Case Law Update
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Supreme Court of Florida

Jimenez v. State, SC18-1247, SC18-1321 (Oct. 4, 2018)

Jimenez, convicted of firsts-degree murder and burglary, and under sentence of death, appealed the denial of his fifth and sixth successive motions for postconviction relief under Rule 3.851, and the trial court's order denying a motion to correct illegal sentence under Rule 3.800(a).

The denial of a rule 3.852(h)(3) request to the Department of Corrections for Jimenez's medical records was properly denied because that rule limits the request of additional public records to "a person or agency from which collateral counsel has previously requested public records." As no such previous requests had been made, Jimenez could not proceed with a request under rule 3.852(h)(3). Additionally, Jimenez's request "did not specifically identify the records requested, or provide any context as to how those records were relevant to a potential, colorable claim."

Challenges to the use of etomidate "as the first of three drugs in [the] lethal injection procedure" and the three-drug protocol were rejected on the basis of prior decisions which have rejected the same claims.

Adding execution to the 23 years that Jimenez has already spent on death row would not constitute cruel and unusual punishment.

The Court also reviewed the denial of multiple overlapping claims based on Brady, Giglio and due process. The Court's opinion includes a detailed statement of the tests and standards applicable to each of these legal claims and then analyzed numerous evidentiary issues under these tests.

One alleged Brady violation of a failure to disclose information as to the victim's neighbor was rejected because "the fact that this interview occurred was disclosed to Jimenez in discovery prior to trial, and the notes reveal that Taranco recounted the relevant facts in the preliminary interview exactly as she did in the taped interview, in her deposition, and at trial, which was not exonerating."

Another claim alleging the failure to disclose information relevant to a phone interview of Jimenez's former girlfriend was procedurally barred as it was referenced in a detective's previously disclosed report.

Another claim regarding a detective's notes of an interview with Jimenez was procedurally barred as it was not based on newly discovered evidence and was otherwise untimely. "The fact that these statements were made by Jimenez and the fact that the detectives took notes while Jimenez made them is not newly discovered evidence because Jimenez necessarily had personal knowledge of these facts an because the detectives generally disclosed the substance of the conversations that occurred disclosed the substance of the conversations that occurred prior to Jimenez invoking his rights under *Miranda*."

Another claim was based on a document allegedly prepared by a prosecutor, containing questions and answers as to a detective who testified at trial. While such a document may, at times, constitute Brady material if it reflects coaching or testimony contrary to that presented at trial, this document did not do that. It contained answers that were consistent with the detective's reports, deposition and trial testimony.

As to all of these claims, as well as others, the Court engages in detailed factual analysis as to why the materials in question, even if not procedurally barred, did not constitute either Brady or Giglio material and why they would not have affected the outcome of the case under Brady or why there was no reasonable possibility that they could have affected the jury's verdict under Giglio.

Anderson v. State, SC18-175 (Oct. 4, 2018)

Anderson appealed the denial of a successive motion for postconviction relief under Rule 3.851. He was not entitled to relief under Hurst v. Florida, 136 S.Ct. 616 (2016), because the Hurst error was harmless. Anderson received a unanimous jury recommendation of death. And, "[n]either the jury instructions provided in this case, nor the aggravators and mitigators found by the trial court, nor the facts of the case compel departing from our precedent."

Zack v. State, SC18-243 (Oct. 4, 2018)

Zack, sentenced to death for fist-degree murder, appealed the denial of a successive Rule 3.851 motion for postconviction relief. The Supreme Court

affirmed the trial court's order denying relief under Hurst v. Florida, 136 S.Ct. 616 (2016), because Hurst did not apply retroactively to a death sentence that became final prior to June 24, 2002, the date of the United States Supreme Court's opinion in Ring v. Arizona, 536 U.S. 584 (2002).

Miller v. State, SC17-1598 (Oct. 4, 2018)

The Supreme Court addressed and resolved a conflict between the First and Fifth Districts regarding mandatory consecutive sentences for a habitual felony offender.

