Case Law Update
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Supreme Court of Florida

Andres v. State, SC15-1095 (Sept. 20, 2018)

In a direct appeal from convictions for first-degree murder and other offenses, the Florida Supreme Court affirmed the convictions, but reversed the sentence of death for a new penalty phase pursuant to Hurst v. State, 202 So.3d 40 (Fla. 2016).

The Court addressed the manner in which the trial court handled a discovery violation. In a pretrial deposition, about five years prior to trial and four years after the murder, witness Ruiz stated that he was at a particular address, for his delivery schedule, on the day of the murder. Subsequently, he changed that during the State's trial preparations, and said that he was not at that address and explained that he was confused during the original deposition. The State did not disclose this alteration to the deposition testimony. Once a recorded statement is given, the State must disclose any "material change."

Upon objection by the defense, the court heard from both parties and Ruiz explained his confusion at the deposition. The trial court concluded that this was merely a clarification of prior deposition testimony and the Supreme Court found that that was not an abuse of discretion. Furthermore, although there had not been a full *Richardson* inquiry, the trial court did learn when the State became aware of this, and the defense, on cross-examination, was able to make use of the witness's convenient change of testimony on the eve of trial. There was no indication that the State's nondisclosure was willful or that the change was "material," or that the defendant's trial preparation was hindered.

The Court addressed arguments that the State introduced inadmissible hearsay. As to questions regarding why officers did not investigate Ruiz, the Court found that defense counsel had opened the door to these through its cross-examination of one witness.

Andres argued that the trial court erred in limiting cross-examination of three witnesses. The defense attempted to ask one witness, the owner of the efficiency rented by the victim and Ruiz, and the scene of the murder, why Andres, who was engaged to do renovation work, did not return home on the day of the murder or thereafter. The Court stated that even if this was error, under the facts of the case it was harmless. It was also observed that had defense counsel's question been answered, it might have opened the door to further detrimental evidence against the defendant. As to a second witness, the State had asked questions as to whether the victim and Ruiz had a good relationship, and defense counsel was barred from exploring that on cross-examination. Even if the State opened the door, the witness had responded that she did not know of any issues in the relationship and that "ended the inquiry." As to the third witness, Ruiz, the victim's boyfriend, when the defense started on a line of cross-examination, the court, at a sidebar, cautioned the defense about opening the door to potential adverse questioning by the State. Defense counsel abandoned the line of questioning. The defendant, on appeal, argued that the trial court had forced the defense to abandon the cross-examination. The Court disagreed; it was only a strategic decision by the defense.

The Court also rejected a challenge to a cell-site simulator search. In this case, "the police had a warrant, obtained after providing probable cause, to seize and search Andres' body, home and van. The evidence obtained – Andres' DNA and photographs of his body – was well within the scope of the warrant.

The Court addressed several comments by the prosecutor in closing argument. The Court rejected arguments that several comments improperly shifted the burden of proof. The comments included: "No evidence that this defendant is not guilty"; "[What] is on the not guilty side? Nothing"; "Innocent people don't need alibis"; and "Where is the evidence before you?" The prosecutor also used a poster board for a presentation to the jury showing a balance scale with "EVIDENCE, EVIDENCE" on the guilty side, and "speculation, guess" on the "not guilty" side. The trial court sustained an object as to one comment – "What is on the not guilty side? Nothing," – and gave a curative instruction. All of the comments were made during the State's rebuttal argument after the defense commented on the State's lack of evidence. "Thus, in making the above comments, the State was calling the jury's attention to the fact that its case against Andres was supported by the evidence presented, whereas Andres' insistence that he was innocent was not." There "is no

impropriety in observing, in response to arguments made by the defense, that the defense's theory of this case is not supported by actual evidence."

References to the defense's case as speculation, guessing and coincidences did not rise to the level of impropriety as in earlier cases where prosecutors improperly denigrated the defense. Several objections were sustained by the trial court, and the Supreme Court concluded "there was no error."

Several comments were challenged as being inflammatory. The comment that Andres took the victim "to the torture chair" resulted in a sustained objection, and the denial of a motion for mistrial based on it was not an abuse of discretion. A reference to the victim choking on her own blood was not inflammatory, but was an "accurate depiction of what happened to the victim based on the medical examiner's testimony."

