Case Law Update
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Supreme Court of Florida

Born-Suniaga v. State, SC17-1014 (Oct. 15, 2018)

The Supreme Court addressed a certified conflict between the Fourth District's decision in Born-Suniaga and decisions of the First, Second and Third Districts. The Court held "that the State is not entitled to the recapture period discussed in Florida Rule of Criminal Procedure 3.191 where the State informed the defendant it had terminated its prosecutorial efforts but failed to notify the defendant of new and different charges based on the same conduct or criminal episode that were filed before the speedy trial period expired."

The defendant was arrested on November 6, 2014 for misdemeanor battery, for an incident which occurred on that same date. He was released on bond the next day. On February 6, 2015, 92 days after the arrest, the State filed an information based on the same incident for tampering with a witness and misdemeanor battery. The State directed the clerk of the court to issue "a not-in-custody capias as to both counts," and asked the Sheriff's Office to serve the capias on February 11th. A detective was assigned to execute the warrant on March 25th and the record did not reflect whether any effort was made to serve the warrant. On April 15, 2015, the State filed a "no information" sheet as to the original misdemeanor battery charge and the defendant was notified that it had been dismissed and that his bond had been discharged. The 175-day speedy trial period expired on April 30, 2015. The defendant "first became aware of the new charges [tampering with a witness] on November 19, 2015, well over 175 days after his arrest, through his co-defendant's counsel." He did not file a notice of expiration of the speedy trial time; rather, he filed a motion to discharge and argued that the State, under these facts, was not entitled to the 15-day window period that would be triggered by a notice of expiration.

The Supreme Court discussed the significance of several of its own prior decisions – State v. Nelson, 26 So. 3d 570 (Fla. 2010); State v. Naveira, 873 So. 2d 300 (Fla. 2004); State v. Agee, 622 So. 2d 473 (Fla. 1993); and Genden v. Fuller, 648 So. 2d 1183 (Fla. 1994).

What was significant in this case was that the defendant had been "led to believe there were no charges against him" based upon the dismissal and discharge of the bond, "when in reality the State had filed new charges." The new charges, however, had been "sealed," and there was no way for the defendant to find out that they existed and no effort was made to alert him to the ongoing charges from the initial incident.

> Accordingly, because the State notified Born-Suniaga that it dismissed the original charges and discharged his bond but failed to notify him that it in fact had filed new charges based on the same conduct, the trial court correctly denied the State the recapture period and discharged Born-Suniaga. Allowing the state to proceed to trial pursuant to the recapture period described in subdivision (p) would allow the State to avoid the effect of the speedy trial time period described in subdivision (a) 'by prosecuting new and different charges based on the same conduct or criminal episode, whether or not the pending charge is suspended, continued, or is the subject of entry of a nolle prosequi,' a result that is expressly prohibited by subdivision (o). Fla.R.Crim.P. 3.191(o). It would also allow the State to do indirectly – arrest the defendant, lead the defendant (whether intentionally or not) to believe it is no longer pursuing the prosecution, and file new charges within the speedy trial period that are only revealed when the defendant can no longer have the speedy trial guaranteed by the rule – what the State cannot do directly under *Agee* (and *Genden*) – arrest the defendant, nolle prosse (or no action) the case, and recharge (or charge) the defendant after the speedy trial period expires.

Jones v. State, SC17-1385 (Oct. 15, 2018)

Jones appealed the denial of a successive Rule 3.851 motion, claiming entitlement to relief on the basis of Hurst v. Florida, 136 S.Ct. 616 (2016). His sentence of death was imposed after a jury vote of 10-2, and his conviction and sentence became final in 1995.

Relief was denied in this case on the basis of Hitchcock v. State, 226 So. 3d 216 (Fla. 2017), which held that "'our decision in *Asay[v. State,]* 210 So. 3d 1, 22 (Fla. 2016), . . . forecloses relief' under *Hurst* for defendants whose convictions and sentences were final prior to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002)." Similarly, a claim that the "death sentence violates *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and the Eighth Amendment is foreclosed by our recent decision in *Reynolds v. State*, 2018 WL 1633075 . . . (Fla. Apr. 5, 2018), in which we held that 'a *Caldwell* claim based on the rights announced in *Hurst* and *Hurst v. Florida* cannot be used to retroactively invalidate the jury instructions that were proper at the time under Florida law.'"

Lowe v. State, SC12-263 (Oct. 19, 2018)

Lowe appealed a resentencing of death arising out of a 1990 first-degree murder. The new penalty phase jury recommended death unanimously. Lowe raised, and the Supreme Court addressed, 18 issues.

