Case Law Update
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Supreme Court of Florida

Wright v. State, SC13-1213 (Sept. 27, 2018)

The United States Supreme Court remanded this case to the Florida Supreme Court, to reconsider Wright's intellectual disability claim in light of Moore v. Texas, 137 S.Ct. 1039 (2017).

Wright's direct appeal of his conviction and sentence of death was pending when the United States Supreme Court decided Hall v. Florida, 134 S.Ct. 1986 (2014). The Florida Supreme Court then relinquished jurisdiction to the trial court to entertain a renewed motion for determination of intellectual disability in light of Hall. The trial court conducted an evidentiary hearing and heard from a total of 19 witnesses and then denied the intellectual disability claim. The Florida Supreme Court then affirmed the conviction and sentence, and a few weeks later, the United States Supreme Court issued its opinion in Moore.

Initially, the Florida Supreme Court addressed the significance of the United States Supreme Court's remand to reconsider in light of Moore. The Florida Supreme Court found that the remand order was not a decision on the merits and did not require any particular result other than a reconsideration to "determine if a different outcome is warranted." The Florida Supreme Court noted that Moore "does not substantially change the law with regard to consideration of intelligence or IQ for the purposes of an ID determination; thus, Wright's claim fails again."

The Court then addressed each of the three prongs of the intellectual disability claim. Moore did not substantially change the intelligence prong analysis. Wright's IQ score range "fell into the borderline ID range and the lowest end of the range dipped 1 point beneath 70; therefore, Wright was allowed to offer evidence of adaptive functioning." "Based on the compelling medical testimony of Dr. Kasper and Dr. Gamache – along with numerous IQ test scores above 70 after SEM adjustments – there was competent, substantial evidence for the postconviction court to conclude that Wright failed to prove significant subaverage intellectual functioning by clear and convincing evidence." One of his IQ tests scored 82 with a range of 79-86, "well above the approximation for ID."

As to the adaptive functioning prong of the test, the only domain that was at issue in this case was the conceptual, as even Wright's own experts testified that he had no deficits in the social and practical domains "that rise to the level of an ID determination." The Florida Supreme Court contrasted its own prior decision in this case, which was based on expert reliance of current medical understanding, as opposed to the Moore decision, where there was reliance "on outdated medical standards and lay perceptions of ID."

"At bottom, Wright's position is less about *Moore* than it is a mere reassertion that his expert, Dr. Kasper, was more reliable than the State's, Dr. Gamache. However, *Moore* did not change our standard of review: we still review a postconviction court's order for competent, substantial evidence, and we neither reweigh evidence nor second-guess credibility determinations on appeal."

In re: Standard Jury Instructions in Criminal Cases – Report 2017-10, SC17-2263 (Sept. 27, 2018)

The Court authorized for publication and use amendments to the following standard jury instructions: 10.1 (Carrying a Concealed [Weapon] [Firearm]), 10.5 (Improper Exhibition of a [Weapon] [Firearm]), and 13.5 (Trespass on School Property with a [Firearm] [Weapon]), and one new instruction, 10.6(b) (Driver or Owner of a Vehicle Knowingly Directing Another to Discharge a Firearm from the Vehicle).

Instruction 10.1 includes "a third element that requires the State to prove that the defendant did not have a license to carry a concealed weapon or firearm at the time he or she did the carrying." It also "includes alternative burdens of proof, depending upon whether the State or the defendant carries the burden of persuasion."

Instructions 10.5 and 13.5 "are amended to exclude the word 'closed' in the phrase 'closed common pocketknife' due to conflict in the district courts of appeal regarding whether an open common pocketknife is a weapon pursuant to the definition provided under section 790.001(13), Florida Statutes (2017).

Instruction 10.6(b) was added "because there is no existing instruction for the offense defined in section 790.15(3), Florida Statutes. It sets forth the two elements of the offense and defines the term "firearm" so as not to include "an antique firearm unless the antique firearm is used in the commission of another crime."