Andres also argued that the trial court erred in limiting the defense closing argument. The Supreme Court disagreed. One defense comment regarding the jury's questions about motive to commit the crime resulted in an objection being sustained, and that was correct because the comment erred in suggesting that motive was an element of first-degree murder. Additionally, there was no error in precluding the defense from arguing inferences, "as none of the inferences defense counsel attempted to use were based on the facts in evidence."

The new penalty phase was ordered based on Hurst. The jury's recommendation of death was nonunanimous (9-3), and the Court was "unable to determine or speculate why the dissenting jurors voted for a life sentence. The error could therefore not be deemed harmless.

Lynch v. State, SC17-2235 (Sept. 20, 2018)

The Supreme Court affirmed the denial of a successive Rule 3.851 motion seeking to vacate two death sentences.

Relief pursuant to Hurst was denied because Lynch waived a penalty phase jury. He argued that the waiver was not valid because "trial counsel's insufficient mental health mitigation investigation ultimately caused him to make an unknowing and intelligent waiver of his right to a penalty phase jury. The Court's opinion

includes a detailed summary of the mitigation evidence presented by the defense. Lynch's argument failed because the "evidence Lynch's lawyers did or did not present has no bearing on the knowing and intelligent nature of the wavier of his right to a penalty phase jury."

The Court further rejected Lynch's argument that the prejudice prong of Strickland changed as a result of Hurst.

Eleventh Circuit Court of Appeals

United States v. Oliva, 17-12091 (Sept. 18, 2018)

Motions to dismiss by two codefendants, alleging a speedy trial violation under the Sixth Amendment, were denied, and the denial was affirmed on appeal. The district court, after an evidentiary hearing, had found that "the delay between indictment and arrest was the result of the Government's gross negligence," but the motions were still denied.

The Court analyzed the speedy trial claim under the four-factor test of Barker v. Wingo, 407 U.S. 314 (1972). The four factors are: the length of the delay; the reason for the delay; the defendant's assertion of the speedy trial right; and actual prejudice to the defendant.

In this case, a delay of 23 months, post-indictment, was not "inordinate." The offenses charged were complex and entailed extensive investigation and the two-year pre-indictment delay was not factored into the analysis of the first two factors under Barker.

The defendants were not arrested until about two years after the indictment. This was viewed by the Court as due to negligence of the government. Key factors were: "(a) a federal crime being investigated by a state law enforcement officer (albeit a federally-deputized one); (b) who was unfamiliar with federal indictment and arrest procedure; (c) and who was serving as a solo investigator for the very first time; (d) in a case where the prosecutor who secured the indictment left the U.S. Attorney's Office and was not replaced on the case for more than a year." Under these facts, two of the first three Barker factors did "not weigh heavily against the

Government," and the defendants had to prove "actual prejudice, which they did not do below and do not attempt to do here."

First District Court of Appeal

Boyd v. State, 1D18-0183 (Sept. 20, 2018)

The trial court abandoned a plea colloquy when the defendant was unaware of the minimum sentence he was facing. The court reset the hearing, hopefully to conclude a plea colloquy. At the next hearing, the parties and court "mistakenly believed appellant had already entered a plea," and the court sentenced the defendant without any further plea colloquy. The conviction and sentence were reversed and remanded for further proceedings.

Johnson v. State, 1D18-1488 (Sept. 20, 2018)

The defendant filed a Rule 3.801 motion, seeking credit for time previously served in "prison." The trial court dismissed the motion as untimely under Rule 3.801. The trial court erred, however. Rule 3.801 applies only to prior "jail" credit. A motion seeking credit for prior prison time, although designated a Rule 3.801 motion, should have been treated as a Rule 3.800(a) motion, and that rule does not have any time limitation period.

Williams v. State, 1D18-2782 (Sept. 20, 2018)

Williams was charged with first-degree murder, conspiracy to commit first-degree murder and accessory after the fact. The case involved the murder of her former husband based on a plan to obtain benefits of large insurance policies. Williams had been having an affair with Winchester, the co-conspirator. Winchester entered into a plea agreement with the State and provided information implicating Williams.