The trial court did not err in granting the State's cause challenge to a prospective juror whose personal beliefs were opposed to the death penalty. The Supreme Court observed conflicting points. The "prospective juror never indicated that he 'would not impose death even if the aggravating circumstances outweighed the mitigating.'" On the other hand, he indicated he would probably go for life irrespective of the court's instructions, and, when asked by defense counsel if he could follow the law, he first said "uh-huh" before saying "yes" when asked the same question a second time.

The use of a mannequin in conjunction with the medical examiner's testimony satisfied the criteria for the use of a demonstrative aid. "The mannequin was used to set out the circumstances of the crime and to attempt to establish aggravation. The mannequin was used to demonstrate the location of the gunshot wounds, the angle of impact against the skin, and the incapacitating nature of each gunshot. The jury was advised that the trajectories were anatomical, not spatial, and had a small degree of error. There only were slight differences between [the victim's] size and the mannequin's dimensions, and there is nothing to suggest that the mannequin was altered to resemble [the victim]."

The State also used a computer-generated diagram of the crime scene – the interior of a convenience store – "to help the jury visualize where the crime scene took place." It was used in opening statements, not with any witnesses. Defense counsel argued that the use of the diagram constituted a discovery violation, since it

had not previously been disclosed. Even assuming that the trial court committed error by not conducting an inquiry into the failure of the State to disclose the diagram, the Supreme Court saw "no conceivable prejudice to Lowe. . . . Lowe presents no explanation of how the diagram could have 'materially hindered the defendant's trial preparation or strategy.'"

Lowe's probation officer at the time of the murder testified and misstated the maximum sentence Lowe could receive for the violation of community control for the sentence he was serving at the time of the murder. He said it was about 30 years and the State referenced this once in closing argument. The officer expressed uncertainty as to the significance of youthful offender sentencing limits. On appeal the State conceded the officer erred, as the maximum possible sentence for the community control violation would have been six years less credit for time served. The erroneous testimony and related comment, however, were not the subjects of objections, and they did not rise to the level of fundamental error. While this testimony had some relevance to the avoid arrest aggravator, the prosecutor's argument for that aggravator was based on several other factors and the court's sentencing order made no reference to this.

The trial court did not err in excluding defense evidence proffered during the penalty phase. The defendant sought to introduce evidence that two other individuals, including Sailor, were also involved in the attempted robbery that resulted in the victim's murder. "Even if credible evidence showed Sailor to be involved in Burnell's murder . . . Sailor's prior criminal act of pointing a gun at traffic and at Officer Ewert had no relevance to any aspect of Lowe's character or record, or to any circumstances of the murder and attempted robbery."

A defense expert was in the process of testifying regarding a risk assessment appraisal for the likelihood of future violence. The State asserted a discovery violation, as this had not been disclosed. The testimony was presented on what was scheduled to be the final day of the penalty phase and the State, not expecting this testimony, had not brought its own expert for any rebuttal. After conducting a Richardson inquiry, the court excluded testimony addressing the risk assessment test. The Supreme Court found that the trial court erred by excluding the testimony as a "first" resort, "as opposed to a last resort," and by not considering less extreme alternatives. However, the exclusion was harmless beyond a reasonable doubt. The jury had been made aware of the risk assessment and the factors on which it was based, and the expert did give his opinion as to the likelihood of future violence.

Lowe challenged multiple comments by the prosecutor from closing argument. None had been objected to. The Court has previously cautioned against the use of victim impact evidence to urge juries "to compare the worth of the life of the victim against that of [the defendant]." However, comments comparing the two lives did not rise to the level of fundamental error. The comments were brief and the jury was instructed on the proper use of victim impact testimony. An argument that Lowe "had been sentenced to death before and should be again because nothing had changed since then" did not constitute fundamental error. Several of the defendant's own witnesses had informed the jury of Lowe's "prior status on death row."

A box of the defendant's personal contents that had been introduced into evidence at the original trial was sent to the jury during deliberations; it included a letter from the defendant's mother. As to Lowe's argument that the letter should have been excluded when it was sent back, the Supreme Court noted an extensive colloquy by the sentencing court as to what was being done with that Exhibit box and its contents, and defense counsel agreed to send it back; the express agreement was deemed more than mere acquiescence and resulted in a waiver of this claim. Moreover, any error was not fundamental as the letter largely duplicated the mother's testimony.

