone in your possession without a warrant, or obtain real-time location information from the cell carrier." The cell-site simulator "does more than obtain data held by a third party." The "government surreptitiously intercepts a signal that the user intended to send to a carrier's cell-site tower or independently pings a cell phone to determine its location." It also "intercepts the data of other cell phones in the area, including the phones of people not being investigated." "Thus, absent a valid exception to the warrant requirement, the government must establish probable cause and receive authorization before using a cell-site simulator."

As the State used the simulator without a warrant for its use, evidence obtained as a result of that use was suppressed. The CSLI order did not qualify as a warrant

for the use of the simulator. It "authorized the acquisition of location information," but was directed to records "'monitored and maintained by the provider,' and included location data 'received by said electronic communication provider' or 'available from the said electronic communication provider.'" It required the "service provider to disclose information in its possession to the Broward Sheriff's Office. It did not authorize action by the State."

The CSLI Order "authorized indirect government surveillance. But the State could not obtain the information it required through the authorized means. So the State conducted direct government surveillance by using a cell-site simulator. And it did so without a warrant."

McMillan v. State, 4D18-1161 (Sept. 5, 2018)

McMillan filed a habeas corpus petition in the Fourth District challenging the life sentence he received in 1999 as an habitual violent felony offender. The Fourth District granted the petition, based on its conclusion that the trial court, at the time of sentencing, "erroneously believed it was required to impose a life sentence" under the HVFO statute.

Key v. State, 4D18-348 (Sept. 5, 2018)

Appellate counsel from the prior direct appeal was ineffective for failing to challenge the habitual offender designations, "because at the time of [the] offenses, life felonies were not subject to enhanced punishment as a habitual offender."

Although the judgments and sentences were imposed in May 2013, the offenses were committed in 1995, and the habitual offender statute, at the time of the offenses, did not permit habitual offender designation for life felonies.

Langel v. State, 4D18-2121 (Sept. 5, 2018)

A petition for writ of prohibition, arising out of a pretrial Stand Your Ground immunity hearing, was denied.

Langel's argument was that the trial court erred in placing the burden on him to prove immunity by a preponderance of the evidence; he asserted that he was entitled to the benefit of the 2017 legislative amendment, which placed the burden on the State.

The Fourth District reiterated its prior holding in Hight v. State, 43 Fla.L. Weekly D1800a (Fla. 4th DCA Aug. 8 2018), in which it agreed with the Third District's decision in Love v. State, 247 So. 3d 609 (Fla. 3d DCA 2018), rev. granted, No. SC18-747 (Fla. June 26, 2018). The Fourth District stated that the statute was at least partially substantive, and, as a result, Art. X, s. 9 of the Florida Constitution precludes the retroactive application of a substantive criminal statute to offenses whose dates preceded the statute.

Additionally, the immunity claim had no merit. "Petitioner did not testify and has never provided an account of what led to the shooting. There are no witnesses, video, or other evidence of what transpired at the time of the shooting. Although petitioner admits he shot the victim, he presented no evidence that he acted justifiably in using deadly force. . . ." His claim was based upon "equivocal circumstantial evidence that, in his view, shows the victim was attempting to rob petitioner. Petitioner relies heavily on the fact that the victim's closed pocket knife was found on the ground beneath the victim's body."

The Court's opinion includes detailed facts of the incident and notes the trial court's finding that "it 'defies reason' that the victim intended on robbing petitioner but did not have time to open the pocket knife, while petitioner had time to react, pull out his semiautomatic handgun, chamber a round, and shoot the victim in the head."

Ferrari v. State, 4D14-464 (Sept. 5, 2018)

Convictions for first-degree murder and conspiracy to commit first-degree murder were reversed for two reasons. "First, the trial court denied appellant's motion to suppress historical cell-site location information (SCLI)." This was based on Carpenter v. United States, 138 S.Ct. 2206 (2018), which required a warrant and probable cause because accessing such information constituted a search under the Fourth Amendment.

"Second, the court held that a mid-trial revelation of discovery that the State failed to disclose did not amount to a *Richardson* violation. We hold that the State's failure to comply with its obligations under Florida Rule of Criminal Procedure 3.220, by neglecting to disclose the substance of a codefendant's statements as well as the existence of exculpatory statements by another witness, constituted a discovery violation."