In re: Standard Jury Instructions in Criminal Cases – Report 2018-01, SC18-488 (Sept. 27, 2018)

The Supreme Court authorized for use and publication amendments to the following standard jury instructions: 10.13 (Shooting or Throwing Missiles in Dwelling), 10.14 (Possession of Forbidden Firearms), 10.15 (Felons Carrying a Concealed Weapon or Possessing Firearm/Ammunition/Electric Weapon or Device), and 10.15(a) (Possession of [a Firearm] [an Electric Weapon or Device] [Ammunition] or [Carrying a Concealed Weapon] by a Person Under the Age of 24 Who Has Been Found Delinquent of an Offense Which Would Be a Felony if Committed by an Adult).

Instruction 10.13 modifies the title to remove the word dwelling "because it is not referenced in the elements of the offense as defined in section 790.19, Florida Statutes (2018). The first element also removes the phrase "shot a firearm" as the statutory language does not include that phrase. The second element adds "that was being used or occupied by any person" to the alternative "a public or private bus." Another alternative is added to element two: the alternative "a vehicle of any kind that was being used or occupied by any person."

Instruction 10.14 amends the title by replacing "Forbidden Firearms" with "A [Short-Barreled Rifle] [Short-Barreled Shotgun] [Machine Gun]." The burden of persuasion is amended with regard to the "antique firearm affirmative defense."

Instructions 10.14 and 10.15(a) amend the definition of "possession" and include "two different definitions for 'knowingly'" as "optional definitions."

In re: Standard Jury Instructions in Criminal Cases – Report 2018-03, SC18-566 (Sept. 27, 2018)

The Court authorized for publication and use amendments to the following instructions: 20.13 (Fraudulent Use or Possession with Intent to Fraudulently Use Personal Identification Information); 20.14 (Harassment by Use of Personal Identification Information); 20.15 (Fraudulent Use of Personal Identification Information of a [Minor] [Person Sixty Years of Age or Older]); 20.15 (Fraudulent Use of Personal Identification Information of a [Minor] [Person Sixty Years of Age or Older] by a Parent, Guardian, or Person who Exercised Custodial Authority); 20.17 (Fraudulent Use or Possession with Intent to Fraudulently Use Personal Identification Information Concerning a [Deceased Individual] [Dissolved Business Entity]); 20.18 ([Fraudulent Creation of] [Fraudulent Use of] [Possession with Intent

to Fraudulently Use] Counterfeit Personal Identification Information); and 20.21 (Fraudulent Use of Personal Identification Information of a [Disabled Adult] [Public Servant] [Veteran] [First Responder] [State Employee] [Federal Employee]).

Most of the instructions were amended to include a new provision explaining the term "possession." All of them include a separate section for the reclassification provided in section 817.568(5), Florida Statutes (2017), and the reclassification provided in section 817.568(1), Florida Statutes. Both reclassifications are related to scoring on the Criminal Punishment Code scoresheet.

Eleventh Circuit Court of Appeals

Randolph v. United States, 17-10620 (Sept. 25, 2018)

Randolph appealed from the denial of a successive motion under 28 U.S.C. s. 2255, challenging his sentence under the Armed Career Criminal Act on the basis of Johnson v. United States, 135 S.Ct. 2551 (2015).

The motion was properly dismissed by the district court because the same claim had been presented in the prior section 2255 motion. Randolph argued that Johnson had been held to apply retroactively, and that that excused the procedural bar of having previously raised the claim. The Court disagreed: "What counts is whether the second motion relies on a new rule of constitutional law made retroactively applicable by the Supreme Court that was unavailable at the time of the first motion. This second s. 2255 motion does not."

Chamblee v. State of Florida, 16-16452 (Sept. 28, 2018)

Chamblee appealed the dismissal of a federal habeas corpus petition which the district court found to be untimely. His argument was based on the existence of a "remand order issued by the state appellate court in his direct appeal that the trial court never acted upon. He maintains that as long as the remand order is pending in the state trial court, his state court judgment never became final and AEDPA's one-year statute of limitations never started running." The Eleventh Circuit affirmed.