At the resentencing hearing, the defense was arguing, as mitigation, that the defendant's role in the murder was that of a minor participant. He argued on appeal that the court's jury instruction, that the jury should only consider the sentence to be imposed, precluded him from arguing the minor participant role as mitigation. The Supreme Court disagreed. The jury was instructed on minor participation as a mitigating circumstance.

In Enmund v. Florida, 458 U.S. 782 (1982), the Court held that in a felony murder case, the death penalty could not be imposed on one whose involvement was such that he himself did not kill, attempt to kill or intend that a killing take place or that lethal force be used. Lowe argued that the jury should have been instructed to make findings in accordance with Enmund and its progeny. The Court disagreed. Lowe was the only person "conclusively linked to the crime" and there was "no evidence showing that any other person has ever been charged with the same crime." The trial court's sentencing order found that the evidence established that Lowe acted alone and that witnesses presented to the contrary were not credible. Lowe was "not merely an aider or abettor in a felony where a murder was committed by others."

As the murder was committed in 1990, there were two sentencing options: death or life imprisonment with the possibility of parole after 25 years. Lowe argued that "because the jury was told he would be credited for time served and because he was precluded from discussing the improbability of his release on parole and from mentioning his fifteen-year consecutive sentence for attempted robbery, the jury was misled as to the effect of a life sentence without the possibility of parole for twenty-five years." The Court disagreed. Prior opinions rejected the same argument and the jurors were "repeatedly told not to concern themselves with the likelihood of parole." Plus, the State never argued that he should be sentenced to death to avoid the possibility of imminent parole.

One of the aggravators the sentencing court found was that Lowe was on community control at the time of the offense. The Supreme Court rejected his argument that this factor did not apply to one sentenced to community control under the youthful offender statute. The prior violent felony aggravator was properly applied based on his prior robbery conviction, where there was evidence that the defendant grabbed the victim from behind and put something sharp against his neck, which the victim thought might have been a knife; Lowe told the victim not to move; that he did not want to hurt the victim. This aggravator can be supported by either the use or threat of violence. The avoid arrest aggravator was also upheld based on the trial court's conclusion that there was no other plausible explanation for the murder other than elimination of the victim as a witness.

The Court also addressed and rejected several claims in which Lowe argued that the trial court incorrectly weighed or evaluated evidence adduced in support of mitigating factors.

Lowe's appeal was pending when Hurst v. Florida was issued. The jury recommendation here was unanimous, and the denial of requests for special verdict forms and instructions as to unanimity for each aggravator beyond a reasonable doubt was deemed harmless beyond a reasonable doubt. There were five aggravators merged into four: under sentence of community control; prior violent felony; murder during felony merged with pecuniary gain; and avoid arrest.

Eleventh Circuit Court of Appeals

United States v. Garcia, 14-11845 (Oct. 19, 2018)

Garcia appealed convictions for conspiring to defraud the United States, and willfully making false personal income tax returns.

At one point during a trial that lasted more than 49 hours, the government was permitted to introduce "inculpatory evidence while both the defendant and her lawyer were absent for three to ten minutes." There was no objection to the violation of the right to counsel or right to confront witnesses or right to be present at trial. The Court reviewed the violation under the plain error standard and concluded that the convictions should be affirmed because the "errors did not affect Garcia's substantial rights" and "Garcia failed to preserve the errors at trial even though she had ample opportunity to do so. She was given every chance to object and to secure some remedial relief from the trial court but expressly declined to act."

On the sixth day of the trial, the government presented an IRS Agent, its last witness. The agent testified about Exhibit 6, a schedule of expenditures which should have been reported as income on Garica's personal return. It was an important piece of evidence. Background information regarding the exhibit was elicited on direct examination, while Garcia and her counsel were present. After a lunch break, the prosecution resumed questioning before the defense team returned to the courtroom. This lasted between three and ten minutes, and the agent highlighted portions of Exhibit 6 at that time. The 10 items highlighted "represented a small sampling of nearly 400 personal expenditures found in the exhibit." They represented about $138,000 of expenditures in an exhibit that detailed over $1,500,000 in such expenditures. The missed testimony consisted of six transcript pages out of 1,559, and 43 questions. There was no objection when counsel returned to the courtroom in the midst of the agent's testimony. The next day, there was a colloquy regarding the missed testimony and counsel expressly declined to state any objection at that time.

The errors in question did not constitute structural error, as the record did not "remotely suggest the complete denial of counsel or the breakdown of the trial process. Nor do the errors defy analysis because their impact is unmeasurable. These mistakes, like so many others, can be quantitatively assessed when measured against the other evidence presented."