"The State had secured CSLI data on two of Ferrari's phones, which showed their location on the night of the murder. The State subpoenaed the records of one company. The other company refused to provide records without a court order. For that company, the detective asking for the records provided an affidavit pursuant to sections 934.32 and 934.33, Florida Statutes (2001), which allows for the installation of a pen register or trap and trace device. The court issued an order requiring production of the CSLI data."

The Fourth District rejected the State's argument that the "good faith" exception avoided "the exclusion of the results of a warrantless search where the police conduct an objectively reasonable search based upon binding decisional law, . . . or in reasonable reliance on the applicable statute, even if that statute is later held to be unconstitutional. . . ." The search occurred in 2001, and, "[a]t that time, no binding decisional law existed determining that CSLI data was not within Fourth Amendment protection and thus exempt from the warrant requirement." And, the statute upon which the detective relied provided "the procedure for authorizing the installation of a pen register on a wired telephone line." It did "not cover the production of CSLI data," and "[r]eliance on an inapplicable statute does not constitute objective reasonableness."

As to the discovery violation, during cross-examination of a witness, Nicholson, "the defense discovered the existence of multiple tapes and statements by Fiorillo [codefendant] and others, which were referred to aptly by the court as 'bombshell' discovery." The trial court, after a lengthy inquiry, concluded that there was no discovery violation because one of the defense attorneys, Williams, "was the 'point person' for distributing discovery to the other defense attorneys," and that based on prior agreements among counsel, it was expected that attorney Williams would receive, copy and provide such discovery to other defense attorneys. "The court assumed Williams did not tell the attorneys about the tapes because 'there was nothing worthwhile or evidentiary on these tapes.' Because no one contested that Williams was the 'lead defense in getting the tapes and DVDs' in 2009, and because Williams had the other tapes listed in the police property receipt from 2006 to 2013, the court found no discovery violation." Defense counsel, however, "did object to the court's characterization that Williams was authorized to act for them as to the distribution of the 2006 tape request." The Fourth District rejected the trial court's reasoning and found that it was not supported by the evidence presented. "While there was an apparent agreement in 2009 that Fiorillo's attorney would receive the copy of jailhouse conversations to distribute to all of the defense attorneys, no such agreement was in place in 2006 when Fiorillo's attorney obtained the tapes from the police. Fiorillo's attorney was not acting as an agent for Ferrari."

State v. Reininger, 4D17-3604 (Sept. 5, 2018)

Reininger was sentenced in 2017 for an aggravated assault that he committed in 2013. His sentence did not include a three-year minimum mandatory under section 775.087(2)(a), Florida Statutes. The State appealed, arguing that the trial court imposed sentence based on the wrong version of the statute. The Fourth District agreed and reversed.

Article X, section 9 of the Florida Constitution provides that a criminal statute in effect at the time of the crime governs the sentence an offender will receive. In 2013, at the time of the offense, aggravated assault was an enumerated offense in the statute and subject to the three-year mandatory minimum. By the time of the trial and sentencing in 2017, aggravated assault had been removed from the list of qualifying enumerated offenses. The 2013 version of the statute was the applicable one.

McCray v. State, 4D17-2006 (Sept. 5, 2005)

The Fourth District reversed a conviction for possession of heroin. The defendant was not in actual possession and the State failed to prove constructive possession.

"The state's evidence consisted almost entirely of testimony about appellant's flight and proximity to the contraband. No witnesses testified that they saw drugs on appellant's person or saw him drop or toss the drugs to the ground while he fled or was detained. No evidence was presented that appellant's fingerprints were found on the contraband. Moreover, the area where the heroin was found was a public area with heavy foot traffic and thus was not in appellant's exclusive control. The state needed to present independent proof of knowledge and control."

The incident started as a traffic stop and the defendant fled and was chased. He was observed reaching into his waistband and an officer thought he was reaching for a firearm. The defendant eventually fell to the ground and was apprehended. After he was handcuffed, another officer arrived and, upon being told that something may have been thrown, searched the general area and about 30 seconds later found a clear plastic bag about 20 feet from where the defendant had been stopped.

