Case Law Update
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Supreme Court of Florida

Franklin v. State, SC14-1442 (Nov. 8, 2018)

Franklin committed several non-homicide offenses when he was 17. He received three concurrent sentences of 1,000 years with parole eligibility. After 11 parole review hearings, he has a presumptive parole release date of 2352. He challenged his sentences pursuant to Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 567 U.S. 460 (2012).

Although the Florida Supreme Court would have held that the sentences did violate Graham and/or Miller based on its own prior decision of Atwell v. State, 197 So. 3d 1040 (Fla. 2016), which had held "that a juvenile homicide offender's life *with parole* sentence violated the Eighth Amendment based largely upon a presumptive parole release date set far beyond Atwell's life expectancy," the Florida Supreme Court has now concluded in both Franklin and State v. Michel, 43 Fla. L. Weekly S298 (Fla. July 12, 2018), based on the intervening decision of the United States Supreme Court in Virginia v. Le Blanc, 137 S.Ct. 1726 (2017), that Atwell "improperly applied *Graham* and *Miller*." "As we held in *Michel*, involving a juvenile homicide offender sentenced to life with the possibility of parole after 25 years, Florida's statutory parole process fulfills *Graham*'s requirement that juveniles be given a 'meaningful opportunity' to be considered for release during their natural life based upon 'normal parole factors,' . . . as it includes initial and subsequent parole reviews based upon individualized considerations before the Florida Parole Commission that are subject to judicial review. . . ."

The Court's opinion was joined by four justices; three justices dissented.

Tisdale v. State, SC16-1032 (Nov. 8, 2018)

Tisdale appealed convictions and sentences for first-degree murder of a law enforcement officer and other offenses. The only issues raised on appeal were sentencing issues. The death sentence for the first-degree murder was reversed for a new penalty phase pursuant to Hurst v. State, 202 So. 3d 40 (Fla. 2016).

The jury returned its penalty phase verdict on October 9, 2015, by a vote of 9-3. The final sentencing by the Court took place after the Supreme Court's decision in Hurst v. Florida, 136 S.Ct. 616 (2016). The sentence by the Court was also imposed after the Florida Legislature enacted chapter 2016-13, Laws of Florida, which "authorized imposition of the death penalty, but only if at least ten jurors recommend a death sentence." The judge, when imposing the death sentence, found two aggravating factors: the victim was a law enforcement officer engaged in the lawful performance of his duties; and a conviction for a prior violent felony. The trial court also found the existence of 41 nonstatutory mitigating circumstances, most of which were given little weight, with a few receiving moderate weight.

Tisdale first argued that chapter 2016-13 should apply and mandate a life sentence without the possibility of parole based on double jeopardy principles. The Court disagreed: "Tisdale's jury was sworn and rendered its recommendation before the passage of chapter 2016-13. Because the recommendation supported imposition of the death penalty at the time the jury was sworn and jeopardy attached, double jeopardy principles do not bar a new penalty phase trial."

On the basis of prior decisions, the Court rejected Tisdale's argument "that he is entitled to automatic commutation of his death sentence to a life sentence without the possibility of parole pursuant to section 775.082(2), Florida Statutes (2012)). See Caylor v. State, 218 So. 3d 416, 425 (Fla. 2017).

Hurst requires reversal "when the jury does not unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravation outweighs the mitigation." Additionally, the jury's recommendation of death must be unanimous. The lack of such unanimity is subject to harmless error review, but the error could not be deemed harmless where the jury's recommendation was not unanimous.

Spencer v. State, SC17-1269 (Nov. 8, 2018)

Spencer's conviction and death sentence for first-degree murder, after a jury recommendation of death by a vote of 7-5, became final in 1997. Spencer was not entitled to relief under Hurst v. Florida, 136 S.Ct. 616 (2016), because his conviction and sentence were final prior to the decision in Ring v. Arizona, 536 U.S. 584 (2002).

First District Court of Appeal

Williams v. State, 1D17-1519 (Nov. 7, 2018)

The First District disagreed with Williams' argument that the information charging armed burglary of a dwelling was fundamentally defective. It sufficiently alleged the elements of the offense and Williams understood the charges.

Williams was convicted of armed burglary of a dwelling with a person assaulted. On the day before the trial, an amended information was filed, changing the charge from an attempt to a completed armed burglary of a dwelling with a person assaulted. The caption of the amended information stated: "ARMED BURGLARY OF DWELLING WITH PERSON ASSAULTED" and referenced section 810.02(2), Florida Statutes. However, the body of the document was not changed. On the morning of the trial, the court addressed the amended information and defense counsel stated that the defense was not prejudiced by the amendment and the trial proceeded. The mismatch was not noticed.