Miller was convicted for kidnapping with a firearm, aggravated battery, and possession of a firearm by a convicted felon. The judge concluded that he had no discretion "and sentenced Miller to twenty years' incarceration as an HFO on the kidnapping conviction, with a mandatory minimum of ten years, to ten years' incarceration, with a mandatory minimum of ten years as an HFO on the aggravated battery conviction, and to five years' incarceration, with a mandatory minimum of three years as an HFO on the possession conviction. The sentences, including the mandatory minimums, were all consecutive."

"Because our caselaw reflects that the crimes stemming from a single criminal episode involving a single victim or a single injury many not be sentenced consecutively, we quash the decision of the First District and remand with instructions to the trial court to enter concurrent sentences." Summarizing the general principles established by prior decisions, the Court stated:

> Together, these cases state that section 775.087(2)(d), Florida Statutes (2014), mandates consecutive sentences for specified crimes committed in separate criminal episodes and permits consecutive sentences at judicial discretion for specified crimes committed in a single criminal episode with either multiple victims or injuries. Section 775.087(2)(d) neither mandates nor permits consecutive sentences for crimes committed in a single criminal episode with a single victim or injury in which a firearm is not discharged.
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> Miller was charged with multiple offenses stemming from a single criminal episode involving a single victim in

> which the gun was not discharged. Under these facts, consecutive sentences are impermissible.

Jennings v. State, SC17-500 (Oct. 4, 2018)

On appeal from the denial of a postconviction motion under Rule 3.851, the Court held that Jennings was not entitled to relief under Hurst v. Florida, 136 S.Ct. 616 (2016), because his sentence of death became final in 1988 and Hurst did not apply retroactively for the reasons set forth in Hitchcock v. State, 226 So. 3d 216 (2017).

Additionally, Jennings was not denied due process as a result of a change of judges in the trial court "between the time when the postconviction court denied his rule 3.851 motion and when the court heard his motion for rehearing." "Despite the change in judges, Jennings was given a meaningful opportunity to be heard before his motion for rehearing was denied." The judge who denied rehearing had reviewed the entire case before denying the motion for rehearing.

Eleventh Circuit Court of Appeals

Ovalles v. United States, 17-10172 (Oct. 4, 2018) (en banc)

The Eleventh Circuit en banc, addressed the issue of whether the residual clause of 18 U.S.C. s. 924(c)(3), defining the terms "'crime of violence' to mean a felony 'that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'" is unconstitutionally vague.

The Court's decision hinged on whether the residual clause was interpreted under the "categorical approach" or the "conduct-based approach." Under the categorical approach, consideration of a defendant's specific conduct was barred, and the focus was exclusively on the statutory language defining the offense. Under that approach, the residual clause would not survive the vagueness challenge. Under the conduct-based approach, the vagueness challenge would fail.

The Eleventh Circuit held "that s. 924(c)(3)(B) prescribes a conduct-based approach, pursuant to which the crime-of-violence determination should be made by reference to the actual facts and circumstances underlying a defendant's offense. To the extent that our decision in *United States v. McGuire*, 706 F. 3d 1333 (11th Cir. 2013), holds otherwise, it is overruled."

The Court chose to apply the conduct-based approach based on the canon of statutory construction that provides that "'[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.'" The Court looked at the factors that previously led the Supreme Court to conclude that statutory construction required application of the categorical approach. After surveying those decisions, the Court concluded that the residual clause could "at the very least plausibly be read to bear a conduct-based interpretation, and we therefore hold, pursuant to the canon of constitutional doubt, that because the conduct-based reading spares the residual clause from the near-certain death to which the categorical approach would condemn it, the conduct-based approach must prevail." The Court joined the Second Circuit in so holding.

While the Court analyzed multiple factors in reaching its conclusion, the most significant one was the statutory language in this residual clause which stated "by its nature." While it was plausible to construe that phrase as referring to statutory elements, given the canon of construction requiring, if possible, that constitutionality be upheld, it was not "necessary" to construe "by its nature" as referring to the statutory elements alone.