Castillo v. State, 4D17-985 (Sept. 5, 2018)

The Fourth District reversed a conviction for racketeering because the State failed to prove the required pattern of racketeering activity. Such a pattern is defined as "engaging in at least two incidents of racketeering conduct with the last incident having occurred within five years of the first incident." "In this case, the only two acts that occurred within five years of each other occurred on the very same day," May 27, 2006, and were "not two separate incidents for the purposes of sustaining a conviction of racketeering."

The two acts that occurred on the same day were battery and possession of cocaine, which was found on the defendant after the arrest for battery. Under Florida's RICO statute, "multiple crimes committed at the same time qualify as only one predicate incident."

Pollard v. State, 4D17-1803 (Sept. 5, 2018)

The trial court appointed an expert to determine competency, but the record did not indicate that a competency hearing had been held prior to trial; nor did the record include any evaluation by the appointed expert. At the sentencing hearing, the defendant was engaging in strange behavior and the court appointed another expert. The post-trial evaluation found the defendant competent to proceed and sentencing resumed after the court found the defendant competent.

Although defense counsel represented at the sentencing hearing that the pre-trial evaluation had found the defendant competent, that was not sufficient, as that was not in the record, and, beyond that, there was a need for the trial court, prior to the start of trial, to make an independent determination.

The case was remanded to the trial court "to decide whether it can determine Pollard's competency nunc pro tunc in accordance with our prior decisions."

State v. Harper, 4D17-1251 (Sept. 5, 2018)

The trial court, after an evidentiary hearing, granted a motion to dismiss charges of trafficking in cocaine, burglary of a dwelling, and grand theft, based on entrapment. The State appealed and the Fourth District reversed. Objective entrapment did not exist because law enforcement "did not engage in such 'outrageous' conduct to offend 'decency or a sense of justice.'" And, subjective entrapment presented a question of fact that is properly for the jury.

Officers were conducting a reverse sting operation. It involved the use of a confidential informant to identify "people who were actively committing crimes." The "CI would tell the subject that she has a friend who cleans hotel rooms. The CI would then explain that, while cleaning a room that appeared to be occupied by drug dealers, the friend saw money, jewelry, and drugs, including a kilo of cocaine, in the safe. Next, the friend would offer to provide the room key for someone to commit a burglary, but did not want to be involved herself because she was known at the hotel. If the subject agreed to the burglary, the CI would inform the subject that the friend would drive them and show them the room."

As to objective entrapment, "law enforcement simply conducted a reverse sting operation providing the defendant with the means and opportunity to engage in a burglary, and he agreed to participate. Due process was not violated since the state's conduct in this case did not amount to the type of 'outrageous' conduct prohibited by the Florida and United States Constitutions."

The trial court had further found that subjective entrapment existed as a matter of law. "Reasonable persons could draw different conclusions from the CI's statement that the defendant would get to spend the day with her. . . . Additionally, the defendant readily acquiesced in the commission of the crime and had an extensive criminal history. . . . Therefore, this matter should have been decided by the jury as a trier of fact."

Fifth District Court of Appeal

Alexander v. State, 5D17-1977 (Sept. 7, 2018)

The trial court granted a pre-trial motion to appoint an expert to determine competency. The case proceeded to trial, but the record did not indicate that a competency hearing had been held, and there was no order adjudicating competency. The case was therefore remanded for a nunc pro tunc determination of competency, if possible; if not, a new trial would have to be held once competency was restored.

Watson v. State, 5D17-4099 (Sept. 7, 2018)

Watson appealed convictions stemming from a drive-by shooting and argued that the evidence was insufficient to identify him as the shooter. The Fifth District disagreed.

Although the identities of the shooters were disputed, "it was undisputed that shots were fired from a vehicle Watson was in and several people were injured. Furthermore, at least one victim testified that Watson fired shots from the vehicle." While there were inconsistencies between the witnesses, it was "within the jury's purview to make credibility determinations among conflicting testimony."

The trial court, during preliminary instructions, inadvertently and erroneously informed the jury that Watson had a prior conviction – the charge of possession of a firearm by a convicted ---. Although the court stopped prior to the word felon, the Fifth District agreed that the jury would likely have inferred that it was Watson's prior conviction. The error, however, was deemed harmless. Watson testified and placed his status as a convicted felony before the jury.