The Court's opinion includes a lengthy general discussion of the plain error standards. It then reviews the missed evidence in the context of each of the individual counts, before concluding that the missed testimony "was not the fulcrum on which the jury's deliberations likely turned;" that the points made were undisputed; that the missed evidence was cumulative; that the defendant's substantial rights were not affected because the government's case was strong; that

defense counsel cross-examined the agent extensively about the information contained in the exhibit at issue.

On the conspiracy to defraud charge, the court's instruction to the jury included "attempting to impair, obstruct and defeat the lawful function of the IRS." Including attempt language was error – unobjected to – as it went beyond the language in the indictment. The error did not rise to the level of plain error. There was just a single reference to attempt in the instructions; the government did not present or argue its case based on any attempt theory; the court did not explain the meaning of attempt; and the jury convicted the defendant of three substantive charges, each of which was included as an object of the conspiracy, thus "substantially reduc[ing] any possibility that the jury found he guilty on an attempt theory."

First District Court of Appeal

Cuomo v. State, 1D16-5091 (Oct. 15, 2018)

In a Rule 3.850 motion, Cuomo argued that trial counsel was ineffective for failing to call his mother as a witness at a pretrial suppression hearing. Cuomo's argument at the suppression hearing was that he was led to believe a jail conversation between him and his mother would be private. He alleged "that his mother would have testified that the police initiated the visit by offering her the opportunity to visit Cuomo without her asking, and that the police specifically told her that the visit would be private." The claim was facially sufficient and the trial court erred by summarily denying it, as the record did not conclusively refute it, and an evidentiary hearing was required.

Cuomo also appealed the denial of a different postconviction claim, which was denied after an evidentiary hearing. On appeal, the State, in its appellate brief, addressed the claim, which was denied after the evidentiary hearing. As to the summarily denied claim – ineffective assistance for failing to call the mother as a witness at the suppression hearing – the State asserted that since it was a summarily denied claim, the State would not be responding to it on appeal unless directed to do so by the Court. The First District addressed this and noted that the State's position was erroneous under the appellate rules. Whenever the trial court denies a Rule 3.850 motion with an evidentiary hearing as to any claim, when the defendant proceeds with an appeal and files a brief, the State must respond to all claims, both the ones denied with an evidentiary hearing, and the ones denied summarily. When the State's answer brief in such an appeal, after an evidentiary hearing on any claim,

fails to address summarily denied claims raised on appeal, "the State's refusal to brief an issue regarding a summarily-denied claim constitutes a forfeiture of the State's right to respond to the appellant's brief."

Simmons v. State, 1D16-5213 (Oct. 15, 2018)

Simmons appealed convictions for attempted second-degree murder and four counts of attempted armed robbery. He challenged the admissibility of deposition transcripts at a pretrial similar-fact hearing and the propriety of prosecutorial comments.

At the pretrial hearing to determine whether collateral offenses were sufficiently similar to the charged offenses to be admissible at trial, the State relied on depositions of witnesses to establish the facts of the charged offenses. The First District held that this was not error, as "hearsay evidence was admissible in the pretrial *Williams* rule hearing, and testimony from the similar-fact witnesses was subject to cross-examination." After the depositions were entered into evidence, the State called a deputy sheriff and the victim of the similar-fact robbery. "Were we to hold otherwise, each victim in the charged offenses would be required to appear and testify *three times* – once at a pretrial deposition, again at the pretrial similar-fact hearing, and finally at trial. Such is not required under either the statute or the relevant case law. The collateral-crime witnesses testified at the pretrial hearing and were cross examined by defense counsel on how these incidents compared to what was known of the charged offenses. Furthermore, the witnesses to the charged offense were cross examined at their depositions and at trial."

The First District also found that there were sufficient similarities between the charged crime and the collateral armed robbery to admit the evidence of the collateral robbery at trial. "[B]oth robberies occurred on 103rd Street in Jacksonville; both crimes happened outside of chain restaurants; both crimes were committed in the early-morning hours, within two days of each other; both crimes were committed by similarly described lone gunmen wearing white tank tops; and both crimes were committed against strangers." The "'signature feature' shared by each instance was that the perpetrator struck up a friendly conversation with strangers and made innocent requests, then returned with a gun to make demands."

Closing argument comments that the defendant lied on the stand were not improper as they "were a fair reference to the evidence, and were not so far afield from the evidence adduced at trial as to constitute fundamental error." There was evidence that the defendant gave a false statement to police. The collateral-crime

evidence established a modus operandi and contradicted the defendant's "testimony that he was an innocent victim ambushed by the victims of the charged offenses."