Applying the conduct-based approach to the facts of this case, the Court looked to the question of whether the underlying attempted-carjacking offense, during which the firearm was possessed, as Ovalles admitted it actually occurred, constituted a crime of violence. Ovalles executed a written plea agreement, and pled guilty to the charge, as set forth in the information, of "'attempt[ing] to take a motor vehicle . . . from the person and presence of another, by force, violence and intimidation' with 'the intent to cause death and serious bodily harm.'" Further, the government's factual proffer in conjunction with the plea agreement, detailed the acts of the defendant and her co-conspirators of approaching the family in the vehicle, hitting a 13-year-old child with a bat, and firing an AK-47 assault rifle at the family who came to the aid of the victims of the carjacking.

First District Court of Appeal

Howard v. State, 1D17-575 (Oct. 2, 2018)

On appeal from convictions for attempted felony murder, home invasion robbery and possession of a firearm by a convicted felon, the First District affirmed and rejected Howard's argument that the trial court erred in denying his motion for severance from his accomplice.

The severance motion was based on the Sixth Amendment Confrontation Clause as the State introduced third-party testimony describing a jailhouse confession by the co-defendant. The First District found that the Sixth Amendment was not implicated because there were no "testimonial" statements involved here. The Confrontation Clause applies to testimonial statements. "'Testimonial' statements are those made with an expectation of being used in an investigation or prosecution of a crime, for example, those given to a police investigator, to a grand jury, at a preliminary hearing, or at a former trial." "The co-defendant's confessional statements in this case were made privately to friends from his neighborhood who were also in jail. In discussing 'what he was in for,' the co-defendant told the story of his crime to his friends, inculpating both himself and Mr. Howard. With these statements, the co-defendant was not acting as a witness, or giving testimony that would reasonably expected to be used prosecutorially."

The First District further found that the trial court properly concluded that the co-defendant's statements had sufficient guarantees of trustworthiness in order to qualify for admissibility as a statement against penal interest. The codefendant's "statements implicated himself in the vicious attack, and were made voluntarily and privately, out of the presence of investigators, to former friends from his neighborhood. The statements also provided details of the crime which were consistent with the other evidence in the case. Whatever their self-serving qualities, the co-defendant's statements did not shift the blame for the crime to Mr. Howard."

State v. Green, 1D17-877 (Oct. 2, 2018)

Nathaniel Green was charged with several offenses, including sexual assault. Prior to trial or determination of guilt, he died. After his death, the State filed a notice of abatement of prosecution. Two weeks later, the State obtained a restraining order, under the same case number, against the defendant's mother, who was not a party to the criminal case. The order directed her to remove a social media posting identifying an alleged victim of sexual assault and prohibited her from making any further posts "pertaining to the case or the alleged victim." On motion of Ms. Green's counsel, the trial court dissolved the order due to abatement of the criminal case. The State, in turn, petitioned for a protective order to restrain harassment of a victim or witness. The trial court dissolved the restraining order and denied the State's petition. The First District affirmed the trial court's order.

The abatement of the case prior to trial or guilt determination "rendered the case non-existent and 'death withdrew the defendant from the jurisdiction of the

court.'" Section 914.24, Florida Statutes, under which the State petitioned to prohibit harassment, "does not extend or preserve the trial court's jurisdiction in the criminal prosecution against Mr. Green under the circumstances of this case." Any remedy the State wishes to pursue against Ms. Green "must be in a separate proceeding."

Williams v. State, 1D17-1927 (Oct. 2, 2018)

"Williams filed a motion for discharge and termination of jurisdiction for incompetency and non-restorability, asserting that the intellectual disability underlying his incompetency was static and that he could not be held on charges without any likelihood of becoming competent to stand trial. After a hearing, the trial court denied the motion, finding a substantial probability that Williams would regain competency in the reasonably foreseeable future." Williams sought review by certiorari and the First District reversed "because the trial court's findings are not supported by competent, substantial evidence."

After Williams was charged with another crime in 2016, Dr. Blandino examined him for competency and issued a report finding him incompetent, but concluding that he was overmedicated and the medication likely contributed to poor performance during the examination. The report concluded "that contingent upon the stabilization of Williams' medications and competency training, his prognosis was 'guarded to fair' and a determination as to his likelihood of attaining competency would be possible in six to twelve months."

However, prior to the competency hearing in court, the doctor reviewed additional materials and concluded that "intellectual developmental disorder [from which the defendant suffered] is a static condition that could not improve, and the fact that Williams was declared non-restorable based on this disorder, rather than any mental illnesses, meant that he would never attain competency." He acknowledged his prior report, but stated that based on the additional information he obtained, there was "no chance of attaining competency . . . regardless of which medications Williams takes."