Williams was denied bail after an Arthur hearing and filed a habeas corpus petition to challenge that denial. She argued that the State failed to meet its burden at the Arthur hearing as a matter of law because a co-conspirator's statement can not suffice to establish that proof of guilt was evident or the presumption great. The First District rejected that argument.

Williams further argued that absent physical evidence linking her to the crime the sworn statement from Winchester was insufficient due to its internal inconsistencies. However, there was other circumstantial evidence of guilt – sworn statements from the mother and brother of Williams' former husband, and the evidence of the insurance policies. Williams threatened to deny her former husband's mother visitation with the granddaughter; and she failed to disclose a $500,000 Cotton States insurance policy "on the sworn petition for presumptive death certificate or the $1 million policy issued by Kansas City Life on the form filed with Cotton States."

Second District Court of Appeal

Taylor v. State, 2D16-5268 (Sept. 21, 2018)

Taylor appealed his conviction for robbery with a deadly weapon. The Second District reversed for a new trial because "the trial court abused its discretion by allowing the prosecutor to repeatedly and improperly suggest to the jury that defense counsel had influenced the victim to change his story between the robbery and trial."

Prior to trial, the victim, a convenience store clerk, gave a statement alleging that the defendant threatened him with a knife in his hand. At trial, the victim testified that the item in the hand had a round edge; that he did not think it was a weapon at the time; and that it looked like a spatula and was not a weapon. The prosecutor then started asking questions about the number of times the witness had talked to defense attorneys since the incident.

After an objection and sidebar conference, with a proffer of the witness's testimony regarding communications with defense counsel – in which the witness said that the item was about a foot long and had a rounded edge and no point and seemed wobbly – the trial testimony resumed, and the prosecutor asked further questions about the communications between defense counsel and the witness. The prosecutor reiterated the them that the witness changed his version of events as a result of pressure or persuasion from defense counsel. The witness gave "unequivocal testimony that he had changed his mind about the nature of the object before any meeting with defense counsel." The State did not present any evidence

to the contrary. "The prosecutor's argument not only impermissibly impugned defense counsel's integrity but went so far as to imply that defense counsel had committed some form of witness tampering."

The foregoing errors were compounded by the prosecutor's suggestions, through questioning, again without evidentiary basis, that the defendant's mother had "also somehow persuaded or pressured Bader [the store clerk] to change his story."

As a final related error, the prosecutor's comments "impermissibly invited the jury to view Bader's prior inconsistent statements as substantive evidence." Prior inconsistent statements are admissible only for impeachment purposes, not as substantive evidence. Although the prosecutor was arguing to the jury that it should focus on the video from the security cameras, "the obvious implication of his argument was that Bader's prior inconsistent statements were the truth, as the video was 'the silent witness that's not somehow impacted by the Defendant's mother coming to the store. It's not impacted all of a sudden after meeting with defense counsel two times. . . .'"

M.P. v. State, 2D17-871 (Sept.21, 2018)

M.P. appealed a restitution judgment, after an adjudication for offenses including burglary and grand theft of a vehicle. The restitution judgment was for the sum of $5,080, which represented the deductible for repairs to the vehicle – the amount the victim had to pay to "replace the vehicle's damaged tire and damaged rims, and the fair market value of items that had been inside the vehicle when it was stolen but were missing when the police recovered it."

The Second District agreed, in part, with M.P.'s argument, and found insufficient evidence to support awards as to several items that were missing from the vehicle. As to one item, a cordless screwdriver, the trial court awarded $250, based on testimony that it had been purchased about two or three years earlier for $243 or $244, and it was in "fairly good working condition." While that was sufficient evidence for the court to determine an appropriate amount, there was no evidence to support the appreciation in value.

As to two other items, the victim "merely testified to the price that he had originally paid for each approximately three to four years before the theft. With only this information and the absence of any testimony concerning either the condition of each at the time of the theft or depreciation, the trial court had insufficient evidence Bromwich it could determine a fair market value at the time of the theft."

The trial court also failed to make "any findings concerning what M.P. or his parent(s) or guardian(s) could reasonably be expected to pay or make." The Second District rejected the State's argument that M.P. failed to preserve this issue – he did object contemporaneously with the court's failure to make the findings and he was not required to object again after the court imposed a lien. The Court likewise rejected the State's argument that "M.P. had the burden to prove what he and his parents could reasonably have been expected to pay or make and that by failing to provide any such evidence on which the court could premise such a finding, M.P. relieved the trial court of its duty to make such a finding." While the controlling criminal statute imposes such a duty on the defendant, it did not apply to juvenile proceedings.