Second District Court of Appeal

T.A.K. v. State, 2D17-3378 (Nov. 9, 2018)

The State failed to prove that T.A.K. knew or should have known that the car the police found him in was stolen. Therefore, the disposition order based on trespass in an unoccupied conveyance was reversed with directions to dismiss the charge.

After the car was reported stolen it was tracked to an apartment building and located. When an officer approached, she saw one male reclining in the driver's seat, but could not identify that person. While she approached, no one entered or left the car. While she saw movement in the vehicle, no one was in the driver's seat when she and a second officer made contact. One juvenile, L.R., was found in the front passenger seat and ordered out. T.A.K. was found 'lying on the floor 'squished' down '[i]n between the two back seats.'" The keys to the car were in the center console next to L.R. and there was no damage to indicate that the car had been stolen.

> Here, the keys to the car were found in the center console next to L.R., and the car had no damage indicating that it had been stolen. Taken in the light most favorable

> to the State, a reasonable interpretation of T.A.K.'s position in the car when he was found is that he was hiding. For the purpose of analyzing whether an individual has knowledge of whether a vehicle is stolen, we cannot make a meaningful distinction between fleeing from a stolen vehicle and hiding in the back seat of a stolen vehicle. Had T.A.K. left the back seat and fled upon the officers' approach, that evidence would be insufficient to prove that he knew or should have known that the car was stolen. Of course, just as there are many reasons why a juvenile might flee from law enforcement, those reasons would apply to hiding as well. If fleeing is insufficient to establish the knowledge element, then so too is hiding.

Pena, et al. v. State, 2D17-4465 (Nov. 9, 2018)

The petitioners were drivers appearing in county court on civil traffic infractions. They sought the disqualification of the judge and the circuit court denied their prohibition petition. They then petitioned the Second District for review by writ of certiorari and the Second District found that the prohibition petition in circuit court should have been granted.

The disqualification issue related to emails and communications between an employee of the clerk's office, the traffic court hearing officer and the county court judge. The motion to disqualify alleged that the employee of the clerk's office learned that the hearing officer had said that he had been talked into withholding adjudication in one case. The clerk's office employee decided to talk to the judge about it and the judge allegedly spoke to the hearing officer, who then made a statement to the petitioners' counsel that he would no longer be as lenient as he had been. The county court judge subsequently inquired why counsel had requested the emails, and the attorney explained the foregoing to the judge. The judge then allegedly explained that he had read a report about Lee County being known for aggressive drivers, "presumably explaining why he 'talked to' the traffic magistrates about their actions in traffic court." It was further alleged that after these communications, counsel's clients' cases "were moved from their originally-scheduled docket to a special docket assigned to this particular county judge."

Allegations suggesting a judge's tough stance and noting prior adverse rulings "may not have been sufficient in themselves to show bias." "However, the petitioners also alleged that the county judge instructed the hearing officer to be less

lenient on traffic defendants and that the county judge believed that drivers in the county were aggressive. Moreover, the petitioners alleged that the county judge inquired why counsel requested the judge's e-mails and that soon thereafter, counsel's clients' cases were removed from their original docket and transferred to the docket of this particular county judge."

Hernandez v. State, 2D18-1875 (Nov. 9, 2018)

The Second District found merit in two claims raised in a petition alleging ineffective assistance of appellate counsel.

First, The Court agreed and the State conceded, that "once trial counsel took a position adverse to Mr. Hernandez's obvious desire to withdraw his plea, the trial court should have either permitted counsel to withdraw or discharged counsel and appointed conflict-free counsel for this critical state of the proceedings."

Hernandez entered a negotiated plea of no contest to burglary and theft charges. He was then found to be incompetent. After competency was restored and the sentencing hearing was scheduled, counsel announced that Hernandez sought to withdraw the plea, and counsel – not the attorney who negotiated the plea – stated that there was no good faith basis to do so. Hernandez was asserting that he did not understand the original plea colloquy. As counsel did not move to withdraw the plea, there was no ruling on such a motion. Hernandez was not asked if he wanted to withdraw the plea. The court just proceeded to sentencing.

On the basis of this claim, the case was remanded to the trial court with directions to appoint conflict-free counsel to file a motion to withdraw if Hernandez still wants to pursue withdrawal.

Additionally, appellate counsel was ineffective for not filing a Rule 3.800(b)(2) motion to preserve the claim of an improper designation as a violent felony offender of special concern. Hernandez was arguing that the VFOSC designation, even though called for in the plea agreement, was not authorized, because he was not on probation at the time of the burglaries and his only prior offense was not a qualifying offense. The Court agreed with Hernandez's argument. The Court rejected the State's argument that "Hernandez may be designated a VFOSC because he will qualify as such when he begins his probationary term for the qualifying offense of first-degree burglary."