Simmons argued that the prosecutor incorrectly stated the law when arguing that he could be "convicted even if the jury believed the discharge of the firearm was an accident." There was no objection to the comment and it did not rise to the level of fundamental error. Furthermore, based upon a review of the prosecutor's argument, the Court found that the State "argued that intent was not required for the *aggravating factor* of discharging a firearm. The State had already explained how to find second-degree murder. . . ."

An argument that the State improperly shifted the burden was also found not to constitute fundamental error, and the comment in question did not shift the burden of proof. The prosecutor stated: "'in order to find a justifiable attempted homicide, you all would have to believe unanimously that [Appellant] was the one being attacked by [the victim] with the pocketknife in order to find that [Appellant's] action, the firing of the gun, was justifiable.'" Shortly after this comment, the State advised the jury that if it had any reasonable doubt on the question of whether the defendant was justified in the use of deadly force, it should find him not guilty.

The final argument was that the prosecutor erred in commenting on the defendant's failure to offer an exculpatory statement prior to trial. Again, there was no objection and no fundamental error. The defendant testified at trial and stated that he was at the scene and did shoot in self-defense. The State then called the arresting officer in rebuttal, and that officer testified that the defendant never said that he shot in the direction of the victims in self-defense; he said he wasn't even there. "Because Appellant did offer an exculpatory statement prior to trial, the State did not comment on his silence."

State v. Williams, 1D17-1581 (Oct. 15, 2018)

The trial court dismissed an affidavit of violation of probation, finding that the probationary period had expired and it was not tolled. The State appealed and the First District affirmed. In 1991, three days before the probationary term was set to expire, the State filed an affidavit of violation alleging a failure to pay costs. A warrant was issued, but apparently was never served. In 2015, Williams was arrested for a domestic violence incident, and the State filed an amended affidavit. Williams was arrested on a new warrant in 2017.

In Mobley v. State, 197 So. 3d 572 (Fla. 4th DCA 2016), the Fourth District held that "a warrant cannot toll probation for technical violations." In this case, in the trial court, the State argued that the trial court should recede from Mobley because Mobley was wrong.

On appeal, the State presented a different argument – i.e., that Mobley did not apply because it interpreted a different version of section 948.06(1), Florida Statutes. The First District held that as that was a different argument from the one presented in the lower court, it was not preserved for appellate review. The State argued that it involved a question of jurisdiction and that it could therefore be argued on appeal even when it had not been presented below. The First District disagreed: "It is true that the question of subject-matter jurisdiction may generally be raised for the first time on appeal. . . . This is because a court acting beyond its jurisdiction may be committing fundamental error. . . . The State, however, misapprehends why a jurisdictional argument may implicate fundamental error. It is the *lack* of subject matter jurisdiction that may be fundamental error and raised for the first time on appeal."

Thompson v. State, 1D17-2012 (Oct. 15, 2018)

Thompson appealed his conviction for second-degree murder. He first argued that fundamental error occurred when "the lead investigator was permitted to comment on Thompson's credibility and testify that this was not a self-defense case." Under the facts of this case, the statements did not constitute fundamental error. "Here, the jury's guilty verdict would be easily attainable without the investigator's statements because the jury was able to watch a video of the altercation." Similarly, although the investigator's comments were objectionable and counsel was deficient for not objecting, Thompson could not demonstrate prejudice for a claim of ineffective assistance of counsel; the admissibility of the surveillance video itself again meant that the jury could come to its own conclusion and Thompson could not demonstrate a probability that the outcome would differ absent the investigator's comments.

The Court also found that the evidence was sufficient as to the "depraved mind" element of second-degree murder. The stabbing was not an "impulsive overreaction because Thompson had time to consider the nature of his act. . . . The surveillance video shows that it took Thompson at least twenty seconds to leave the fight, go inside the market, retrieve the sword, and return outside to reinitiate the fight."

The trial court refused to instruct the jury on justifiable use of non-deadly force and granted an instruction on "the initial aggressor exception to the use of deadly force." Thompson challenged both rulings. "Here, Thompson's use of a sword with a fifteen-inch blade was deadly force as a matter of law because death is a natural and foreseeable consequence of slashing and stabbing another person with a sword." Thus, the evidence did not support the request for an instruction on non-deadly force.