The trial court "did not find 'any evidence' that Williams' competency would not be restored because 'people's conditions change'" and the trial court's reliance on the original report was insufficient in light of the doctor's testimony at the hearing.

Oats v. State, 1D15-5169 (Oct. 3, 2018)

The First District reversed and remanded because the trial court failed to conduct a necessary competency hearing. If the trial court can not conduct one nunc pro tunc, a new trial must be held once competency is found to be restored.

Mardosas v. State, 1D17-2537 (Oct. 3, 2018)

A search warrant resulting in the seizure of Mardosas' computer and hard drive was found to be sufficient based on the rationale of the fellow officer rule.

The defendant was charged with 421 counts of aggravated possession of child pornography. The officer in charge of the investigation "was unable, personally, to view the video containing the child pornography – which he knew from his investigation had been downloaded onto Appellant's hard drive – but, instead, in his affidavit for search warrant, utilized a graphic description of the same video given by another detective who had personally viewed the video, which description he was able to acquire from a law enforcement database maintained by the National Center for Missing and Exploited Children." Any flaw in the affidavit in support of the search warrant was cured through application of the rationale of the fellow officer rule. That rule, as set forth in State v. Bowers, 87 So. 3d 704 (Fla 2012), provides: "If an officer relies on a chain of evidence to formulate his or her belief as to the existence of probable cause for a search or seizure, the rule excuses the officer from possessing personal knowledge of each link in the chain of evidence if the collective knowledge of all the officers involved supports a finding of probable cause."

Second District Court of Appeal

Hunt v. State, 2D17-2932 (Oct. 4, 2018)

A motion for judgment of acquittal as to possession of a conveyance used for trafficking of controlled substances was reversed because the State failed to prove the car would be used for trafficking.

Officers were in the process of arresting Hunt on an outstanding warrant for another offense and observed him working on a motorcycle parked next to a Chevy Impala. Hunt was going back and forth "as if retrieving tools out of the car." Upon seeing the officers, he got into the car; the key was in the ignition and the officer though he was attempting to flee. Upon the eventual arrest, a backpack on the front passenger seat was found and it contained the contraband.

"The only evidence of trafficking here is the amount of drugs discovered. There was no evidence that a sale had occurred or was going to occur during the time Hunt possessed the car. In fact, the State presented o evidence of a sale at all. All of the officers who testified stated that at the time they made contact with Hunt, he was busy repairing a motorcycle. . . . As such, there was nothing about the use of the car that was specific to Hunt's trafficking in a controlled substance; he just happened to set the drugs down there while he worked on the motorcycle."

Third District Court of Appeal

Parks v. State, 3D16-2041 (Oct. 3, 2018)

Parks was originally sentenced as a youthful offender, pursuant to a guilty plea, and received a sentence of community control plus probation. Upon violation of probation for new criminal offenses, probation was revoked and Parks was sentenced to 30 years in prison for the armed burglary and lesser sentences for two other offenses. The burglary sentence included a 10-year mandatory minimum pursuant to section 775.087(2), Florida Statutes.

Pursuant to Eustache v. State, 248 So. 3d 1097 (Fla. 2018), the Third District held that the trial court, upon revocation of probation for a substantive violation, was "authorized to either impose another youthful offender sentence, with no minimum mandatory, or to impose an adult Criminal Punishment Code sentence, which would require imposition of any minimum mandatory term of incarceration associated with the offense of conviction."

U.T. v. State, 3D17-633, 3D17-293 (Oct. 3, 2018)

U.T. appealed two contempt orders which were rendered based on "repeated violations of home detention orders." The Third District affirmed the trial court's orders.

The first contempt hearing resulted in a finding of indirect criminal contempt for 10 violations of prior court orders. Pending sentencing, U.T. committed additional home detention violations and was also charged with three new criminal offenses. A second contempt hearing resulted in a further finding of indirect criminal contempt based on three additional violations. The court sentenced U.T. to 140 days of secure detention.

