Case Law Update
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Supreme Court of Florida

Shepard v. State, SC17-1952 (Nov. 1, 2018)

The Supreme Court resolved a conflict between the First and Second Districts "on the issue of whether an automobile can be considered a 'weapon' for purposes of enhancing a defendant's sentence to a higher degree under Florida's reclassification statute, section 775.087(1), Florida Statutes (2011). The Court held that an "automobile can be a weapon for purposes of the reclassification statute."

Shepard was convicted of manslaughter with a weapon; the weapon was an automobile. The trial court reclassified the offense from a second-degree felony to a first-degree felony pursuant to section 775.087(1), for using a weapon. Section 775.087(1) reclassifies a felony to a higher degree when the defendant "carries, displays, uses, threatens to use, or attempts to use any weapon or firearm" during the commission of the felony.

The Court looked to multiple definitions of "weapon" in dictionaries. The Court also looked to the way in which it has "repeatedly used the word 'weapon' to describe ordinary objects that were used as weapons." The Court further receded from the holding in its own opinion in State v. Houck, 652 So. 2d 359 (Fla. 1995), where the Court stated "that an object must be 'commonly understood to be an instrument for combat' in order to constitute a weapon under section 775.087(1)." In Houck, the defendant had been convicted of manslaughter with a weapon, "after repeatedly beating the victim's head against pavement." The Court now held "that any object used or intended to be used to inflict harm on another constitutes a weapon within the meaning of the statute." Furthermore, "whether an object is being used as a weapon during the commission of a felony would typically be a question of fact for the jury." Here, too, the Court receded from a portion of its prior opinion in Houck, which had left that determination for the court.

Nock v. State, SC17-472 (Nov. 1, 2018)

The Supreme Court reviewed a certified conflict between the Fourth and Second Districts as to an "issue regarding the rule of completeness codified in the

Florida Evidence Code and a related issue concerning the rule of evidence authorizing the impeachment of hearsay declarants."

> Specifically, two issues are presented on review: (1) whether a defendant is permitted to require the State under section 90.108(1), Florida Statutes (2014) – the statutory rule of completeness – to introduce into evidence the entire video recording of the defendant's statement to police when the State has questioned a detective on direct examination concerning inculpatory statements of the defendant without producing any portion of the recording of the defendant's statement and (2) whether the State is permitted to impeach a defendant under section 90.806(1), Florida Statutes (2014) – which authorizes attacking credibility of a hearsay declarant – when the defendant elicits from the detective on cross-examination exculpatory portions of the defendant's statement to the police.
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> We hold that section 90.108(1) does not apply unless a written or recorded statement is introduced into evidence. We also hold that a defendant is subject to impeachment under section 90.806(1) whenever the defendant introduces through cross-examination hearsay exculpatory statements of the defendant.

A detective obtained a Mirandized statement from Nock and it was videotaped. At trial, neither party introduced the video recording. The State, on direct examination, elicited the detective's testimony as to incriminating statements made by Nock during that interrogation. Nock sought to require the State to admit the entire video recording under the rule of completeness. The trial court "denied the request, specifically finding the rule of completeness . . . inapplicable because the State did not offer the video into evidence. The [trial] court stated that if the desired portions of the statements were elicited when the defense cross-examined the detective, then section 90.806(1), Florida Statutes (2014), allowed the State to use [Nock's] prior convictions for impeachment."

The statutory rule of completeness applies only to writings or recordings, not to oral testimony about statements that were made. Therefore, section 90.108(1) was inapplicable because the recording was not being offered into evidence. A

defendant who introduces exculpatory portions of the defendant's out-of-court statement through the rule of completeness operates under the concept of opening-the-door, and that principle then entitles the State to subject the defendant to impeachment.

Eleventh Circuit Court of Appeals

Jones v. Secretary, Florida Department of Corrections, 17-10693 (Oct. 29, 2018)

Jones challenged his Florida conviction for aggravated domestic battery in a federal habeas corpus petition. The federal district court concluded it was untimely. The Eleventh Circuit reviewed that determination.

A federal habeas corpus petition must be filed within one year of the finality of the state court conviction. That one-year limitations period is tolled when a state court post-conviction motion, such as a Rule 3.850 motion, is "properly filed" in state court. In this case, the federal district court concluded that the Rule 3.850 motion was not "properly filed" in state court, and therefore the pendency of the Rule 3.850 motion did not toll the running of the one-year federal limitations period for the filing of the federal habeas petition.