A person is not justified in the use of deadly force if, inter alia, he or she was the initial aggressor. In this case, there were two altercations between Thompson and the victim, Halley. Halley was the initial aggressor in the first altercation. That ended, and Thompson left and obtained the sword. Halley did not pursue Thompson and did not try to continue the fight; he was in the process of leaving the scene. The return of Thompson therefore marked the start of a second, distinct altercation, as to which Thompson was the initial aggressor, and the instruction on initial aggressors was therefore properly given.

Klingler v. State, 1D17-3173 (Oct. 15, 2018)

The defendant pled no contest to five charges, and the State agreed to a sentencing cap of 40 years in prison. The judge imposed a total sentence of 29 years in prison followed by 11 years of probation. Several hours after the sentencing hearing ended, and after consulting all counsel by email, the trial court modified the sentence for count V from 11 years probation to 15 years in prison, to be served concurrently with the other prison sentences. This modification had no impact on the total sentence, which was still 29 years in prison plus 11 years of probation.

The First District agreed with Klingler that the increase in the sentence for count V constituted a double jeopardy violation. Although there was a negotiated plea, this was not the type of claim deemed waived by a negotiated plea. The original sentence was reinstated.

Murphy v. State, 1D18-3526 (Oct. 15, 2018)

A notice of appeal must be filed in a timely manner. "Merely mailing the notice or having the notice placed in a post office box within the required time period is not sufficient."

Note: The facts of the case are not set forth in the opinion. Although this was a pro se appeal, it does not appear as though it involved application of the mailbox rule which would apply for proceedings involving pro se prisoners.

Jones v. State, 1D17-2808 (Oct. 16, 2018)

A conviction for possession of cocaine was reversed because the State failed to prove constructive possession.

Jones was driving a car rented by his sister. After he provided a false name to an officer during a traffic stop, a K9 unit was called and the dog alerted. Jones' identification was found "in the driver's door pocket and a paper CD case containing marijuana on the driver's seat." A passenger, Lyles, had a marijuana grinder in her purse. Cocaine was found in the center console, along with "Swisher cigars." Jones admitted that the marijuana on the seat was his, but denied knowledge of the cocaine in the center console.

> . . . Constructive possession exists where the defendant does not have physical possession of the contraband but knows of its presence and can maintain dominion and control over it. . . . But because the rental car in which the troopers found the cocaine was in joint possession, rather than in Jones's exclusive possession, "knowledge" and "ability to maintain dominion and control" could not be inferred from Jones's mere proximity to the contraband. . . . Rather, the State was required to establish independent proof of Jones's knowledge and ability to maintain control over the cocaine, such as evidence of incriminating statements or actions or circumstantial evidence from which a jury might properly infer that Jones had knowledge of the presence of the cocaine.

The State's argument as to Jones's knowledge was based on testimony that Jones made multiple requests while being questioned outside the vehicle to smoke a "Black and Mild." There was no testimony, however, equating a Black and Mild cigarette with a "Swisher cigar." And, while knowledge of the presence of contraband in a jointly occupied area may be inferred from the presence of other personal property owned or controlled by the defendant, there was no evidence establishing that the "Swisher cigars" in the console belonged to Jones.

Proximity to the cocaine and Swisher cigars was further consistent with the reasonably hypothesis that the items had been placed in the console by the passenger, who remained seated in the car while Jones was being questioned outside.

Edwards v. State, 1D17-3083 (Oct. 16, 2018)

After entry of a plea of no contest, Edwards appealed and challenged the denial of a pretrial motion to dismiss based on statutory immunity under the Stand Your Ground law. The First District affirmed.

The Court did not set forth the facts of the case in the opinion. The Court noted that there was conflicting evidence and that the trial court "applied the correct standard, weighed the conflicting evidence, and determined the credibility of the witnesses in reaching its decision." It was further noted that "[e]ven if the appellate court 'may have decided this case differently had we been the trier of fact, "it is not the function of this court to reweigh the evidence and substitute our judgment for that of the trial court."'"

Jackson v. State, 1D18-4109 (Oct. 16, 2018)

Jackson was sentenced to death for first degree murder in 2010, and the Florida Supreme Court reversed and remanded for a new trial. As a result, Jackson argued that the State violated section 782.04, Florida Statutes (2016), by not providing notice of aggravating factors within 45 days of arraignment. He filed a prohibition petition in the First District.

The First District found that the Supreme Court's reversal and ordering of a new trial "did not require a *new arraignment*," and the 2016 amendment to section 782.04(1), requiring notice of the aggravating factors within 45 days of arraignment was not applicable and did not apply retroactively to an arraignment that occurred in 2007.