Perez v. State, 2D17-4670 (Sept. 21, 2018)

The summary denial of a Rule 3.850 motion was reversed and remanded for further proceedings as to one claim.

The motion alleged that the defendant "informed his trial counsel that he suffered from mental illness, that he had previously been involuntarily committed due to his mental illness, and that his mental illness prevented him from assisting his counsel in preparation of his defense. He further alleged that '[a]t the time of entering the plea, Defendant wavered between using a cocktail of sedatives that seized his competence, and refusing the cocktail due to its adverse psychiatric effect' and that if his counsel had investigated, the trial court would have found him incompetent to enter a plea." The trial court denied the claim on the basis of the plea colloquy, finding it refuted the claim as the defendant did not advise the court regarding any mental health concerns.

The Second District's opinion quotes the plea colloquy and concludes that it did not "provide sufficient information to conclusively refute the claim. Perez's answers during the colloquy were minimal, two-word responses – e.g., "yes, sir" and

"sort of." On remand, the trial court was given the opportunity to rely, if possible, on additional portions of the trial court record to conclusively refute the claim. If not possible, the claim requires an evidentiary hearing.

Third District Court of Appeal

L.M. v. State, 3D15-893 (Sept. 20, 2018)

L.M. appealed an adjudication for trespass on school grounds. The Third District affirmed and found the evidence was sufficient. The offense requires proof, inter alia, that the person charged is "a student currently under suspension or expulsion."

L.M. argued that "his 'suspension' never became effective." After receiving the written notice of suspension, L.M. entered the school cafeteria and classrooms on three separate days. His grandmother testified that she was the legal guardian and that she was not advised of the suspension prior to L.M.'s arrest. There was substantial evidence of efforts by school authorities to contact L.N.'s mother or a guardian, but none of the phone numbers they had or were provided were working. The vice principal "testified that L.M. called someone and told them he was on suspension." Section 1006.09(1)(b), Florida Statutes, requires the principal or principal's designee to "make a good faith effort to immediately inform a student's parent by telephone of a student's suspension and the reasons for the suspension."

Silva v. State, 3D17-1054 (Sept. 20, 2018)

Silva appealed convictions for second-degree murder and attempted first-degree murder. The conviction for second-degree murder was reversed based upon a finding of fundamental error in the use of a jury instruction that shifted the burden to the defendant to prove the victim's aggression beyond a reasonable doubt in order to establish the defense of self-defense. The conviction for attempted first-degree murder was affirmed because there was no request for a self-defense instruction on that charge.

The instruction on self-defense advised the jury that "to find the defendant was justified in his use of deadly force to resist an attempted first-degree

premeditated murder, you must find the following three elements beyond a reasonable doubt. . . ." The instruction then set forth the elements of self defense.

The instruction used was not the then-current standard instruction and it was erroneous. The Court notes that between 2006 and 2007 the standard jury instruction "inadvertently contained the inaccurate language putting the burden of proof on the defendant." That error was corrected by an amendment in 2007. The trial in this case took place 10 years later.

Defense counsel did not affirmatively agree to the erroneous instruction. "Defense counsel apparently thought he was agreeing to the then-effective form of the standard jury instruction on justifiable use of force, and there is no indication that counsel for the parties or the court knew otherwise."

The Court also rejected the State's effort to extend the concurrent sentence doctrine of Jordan v. State, 143 So. 2d 335, 338 (Fla. 2014) to this case.

Fourth District Court of Appeal

Johnson v. State, 4D17-935 (Sept. 20, 2018)

The trial court erred by failing to make a competency determination prior to trial. Upon motion of defense counsel, a competency expert was appointed and a report was submitted, finding the defendant competent, but there were no further proceedings regarding competency prior to trial. On remand, if possible, the court can make a finding as to whether Johnson was competent nunc pro tunc.

Delancy v. State, 4D17-43 (Sept. 20, 2018)

On appeal from a conviction for high speed or wanton fleeing and resisting an officer without violence, the defendant argued that trial counsel was ineffective on the face of the record for failing to object to impeachment "of his star witness based upon pending charges against that witness." The Fourth District affirmed, finding that even if counsel was deficient for not objecting, Delancy did not demonstrate that the result of the trial would probably have been different.