The state-court 3.850 motion set forth a claim of newly discovered evidence based on the allegation that Jones recently discovered the failure of his trial counsel to convey a plea offer. The state court conducted an evidentiary hearing and then ruled that if there was such a failure to convey, "Defendant had the opportunity to discover the offer in question within the two-year time limit imposed by Rule 3.850." The trial court alternatively found that the motion was frivolous.

If the 3.850 motion was denied because it was "untimely," it would then follow that the motion was not "properly filed" in state court and therefore did not toll the running of the federal limitations period. The Eleventh Circuit therefore considered whether a Florida court's conclusion that evidence "could have been discovered" previously with due diligence constituted a finding that the motion was "untimely." The Eleventh Circuit concluded "that based on the language in the Trial Court Order, an untimeliness finding was subsumed within the state court's denial of relief because (according to that court) the petitioner *could* have discovered the new evidence several years before. To hold otherwise would be tantamount to saying that 'magic words' are required which, as we have stated, is not the law." Thus, the state court's ruling was one which was based on untimeliness and the federal habeas court was required to defer to that ruling.

The Court rejected a further argument by Jones based on Pace v. DiGuglielmo, 544 U.S. 408 (2005). "To repeat, *Pace* holds that a state post-conviction motion is not, and cannot ever be, 'properly filed' if it was rejected by the state court as untimely. To limit this clear holding to cases involving movants who are required (but fail) to 'allege and prove' that their motion was timely, and not apply the holding to movants who are only required to (and do) 'allege' timeliness, would . . . 'leave a gaping hole in what [*Pace*] plainly meant to be a general rule.'" "Because *Pace* clearly hold that when a state court finds a post-conviction motion untimely '"*that [is] the end of the matter"'* and the motion cannot be considered a tolling motion. . . ."

Phillips v. Warden, 14-11910 (Oct. 31, 2018)

Phillips sought review of the denial of a federal habeas corpus petition. The federal district court denied the petition as time-barred. The Eleventh Circuit granted review "on the sole issue of whether the district court erred by concluding that the statute of limitations began to run when the deadline expired for Petitioner to file a certiorari petition in the Georgia Supreme Court, rather than ninety days after the date the Georgia Supreme Court dismissed Petitioner's certiorari petition as time-barred."

In 2004, the Georgia Court of Appeals affirmed one conviction but reversed another due to insufficient evidence. In 2005, Phillips was sentenced to 20 years on the remaining conviction for child molestation. His appeal from that conviction and sentence was dismissed on July 24, 2006; a motion for reconsideration was denied on August 16, 2006. Under Georgia Supreme Court rules, he had 10 days from August 16, 2006 in which to file a notice of intent to apply to the Georgia Supreme Court for certiorari, and 20 days, until September 5, 2006, to file the certiorari petition with the clerk of the Georgia Supreme Court. Both of those rules are "mandatory." Phillips never filed the notice of intent to apply for certiorari and did not submit the petition until September 7, 2006, two days after the deadline. Thus, the Georgia Supreme Court dismissed the petition as untimely. A motion for reconsideration was denied on December 15, 2006. No further review was sought.

The one-year federal limitations period begins running when the state court conviction and sentence become final. The federal magistrate determined that it became final when the time to file the Georgia Supreme Court certiorari petition expired on September 5, 2006. Phillips argued that finality did not occur until 90 days after the Georgia Supreme Court dismissed his certiorari petition as untimely,

an argument which provided for an additional 90 days in which to seek certiorari review in the United States Supreme Court after the dismissal in the Georgia Supreme Court.

United States Supreme Court rules and case law provide that a United States Supreme Court certiorari petition must be filed within 90 days "after entry of the order [of the state court] denying discretionary review." The federal district court found this period and rule to be inapplicable, because "when a petitioner misses a deadline for seeking review of his direct appeal in the state's highest court, his conviction becomes final on the date the deadline expires."

The Eleventh Circuit agreed with the federal district court and affirmed. Under 28 U.S.C. s. 2244(d)(1)(A), there are two alternative dates upon which a conviction becomes final – 1) at the conclusion of direct review; or 2) upon the "expiration of the time for seeking such review." When direct review was not pursued all the way to the state supreme court, Phillips fell into the category governed by the expiration of the time for seeking such review.