Richardson v. State, 1D17-2156 (Oct. 18, 2018)

"An appellate court's mandate is the procedural vehicle by which jurisdiction transfers back to the trial court. . . . Until issuance of our mandate, the trial court lacked jurisdiction to enter an order complying with out directions." The trial court's order on remand was entered prematurely and therefore had to be reversed and remanded for reentry.

Forest v. State, 1D17-4201 (Oct. 18, 2018)

Forest appealed a conviction for possession of a controlled substance, cannabis. He argued "that he could not have committed the crime because Florida's criminal code, which classifies cannabis as a substance that 'has no current medical use,' is in direct conflict with the recent amendment to the Florida Constitution regarding the production, possession, and use of medical marijuana." The First District disagreed.

Article X, section 29(c)(1)-(2) of the Florida Constitution, expressly provided that "[n]othing in this section shall affect or repeal laws relating to non-medical use, possession, production, or sale of marijuana."

Cowart-Darling v. State, 1D17-5076 (Oct. 18, 2018)

The First District concluded that the trial court correctly denied a motion to suppress "items seized from [the defendant's] vehicle following a traffic stop and a sniff test of his vehicle by a drug detection dog."

A deputy conducted a traffic stop and the defendant did not have a license on him. The deputy called in the defendant's name and date of birth to check for outstanding warrants. While awaiting the results, the deputy observed the defendant's "hands were shaking and that he kept moving his right hand towards his right hip area." The deputy called for assistance while writing a traffic citation. The deputy explained that he was a K-9 officer "and asked if there was anything in the car that could cause a drug detection dog to alert. Cowart-Darling shook his head up and down in an affirmative gesture." Upon verbal inquiry, the defendant denied having anything illegal in the vehicle.

A second officer responded to the call for assistance 12 minutes after the original stop, and the first deputy had not yet heard back from dispatch as to outstanding warrants. The canine was then used for a sniff search and alerted to the driver's side door, "where a syringe and a spoon with a powdery residue were located. The powdery substance was field tested and tested positive for cocaine."

The general legal principles that the Court relied on were: "absent reasonable suspicion of criminal activity, a traffic stop may last no longer than necessary for an officer to address the traffic violation that warranted the stop and attend to related safety concerns. . . . A stop may last long enough for an officer to check drivers' licenses, search for outstanding warrants, and inspect registrations and proofs of

insurance. . . . But a traffic stop may not be prolonged to conduct a dog sniff unless the officer has reasonable suspicion of criminal activity."

"Here, the traffic stop was still in progress when the deputy conducted the dog sniff of Cowart-Darling's vehicle." The prolonging of the traffic stop was "properly attributed . . . to Cowart-Darling's failure to have his driver's license, not the deputy's decision to conduct a search of the car." The deputy also "had a reasonable, well-founded suspicion of criminal activity to justify detaining Cowart-Darling." In addition to the defendant's signs of nervousness, the defendant gestured affirmatively in response to the deputy's inquiry regarding illegal substances. The subsequent verbal denial "was insufficient to dispel the deputy's concern. If anything, Cowart-Darling's conflicting answers heightened the deputy's suspicion that criminal activity was afoot."

Second District Court of Appeal

Lapace v. State, 2D17-1493 (Oct. 17, 2018)

The Second District reversed the trial court's order denying a suppression motion. The "evidence presented did not support the trial court's finding that the deputies reasonably believed that exigent circumstances existed that justified immediate entry into the residence without a warrant."

Officers responded to a vague 911 call regarding an "unknown law enforcement problem." A precise address was not given, and the address was subsequently determined by the cell phone satellite ping. Upon arriving at the address, officers observed a woman parked in an empty lot across the street from the address. When questioned, she said she did not know why they would have been dispatched to that address. As she was leaving, she said that her ex-boyfriend was in the house and that there was an outstanding arrest warrant for him.

When the officers went to the residence, a woman responded, but refused to open the door, stating that she was just beaten up by an unknown woman. The officers assured her that the woman was gone. She denied the presence of anyone else inside, and when she opened the door, there were indications that she had been attacked – a cut on her foot and a red mark on her leg, where she said the unknown woman had bitten her.

When the woman, as instructed, went to get her identification, the officers followed her inside, based on their belief that there was a possible domestic dispute

requiring them to "check on the welfare of anyone who may have been inside the house." They subsequently discovered the defendant, hiding in a bedroom, and drugs and paraphernalia were then seen in the same bedroom, and were seized.