The remand from the direct appeal related to restitution. The trial court had not determined Chamblee's ability to pay restitution, and the remand authorized the trial court to reimpose the fine after making the appropriate findings – the reimposition was within the trial court's discretion.

Notwithstanding the pending remand order, the judgment of conviction "was final under Florida law and the entirety of the state appellate review process was complete when the First District Court of Appeal issued its decision 'affirm[ing] the judgment and sentence in all other respects' on direct appeal." The federal statute of limitations therefore commenced running when the 90-day period for filing a certiorari petition from the First District's decision expired.

First District Court of Appeal

B.E. v. State, 1D18-43 (Sept. 25, 2018)

On appeal from an adjudication of delinquency for battery and other offenses, the First District reversed and remanded for further proceedings due to the failure of the trial court to hold a competency hearing after appointing an expert to conduct an evaluation. On remand, if possible, the trial court was authorized to make a nunc pro tunc competency determination.

Second District Court of Appeal

Washington v. State, 2D15-3206 (Sept. 26, 2018)

Washington, a juvenile at the time of the offenses he committed –two counts each of kidnapping and first-degree murder – received two life terms and two forty-year terms, with the right to seek judicial review after 25 years. At the sentencing hearing the judge made the finding that he intended to kill the victims.

Washington argued, on the basis of Williams v. State, 242 So. 3d 280 (Fla. 2018), that Alleyne v. United States, 570 U.S. 99 (2013), required "a jury, rather than a judge, to make the factual finding as to whether the juvenile offender actually killed, intended to kill, or attempted to kill the victim." The Second District agreed.

Waterman v. State, 2D16-4423 (Sept. 26, 2018)

Waterman appealed convictions for sexual battery and lewd molestation. The Second District reversed, finding that Waterman was not competent to knowingly and intelligently waive his Miranda rights at the time of his confession."

The reversal was based, in part, on a conclusion that some findings by the trial court were not supported by the record: "there was ample evidence presented that provided clear guidance on the issue of whether Waterman's waiver was knowing

and intelligent at the time of his arrest." The trial court was found to have overlooked facts such as the evaluation of Waterman, by three doctors, within 13 months of his arrest, with each "concluding that Waterman was most likely not able to understand his rights at the time of his arrest."

Second, the trial court placed weight on Waterman's "responsiveness to the questions and acknowledgment that he understood his rights. While we recognize that an accused's responsiveness is an appropriate factor for the trial court to consider in reaching its determination, mere acknowledgment that one understands his or her rights is not sufficient to show comprehension of those rights."

The Court summarized the key facts:

> Waterman was eighteen years old at the time of the interrogation and had no prior criminal experience with law enforcement. He was crying and asking for his "mommy." He was a special education student since kindergarten, had a very low IQ that placed him in the "mild mental retardation" range, read at a third or fourth-grade level, and was susceptible to suggestibility. And given the uncontroverted evidence that the Miranda warnings were administered at a seventh-grade reading level and in the police station, we conclude that Waterman did not knowingly and intelligently waive his rights.

Third District Court of Appeal

S.B. v. State, 3D17-1206 (Sept. 26, 2018)

The Third District reversed a finding of delinquency for robbery because the State improperly shifted the burden of proof on cross-examination "when it asked S.B. if he had any other witnesses corroborating his testimony that he was somewhere else at the time of the robbery." This "'may have led the [trier of fact] to believe that [S.B.] had a duty to produce exculpatory evidence.'"

The exception allowing "'comment when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state,'" was not applicable here "because S.B. did not assert an

affirmative defense, and the witnesses the state referred to in its 'confirm' question were equally available to both sides."

Toiran v. State, 3D17-2389 (Sept. 26, 2018)

The Third District denied a prohibition petition in which Toiran argued that he was immune from prosecution under the Stand Your Ground Law. The Third District reiterated its holding from love v. State, 247 So. 3d 609 (Fla. 3d DCA 2018), which held that the "old immunity standard continues to apply to crimes committed before the 2017 amendment to section 776.032."