In re: Tracy Garrett, 18-13680 (Nov. 2, 2018)

The Eleventh Circuit denied a request for leave to file a successive motion to correct his federal sentence. Garrett wanted to argue that the residual clause in the definition of "crime of violence" in section 924(c) of 18 U.S.C. s. 924(c)(3)(B) was unconstitutionally vague in light of Johnson v. United States, 135 S.Ct. 2551 (2015), and Sessions v. Dimaya, 138 S.Ct. 1204 (2018). The Eleventh Circuit, however, has already ruled that the section in question is not unconstitutionally vague "because it requires a conduct-based instead of a categorical approach," in Ovalles v. United States, 905 F. 3d 1231 (11th Cir. 2018) (en banc).

First District Court of Appeal

Tucker v. State, 1D17-0752 (Oct. 31, 2018)

An order revoking probation was reversed where the State conceded that the trial court failed to conduct a proper Faretta hearing "after appellant made an unequivocal request to represent himself."

Davis v. State, 1D17-0941 (Oct. 31, 2018)

Davis was convicted of possessing a controlled substance and challenged the denial of his motion to suppress physical evidence obtained from the search of his vehicle and statements which ensued.

An officer stopped the vehicle because Davis failed to come to a complete stop when exiting a gas station. Davis stopped on a dirt road on the side of his mobile home. He parked outside a chain-link fence that surrounded the home. There "was no type of enclosure around the vehicle or roof over it." A few minutes later, a second officer arrived with a dog and a canine sniff of the vehicle was conducted. No one entered the fenced-in portion of the property. Davis objected to the search and did not give consent. He argued that the vehicle was within the curtilage of the residence and that the search therefore required a warrant. The First District disagreed.

The Court addressed the four factors enunciated in United States v. Dunn, 480 U.S. 294 (1987). First, the distance between the home and parking area was about 20 feet. This was the only factor suggesting curtilage.

Second, the area was outside of the fence. Third, there was nothing indicating that the parking area was used for any purpose other than parking. Fourth, there was no effort to conceal the area from public observation.

Coffell v. State, 1D17-1611 (Oct. 31, 2018)

Coffell's Criminal Punishment Code score of 16.9 points called for a non-state prison sanction absent written findings under section 775.082(1), Florida Statutes, that such a sanction could present a danger to the public. The trial court made such findings and imposed an upward departure sentence.

Pursuant to the First District's earlier decision in Booker v. State, 244 So. 3d 1151 (Fla. 1st DCA 2018), the Court again held that section 775.082(1) was unconstitutional as applied as it authorized the trial court "to make factual findings that increased his maximum sentence."

Ford v. State, 1D17-2091 (Oct. 31, 2018)

An order dismissing some claims of a Rule 3.850 motion was dismissed as untimely. The First District reversed for further proceedings.

When the motion was first filed, the trial court found that it was insufficient and granted Ford 60 days to amend, and Ford complied with that order. The trial court then ruled that this motion reiterated some sentencing claims that were related to other sentencing claims included in a Rule 3.800(a) motion that was then pending on appeal. The trial court dismissed those claims as untimely due to the pending 3.800 motion, but the order did not include an explicit deadline for refiling at the conclusion of the appeal. When the 3.800 appeal ended, Ford did refile the 3.850 motion, which the trial court again dismissed as untimely. This order of dismissal found that Ford should have inferred from the prior order of the court that he had 60 days after the completion of the appeal.

"It is well-established that a court cannot enforce a filing deadline which must be inferred by a party."

Floyd v. State, 1D17-5007 (Oct. 31, 2018)

The First District affirmed the denial of multiple claims of ineffective assistance of counsel in a Rule 3.850 motion.

It was alleged that defense counsel received an email with the State's notice to seek an enhanced sentence as a prison releasee reoffender; that counsel received the email on May 6th, opened it on May 8th, and did not inform the defendant of it until jury selection on May 11th. Thus, Floyd argued that if he had received prompt notice of it prior to trial, he would have reviewed the evidence and decided to accept the then-existing offer of an eight-year sentence from the State, which was less than the 25 years he received after his trial.

The transcript of portions of the trial conclusively refuted the claim. Defense counsel asked for leave to speak on the record at the beginning of jury selection. She advised the court that she received the notice on May 8th and advised the defendant of it the morning of jury selection. "She wrote him a note explaining the designation and how it would result in him serving 100% of the maximum sentence, and noted that one of his charged offenses was a first-degree felony punishable by life in prison. She explained that there was a great deal of evidence against him and a strong likelihood that he would be convicted at trial. She informed him that if he was convicted, the judge would have no discretion to impose anything other than a life sentence." She further stated that the PRR designation was a "game changer" and that she urged Floyd to accept the State's eight-year offer, which was still open that morning.