"Here, the deputies certainly had a duty to investigate the 911 call until they were reasonably satisfied that no emergency existed or that a once-urgent situation was no longer urgent. However, the deputies were not entitled to enter the home once they determined that any emergency had dissipated." The woman's explanations for the injuries to the foot and leg were plausible and corroborated by having seen the first woman drive away. No other evidence of a domestic disturbance was seen or heard.

The information from the first woman qualified as an anonymous tip, as she never identified herself, and it carried a low level of reliability, especially as it was vague on any details.

Cowart v. State, 2D17-2820 (Oct. 19, 2018)

The State charged Cowart with "failure of sexual predator to reregister or provide required information." The charging document included an extensive litany of charges within a single paragraph, causing the Second District to refer to the information as "the State's indefensible linguistic buckshot."

Notwithstanding the wide-ranging language in the charging document, the State still managed to omit allegations as to two elements of the offense for which the defendant was convicted – "Although the State alleged that Cowart is a sexual predator, it alleged neither that he had previously established transient residence in Polk County nor that he failed to report all of his transient residences within thirty days of the date that he had last reported all of his transient residences."

"The failure to adequately charge an offense, however, is not per set reversible error because '[g]enerally the test for granting relief based on a defect in the information is actual prejudice to the fairness of the trial." Here, the defendant "plainly was not misled or embarrassed in the preparation of his defense." At trial, "[f]ar from expressing uncertainty of the charge against him, Cowart vehemently protested to the jury that he had not knowingly violated the thirty-day requirement because he had innocently misinterpreted it to mean that he had to report his transient residences once every calendar month." Nor was there any objection to the jury instructions or assertion of fear of being subject to prosecution for the same offense again.

Third District Court of Appeal

Lee v. State, 3D18-698 (Oct. 17, 2018)

The trial court granted a motion to correct sentence. It then imposed a new sentence, but neither the defendant nor counsel were present for the resentencing. As a result, the newly imposed sentence was reversed and remanded for further proceedings. "When a trial court grants a motion to correct an illegal sentence, a defendant has the right to be present and to be represented by counsel." "The trial court had the authority to impose a sentence less than the maximum legal sentence of thirty years." The resentencing was therefore not merely a ministerial act.

Fourth District Court of Appeal

King v. State, 4D17-2670 (Oct. 17, 2018)

The summary denial of a Rule 3.850 motion was reversed in part to allow the defendant to amend a successive Rule 3.850 motion.

About one month after the mandate from the direct appeal, King filed a 3.850 motion which the public defender's office had prepared for him, asserting one issue. Less than a month later, after the trial court ordered a response from the State, King filed a motion seeking, inter alia, additional time to file an amended motion. One month after that, a pleading containing an amended or second motion with thirteen claims was filed. The original motion prepared by counsel was a form motion, and it appeared to generate confusion. The trial court's summary denial referenced the original form motion and did not address the subsequent pleadings.

Zelaya v. State, 4D17-2710 (Oct. 17, 2018)

Zelaya was found guilty of "three counts of robbery with a weapon (lesser included offenses of robbery with a firearm/deadly weapon), two counts of attempted robbery with a weapon (lesser included offenses of attempted robbery with a firearm/deadly weapon), one count of aggravated battery with a deadly weapon, and one count of resisting arrest without violence."

The Fourth District reversed the conviction for aggravated battery with a deadly weapon based on a legal inconsistency with the other verdicts. The jury's finding on the robbery and attempted robbery charges that "a defendant did not

possess a firearm but at the same time used a firearm or deadly weapon is legally inconsistent when the possession or use is a necessary element of the crime." Through its verdict, "the jury found as a matter of law that Appellant did not possess a firearm or deadly weapon when he committed the robbery and attempted robbery offenses."

One judge dissented from this holding, finding that the allegations in the aggravated battery count in the information were significantly different from the firearm allegations in the robbery and attempted robbery counts. The aggravated battery count had alleged that the deadly weapon, the firearm, was used as a bludgeon.

Fifth District Court of Appeal

Mobley v. State, 5D16-4340 (Oct. 19, 2018)

Mobley was convicted of sale of cocaine, an offense which carried a three-year mandatory minimum prison sentence. The court sentenced him to seven years in prison "with the first 36 months day-for-day minimum mandatory." Mobley argued that the "day-for-day" language erroneously precluded him from being eligible for gain-time. The Fifth District agreed.

"This statute [section 893.13(1)(c)1] does not contain explicit language precluding eligibility for statutory gain-time prior to serving the mandatory minimum sentence." Thus, "the Legislature did not intend to prohibit gain-time from being awarded regarding the mandatory minimum portion of Mobley's sentence."