Fourth District Court of Appeal

Perry v. State, 4D17-3064 (Sept. 26, 2018)

The Fourth District reversed multiple convictions and addressed two issues – the giving of standard instruction 3.6(p) regarding "Abnormal Mental Conditions," and bolstering of a police officer's testimony.

Instruction 3.6(p) provides that "mental illness, an abnormal mental condition, or diminished capacity is not a defense to any crime in this case. Any such evidence may not be taken into consideration to show that the defendant lacked the specific intent or did not have the state of mind essential to proving that [he] [she] committed the crime[s] charged [or any lesser crime]." The instruction, when given, "should be anchored to evidence in the case." In this case, the defendant gave a recorded statement. The Fourth District reviewed it and concluded that "[n]either the defendant's behavior nor his references to 'spazzing out' or psyching out' constituted sufficient evidence of an abnormal mental condition to trigger the need for the instruction." There was no insanity defense in the case; the defense was misidentification.

"The trouble with Instruction 3.6(p) here is that it was tantamount to a comment on the evidence, a *suggestion* that Perry suffered from 'mental illness or an abnormal mental condition or diminished capacity.' Were the jurors supposed to make the diagnosis themselves from the recorded statement? If they decided that Perry suffered from an abnormal mental condition, did the instruction mean that they had to find Perry guilty as charged?"

It was also error to permit an officer to testify "that Perry had not commenced any internal affairs investigations or filed any lawsuits or complaints of police

brutality against him." Such testimony "was irrelevant because it did not tend to prove or disprove whether Officer Blaszyk behaved appropriately when he forcibly arrested the defendant." If a complaint or lawsuit had been filed, such evidence would be "proper and relevant on cross-examination of the officer to expose biases and prejudices." The State, however, was not entitled to elicit the absence of such suit or complaint on direct examination.

Rodriguez v. State, 4D18-494 (Sept. 26, 2018) (on motion for rehearing)

The Fourth District denied a prohibition petition alleging a speedy trial violation. "The issue we decide is whether the trial court properly determined that Petitioner was unavailable for trial because he did not obtain properly fitting civilian clothes and objected to appearing for jury in jail clothing. We conclude that the State was not responsible for providing civilian clothing. The trial court offered to reset the trial within the speedy trial period, and Petitioner failed to make himself available by insisting that the State had to clothe him."

Fifth District Court of Appeal

Fuller v. State, 5D16-2646 (Sept. 28, 2018)

Fuller appealed a conviction and sentence for manslaughter with a firearm, as a lesser included offense of the charge of first-degree murder. The Fifth District reversed and ordered a new trial based on several independent and cumulative errors.

First, the State was "permitted to introduce evidence that [defendant] refused to voluntarily provide a blood sample that police would have tested for alcohol and drugs." The conversation with the defendant occurred at police headquarters on the morning of the shooting." Officers described Fuller's speech "as slurred and his eyes as bloodshot when they arrived at the crime scene." The problem here was that "Fuller was not told that the requested blood draw was compulsory, nor was he informed of adverse consequences should he refuse." Thus, it was error to admit the testimony.

In addition to the murder charge, Fuller was charged with sexual battery of a helpless person, S.G., while she was incapacitated due to voluntary alcohol and drug use. That was severed for a separate trial. At the homicide trial, it was "permissible for the State to present evidence that Fuller had intimate sexual contact with S.G., specifically that he placed his fingers in her vagina the night before the shooting, because that evidence was relevant to explain how her DNA was transferred by

Fuller to the gun and its case." "What was impermissible and unfairly prejudicial was the State's insistence on presenting evidence, over repeated defense objections, that Fuller's intimate sexual contact with S.G. was done without her knowledge and while she was physically helpless as a result of voluntarily consuming wine and an Ambien provided by Fuller." The sexual battery charge was not at issue since it was severed. The victim of the homicide was someone other than S.G.