The defense witness, McIntyre, appeared in court in jail clothes and the prosecutor "questioned him about his many pending charges, including robbery with a deadly weapon, aggravated assault with a firearm, and grand theft." Defense counsel did not object. On appeal, the State conceded that this line of questioning was improper. The State "many not question a defense witness on his or her pending criminal charges of which he or she has not been convicted."

Delancy's failure to demonstrate prejudice was based upon the totality of the facts of the case, which included two officers who "positively identified appellant as the driver of the vehicle," and dashcam video testimony that refuted defense evidence. McIntyre stated that the driver was "Parks," whom one of the officers knew and that officer testified that the driver was not Parks.

Delancy also filed two Rule 3.800(b) motions pending the direct appeal, and argued that the trial court misunderstood its past sentencing practices, which the defendant argued reflected lower sentences for those convicted of the same offense. One motion was denied; the other was not ruled on and was thus deemed denied. Rule 3.800(b) was not a viable procedure for such claims, as Rule 3.800(b) authorizes challenges to the sentence, not to the sentencing process. As the claims were not of sentencing error, the absence of a contemporaneous objection at the time of sentencing meant that the claims were unpreserved and could only succeed if they constituted fundamental error.

Lastly, the trial court had acknowledged that it had sentenced others to lesser sentences. The court had considered the facts of this case – speeding through a residential neighborhood – to be more egregious than the other cases.

Butler v. State, 4D17-544 (Sept. 20, 2018)

Butler appealed convictions for sexual battery on a person less than 12 years of age. The Fourth District affirmed and addressed the argument regarding the trial court allowing the victim to testify via satellite. The offenses occurred in 1998 and Butler was not arrested until 2009. The State obtained an affidavit from the victim stating that she resides in Australia and can only return if approved for a return visa, for which she had not yet been approved. Additionally, travelling to Florida would jeopardize her employment due to the amount of work she would miss. She would

also suffer financial hardship. A few months prior to trial, the victim did obtain approval for the return visa. The court still permitted her to testify by satellite.

The trial court did not approve the satellite testimony merely as a convenience to the victim. "Instead, the trial court found that the important policy considerations were that the State has an interest in prosecuting alleged child sex offenders and that the Victim was beyond the subpoena power of the court and refused to travel to testify."

Butler also challenged the sufficiency of the oath of the victim because she was not subject to prosecution in Australia for perjury. However, there was a treaty between the United States and Australia that addressed extradition for the crime of perjury, and it covered offenses punishable under the laws of both countries by incarceration for more than one year. Perjury in an official proceeding is a third-degree felony and thus qualified for extradition. The challenge to the oath therefore had no merit.

Sanders v. State, 4D17-2489 (Sept. 20, 2018)

The Fourth District affirmed a conviction for first-degree murder in the shooting death of Bradwell, and addressed the argument that the trial court erred "by allowing the jury to hear evidence that, within two hours after Bradwell's death, a shooting occurred at appellant's home."

The details of this incident "were relevant to establish the sequence of events that led up to police arriving at Kerr Street and identifying appellant, particularly where defense counsel had opened the door by portraying the police as not having conducted a through investigation and implying that the police just showed up to disrupt a sleeping family."

Pittman v. State, 4D16-4278 (Sept. 20, 2018)

The Fourth District reversed a conviction for dealing in stolen property because the trial court failed to make a competency determination prior to trial. The court had appointed an expert to determine the defendant's competency. At a subsequent hearing, the court noted that the report was in the file and it said the defendant was competent. Defense counsel then stipulated that the defendant was

competent. The court then stated: "Well, he's competent." The trial court, however, did not enter a written order finding the defendant competent.

Here, the parties did not stipulate to the contents of the report and there was no agreement to determine the issue on the basis of the report alone. It was unclear as to whether the trial court "made an independent determination of appellant's competency." The trial court may have based its decision solely on the defense stipulation to competency, which would not be sufficient.

On remand, the trial court is authorized to make a nunc pro tunc determination of competency, if possible. If not, a new trial must be held once the defendant is found competent.