State v. Scharlepp, 1D18-1511 (Oct. 31, 2018)

A petition for writ of prohibition, seeking disqualification of the trial judge, was granted. When denying the state's second motion to disqualify, "the trial judge attempted to refute the charges of partiality. This created an independent basis for disqualification."

Shaw v. State, 1D18-1804 (Oct. 31, 2018)

A special master recommended that Shaw be granted a belated appeal; the First District rejected that recommendation. The master made the recommendation "because the trial court failed to orally pronounce Shaw's right to appeal." The master set forth three reasons to support this: "first, counsel should not have consented to sentencing on the day of trial and Shaw's appellate rights 'would have been better protected' had he not; second, family members of Shaw were present at trial and they were never made aware that Shaw could appeal; and third, trial counsel could have just filed a notice of appeal without Shaw's consent. None of these reasons supports belated appeal."

Shaw absconded after sentencing and the "real question presented here is whether a defendant is entitled to a belated appeal when the court does not pronounce the right to appeal at sentencing, when the defendant has absconded and is not present at sentencing." While the failure of a sentencing court to advise a defendant of the right to appeal would typically provide an entitlement to a belated appeal, that is because "the defendants there were present to hear the court's advice." "If the defendant is absent, there is no one to advise, and the failure to present the advice is harmless. The court is not required to give advice to any empty chair. Granting a belated appeal in this circumstance is elevating form over substance."

Second District Court of Appeal

I.K. v. State, 2D16-2186 (Oct. 31, 2018)

I.K. was found guilty of criminal mischief and resisting an officer without violence. The trial court should have granted the motion for judgment of dismissal as to the charge of resisting an officer.

Two officers received a dispatch call "to respond to a residence for a local pickup of I.K. for violation of probation." The dispatch call "was an internal practice

of the Department by which officers from the Department check in on juveniles who are on probation." Upon arrival at the residence, the officers found I.K. hiding in a bedroom closet. When exiting the apartment, I.K. "refused to walk down the stairs so the officers had to physically carry him. Once they got him in the patrol car, he kicked out a window. They had to use a special technique to restrain him."

The local pickup dispatch was compared to a BOLO, and under certain circumstances "could be utilized to establish the lawful execution of a legal duty under the fellow officer rule to support an adjudication of delinquency for resisting an officer without violence." "Here, however, the State adduced no proof that the juvenile was on probation at all, much less what the terms of his probation were and whether there was probable cause to believe he had violated those terms in order to justify an arrest." "Another's knowledge of probable cause to believe that I.K. violated a specific condition of his probation might very well have motivated the dispatch call; and that knowledge could be imputed to the arresting officers despite their ignorance of those details. However, to establish that these officers were lawfully executing a legal duty when they took I.K. into custody, the State was required to adduce evidence establishing the factual basis for that probable cause."

Fourth District Court of Appeal

Cadavid v. State, 4D17-1224 9Oct. 31, 2018)

Cadavid appealed a conviction for first-degree murder with a firearm. The State conceded that the "trial court erred in prohibiting him from speaking to his attorney during a ten-minute recess between his direct and cross-examinations." The Fourth District, further agreeing with the State, concluded that the error was harmless and affirmed.

After the 10-minute recess, defense counsel stated that he complied with the court's prohibition, but objected and sought permission to consult with the defendant privately. The judge deferred to the prosecution, and the State would not stipulate to that. After cross-examination, a defense motion for mistrial on this basis was denied.

The reason why the error was deemed harmless was that "the defendant's performance on cross-examination could not have affected the verdict. While his credibility was at issue, on direct he opened the door to the fact that he had lied to the police a *second* time about how the victim was shot. On cross-which was relatively brief (only 22 of 892 pages of transcript), his testimony was cumulative to

his testimony on direct. The defendant did not dispute his lies, and agreed with the State on almost every question. While he disputed his level of sobriety during the police interview, he had already impeached himself on direct by stating that methamphetamine does not make him hallucinate, disoriented, or crazy, but 'just levels [him] out' when his leg is bothering him. Moreover, the videotape of the interview – which depicts an alert, calm, coherent, and cooperative defendant – speaks for itself."