Third District Court of Appeal

Charles v. State, 3D17-0361 (Nov. 7, 2018)

Charles appealed convictions for first-degree murder and other offenses. The Third District affirmed and disagreed with his argument that "the trial court abused its discretion by denying his motion for a mistrial based on two improper comments made by the prosecutor."

The murder occurred in a pawnshop, and both the defendant and another individual, Carr, testified at trial, each blaming the other for the shooting of the owner of the pawnshop. On cross-examination of the defendant, the prosecutor first referenced Charles' looking for and exploiting girls, and having referred to himself, on direct examination, as a hustler. The prosecutor's questioning continued: "And you're trying to hustle this jury with that testimony that you just gave to your defense counsel. You're trying to hustle them, that you hustled those girls, and like you tried to hustle Martin Spring [the victim]." And: "So let's talk about what you told him on direct because I'm not going to let you hustle this jury."

Additionally, after Charles denied knowledge of the stolen car, the prosecutor asked, "[y]ou expect this jury to believe that?"

On appeal, Charles argued that the comments and questions "were designed to attack his integrity." This argument was not preserved in the trial court. As to the comments about hustling, defense counsel had objected that the prosecutor was making comments, not asking questions. As to the final question/comment, defense counsel objected to a "speaking argument." Preservation requires that the same argument be made in the trial court.

Even if properly preserved, there was no abuse of discretion in denying the motion for mistrial. The two improper comments were isolated, not pervasive, and no curative instruction was requested. Additionally, the evidence of guilt was deemed overwhelming, and any error was deemed harmless beyond a reasonable doubt as there was "no reasonable probability that the two isolated comments made by the prosecutor affected the verdict."

Fourth District Court of Appeal

State v. I.J., 4D17-2982 (Nov. 7, 2018)

The trial court erred "by failing to commit I.J. to a mandatory fifteen days in secure detention for the offense of armed burglary of a conveyance."

Section 790.22(9)(a) states: "Notwithstanding s. 985.245, if the minor is found to have committed an offense that involves the use or possession of a firearm, . . . (a) For a first offense . . . the minor shall serve a minimum period of detention of 15 days in a secure detention facility." "The question raised in this case is whether the statute requires that the minor *actually* use or possess a firearm in order for the enhancement to apply. We agree with the Third District and hold that it does not."

Alexis v. State, 4D18-788 (Nov. 7, 2018)

On appeal from the summary denial of a Rule 3.850 motion, the Fourth District reversed and remanded for resentencing with a corrected scoresheet. The scoresheet used at sentencing improperly included victim injury points for sexual penetration.

The defendant pled guilty to lewd or lascivious battery. "When a defendant pleads to an offense that does not require proof of sexual penetration as charged, victim injury points for penetration cannot be assessed unless the defendant stipulates that penetration occurred or agrees to inclusion of the points as part of a plea bargain." In this case, "[n]either the information nor the factual basis for the plea alleged penetration," and there was no stipulation as to penetration.

Depasquale v. State, 4D18-1487 (Nov. 7, 2018)

The trial court erred in denying a Rule 3.850 motion as successive. The motion in question pertained to a conviction and sentence that were not the same as the conviction and sentence at issue in the prior motion. Additionally, the trial court erred in denying the motion as untimely. It was filed on November 1, 2016, less than two years after it became final in December 2014. And, the defendant was free to amend the motion in January 2018 "because he did not allege any new claims and the court had not taken any action on the motion."

James v. State, 4D17-1071 (Nov. 7, 2018)

Upon resentencing the defendant, who was 16 years old when he committed the first-degree murder for which he was convicted, the trial court relied on the 2014 juvenile sentencing statutes and resentenced the defendant to 55 years in prison. The court failed to include the provision for judicial review after 25 years. This was treated as a matter requiring a ministerial correction on remand for which the defendant did not need to be present.

Donahue v. State, 4D18-2148 (Nov. 7, 2018)

Pursuant to the Court's prior decisions in Hart v. State, 246 So. 3d 417 (Fla. 4th DCA 2018) an Pedroza v. State, 244 So. 2d 1128 (Fla. 4th DCA 2018), the Court affirmed the convictions and sentences and certified conflict with several decisions of the Second and Fifth Districts.

Fifth District Court of Appeal

Haggan v. State, 5D18-3267 (Nov. 5, 2018)

The Fifth District granted an emergency habeas corpus petition challenging pretrial detention without bond.

After bond was granted and posted, Haggan failed to appear and a trial management conference and the trial court issue a capias. One months later, Haggan turned himself in an moved to set bond. He claimed that his failure to appear was unintentional. The trial court denied the motion without a hearing and without any findings. The trial court was required to grant a hearing on the motion and determine whether the failure was willful and "whether any reasonable conditions of pretrial release exist."