U.T. argued that because he had been "'committed' to DJJ pursuant to section 985.441(1)(b) of the Florida Statutes, U.T.'s only disciplinary remedy was for DJJ to conduct a transfer hearing pursuant to section 985.441(4)." He argued that the trial court lacked the authority to enter the original two home detention orders and that the resulting contempt findings were unlawful.

U.T. was originally committed to DJJ for a minimum risk non-residential program. Under the statutory scheme, if rehabilitation does not succeed, "DJJ may invoke an administrative 'transfer' option to find another facility or program to address the child's ongoing behavior problems. S. 985.441(4), Fla. Stat. 92016). The trial court may agree to the transfer or hold a hearing to review the proposed transfer. Id. In this case, DJJ did not seek to transfer U.T. to another program after U.T. failed to attend AMI on a regular basis. U.T. argues that, because DJJ sought and obtained home detention of U.T., rather than a transfer to another rehabilitative program, the trial court violated chapter 985's commitment protocol when it complied with DJJ's request."

The Third District disagreed: "We read the plain and unambiguous language of section 985.03(18)(b) to authorize a trial court to order home detention to a committed child who has incurred a new criminal charge for which adjudication is pending." Because the original home detention orders were authorized, the contempt and resulting sentencing were affirmed.

W.T. v. State, 3D17-904 (Oct. 3, 2018)

Reasonable suspicion existed to support the stop of W.T. and two other juveniles "given the be-on-the-look-out transmission, the juveniles' geographic and temporal proximity to the armed robbery, the match between the suspects' reported descriptions and the juveniles' appearances, and the juveniles' behavior when approached; and, once the firearm was discovered, the officer had probable cause to arrest. Therefore, the officer was engaged in the execution of a legal duty when Appellant knocked him to the ground in an apparent attempt to escape."

K.N. v. State, 3D17-1467 (Oct. 3, 2018)

The trial court lost jurisdiction of the juvenile proceedings based on the incompetency provisions of section 985.19, Florida Statutes.

K.N. was found to be incompetent on September 6, 2013. Semi-annual evaluations continued to find him incompetent until November 14, 2016, more than three years after the first determination of incompetency. The case then proceeded to the delinquency trial.

Under section 985.19(5)(c), the trial court must dismiss the delinquency petition if "at the end of the 2-year period following the date of the order of incompetency, the child has not attained competency and there is no evidence that the child will attain competency within a year." Here, there was no evidence at the end of the two-year period that competency would be restored within a year.

At the two-year mark, one expert opined that K.N. still needed weekly counseling. That, "however, falls far short of stating K.N. will become competent to go to trial at any time, much less within a year." The Court also rejected the State's argument that the statute "requires affirmative evidence at the two-year mark that the child will not attain competency in the next year."

Fourth District Court of Appeal

Green v. State, 4D17-3276 (Oct. 3, 2018)

The Fourth District reversed the denial of a request for a downward departure sentence and remanded for further proceedings before a different judge. The sentencing judge erred in concluding that he lacked discretion to impose a downward departure sentence.

After an evidentiary hearing addressing the possibility of a downward departure under sections 921.0026(2)(c) and 921.0026(2)(d), the trial court found the defendant had a mental disorder that was unconnected to substance abuse, but found that the doctor said he was not amenable and that there was no evidence that the defendant would cooperate and take his medications.

The record contradicted the judge's factual findings regarding an absence of evidence. "In short, although there was conflicting evidence as to the defendant's amenability to treatment, there was not a total lack of evidence on this point . . . and there was in fact sufficient evidence to depart." Additionally, the trial court failed to make any findings as to the second reason for departure pursued by the defendant.

Fifth District Court of Appeal

Lazzaro v. State, 5D17-3300 (Oct. 5, 2018)

Lazzaro appealed convictions for dealing in stolen property and giving false verification of ownership to a pawnbroker. The Fifth District reversed and remanded for a new trial because the prosecutor, in closing argument, improperly bolstered the victim's credibility.

In closing, "the prosecutor invited the jury to compare and contrast Lazzaro's criminal history with that of the victim, pointing out that there had been 'no evidence in this case that's been presented that [the victim] has had any problems with the law.'" Suggesting the lack of a prior criminal record constitutes improper bolstering.