The State also introduced evidence of Fuller's drug use long before the date of the shooting. The use of "outdated collateral crime evidence" was relevant only to prove bad character or propensity to commit crime and was improperly admitted. The Fifth District, however, concluded that evidence regarding drug use during the days leading up to the shooting was properly admitted, as it was relevant "to establish that contrary to Fuller's testimony, a party had taken place during the night after S.G. went to sleep, which could have led to Fuller being 'perturbed' by Alam [the homicide victim], as S.G. testified he appeared to be on the morning of the shooting."

Next, it was error to admit a portion of a jail call in which Fuller disparaged the prosecutor, referring to the prosecutor's tactics as "sucker punches," and asking how the prosecutors could sleep at night. The call also had repeated references to the lying of the prosecutor, interlaced with substantial profanity. This was not relevant to the charges and it did not shed any light on Fuller's credibility; it appeared to be an inappropriate attack on Fuller's character before the jury.

The stand your ground instruction improperly suggested that there was a duty to retreat if Fuller engaged in unlawful activity. However, it was defense counsel who specifically requested this instruction, "even after the trial court repeatedly and plainly expressed the opinion that this instruction did not apply." Thus, even if this was fundamental error, it was waived.

Last, the Fifth District held that the 2017 legislative amendment changing the burden of proof for the claim of self-defense immunity from the defendant to the State applied retroactively. The Fifth District noted its agreement with a recent decision of the Second District on this issue, and its disagreement with the Third and Fourth Districts. The Second and Fifth Districts both view the change in law as procedural and thus applicable retroactively; the Third and Fourth view the change in law as substantive. As a result, Fuller was entitled to a new pretrial immunity hearing, decided under the amended burden of proof.

Taylor v. State, 5D17-1912 (Sept. 28, 2018)

Taylor appealed a conviction for lewd or lascivious molestation of a child under 12 years of age. The Court rejected, without comment, the argument that section 800.04(5)(a) was unconstitutionally vague.

The Court agreed that the trial court erred in admitting "collateral crime or similar fact testimony that Taylor had previously committed a sexual battery upon the victim's then twelve-year-old sister." The Court found that the "significant dissimilarities between the charged crime and the collateral crime of the prior sexual battery committed by Taylor upon L.G., combined with the admittedly highly prejudicial nature of this evidence, and in light of the other similar fact evidence properly admitted," rendered the admission of the battery on L.G. an abuse of discretion.

After noting similarities between the two incidents – both victims were female children, about the same age, with offenses in the home involving their stepfather - the Court highlighted the significant differences: "First, there was no testimony at the pretrial hearing as to the specific nature of Taylor's 'touching' of L.G. prior to committing the sexual battery. Second, unlike at the pretrial hearing, L.G. did not testify at trial as to any 'touching' by Taylor, only the sexual battery, thus making the trial evidence of the sexual battery committed on her even less similar to the charged crime and therefore less relevant and even more prejudicial than probative under *McLean*. Finally, even if the 'touching' of L.G. was in fact similar to the alleged molestation of the victim, the jury had already heard other collateral crime or similar fact evidence from both the victim and another sister." By contrast, the victim in this case had been "touched on the top part of her breast over her t-shirt for a matter of a couple of seconds," whereas the defendant 'pinned L.G. on the bed and prevented her from getting up, and "the inserting his penis in L.G. for what seemed like a 'long time.'"

Barros v. State, 5D18-1181 (Sept. 28, 2018)

The Fifth District reversed the summary denial of a Rule 3.850 motion based on a claim of newly discovered evidence – the recantation of one of two victims. The trial court "determined the recanting witness's credibility and weighed conflicting testimony based upon the proffered affidavit. Given that the affidavit was not 'inherently incredible' nor 'obviously immaterial,' . . . we conclude that the trial court improperly made these determinations without the benefit of an evidentiary hearing."

De La Cruz v. State, 5D18-1897 (Sept. 28, 2018)

"'[A] defendant who is arrested for different offenses on different dates is not entitled to have jail credit applied equally to all prison sentences even though the sentences are run concurrently.'"