J.H. v. State, 4D17-2466 (oct. 31, 2018)

The trial court erred in denying a motion to suppress. A 911 call was received from a person identifying herself as a restaurant owner on a specified street. The caller reported that there were drug dealers on the corner and provided a description of three individuals, but did not describe any drug selling activity. She just stated that when a police vehicle drove by, they would disappear and return shortly afterwards.

An officer was dispatched to investigate and described the area as a high crime area. The caller had referenced two of the men wearing white t-shirts. The officer said that the dispatcher referenced t-shirts and shorts, but the caller did not mention shorts. Upon arrival, two officers observed one adult in a white t-shirt. Upon seeing the police vehicle, he began walking to the rear of an apartment complex. There were no other individuals in the area. When the police followed, near the rear of the apartment complex, one officer saw two juveniles, "wearing no shirts and peeking into an apartment window." The officer was familiar with one of those boys, J.H., from prior calls, and knew that he lived in the complex. The two boys started walking in the opposite direction.

When the second officer approached, the boys "reached into their pockets, and the first officer ordered them to stop because she was nervous for her safety." J.H was ordered to walk towards the officer and remove his hands from his pocket. The officer then observed a container in his hand: it "was a white, cylindrical container with a red cap and appeared to be a Krazy Glue container with the label off. Based on her training and experience, she knew that these containers are commonly known to hold crack cocaine." A pat-down search was conducted and the officer found a handgun on J.H.

The initial call from the person identifying herself as a restaurant owner did "not describe any criminal activity at all, whether it is information supplied by a citizen informant or witnessed by police." Nor did the remaining observation of the

officer provide founded suspicion for a stop. The descriptions of how the individuals were dressed did not comport with what the caller related. The fact that J.H. was walking away from the officer "in an alley in which his home was located" did not constitute "headlong flight" such as would warrant a finding of founded suspicion.

Curry v. State, 4D18-1294 (Oct. 31, 2018)

In 2018, Curry filed a rule 3.850 motion seeking "to vacate a plea he entered in 2004 to felony driving while license revoked as a habitual traffic offender. . . . His motion relied on a change in statutory interpretation that was announced in *State v. Miller*, 227 So. 3d 562 (Fla. 2017), in which the Court held "that a defendant, who never obtained a license, could not be convicted under section 322.34(5)."

The trial court properly found that the 3.850 motion was untimely. Curry argued that his motion was timely filed within two years of the Miller decision. The Miller decision "did not announce a new fundamental constitutional rule" and did not apply retroactively. As such, Miller did not trigger a new two-year limitations period for the filing of a motion.

Fifth District Court of Appeal

Raymond v. State, 5D17-2759 (Nov. 2, 2018)

Raymond appealed a conviction for attempted second-degree murder. The Fifth District reversed for a new trial.

First, the Court rejected Raymond's argument that the admission into evidence of a 911 call from the alleged victim, his mother, violated the Confrontation Clause. The 911 call "described events 'as they were actually happening' in order to assist law enforcement with the ongoing emergency she faced. Thus, the statements were nontestimonial and not in violation of the Confrontation Clause."

The 911 call also satisfied the requirements for admission under the excited utterance hearsay exception. She "called 911 immediately after Raymond shot at her, while under the stress of the shooting, and explained what had just happened before she had time for reflective thought or the capacity for conscious misrepresentation."

Statements from the victim to two deputies upon arrival at the crime scene were problematic, however. "Those statements, explaining in detail the events

leading up to the incident, occurred after the threat ceased and were the result of a police interrogation similar to the one conduct in *Hammon [v. Indiana*, 547 U.S. 813 (2006)], intended to capture historical information. . . . Because Mrs. Raymond did not testify at trial, nor was she ever cross-examined, we agree with Raymond that the introduction of these statements violated his Sixth Amendment right to confrontation." The Court reviewed the evidence and concluded that the error was not harmless beyond a reasonable doubt.

Parcilla v. State, 5D17-2980 (Nov. 2, 2018)

After ordering that Parcilla be evaluated for competency, the trial court "failed to conduct a hearing before trial or enter a written order." The case was reversed and remanded for further proceedings to determine competency. If possible to do so and if Parcilla is found to have been competent at the time of the trial, the trial court may enter a nunc pro tunc order to that effect; otherwise, the judgement and sentence must be vacated and a new trial held when competency is found to have been restored.

Davis v. State, 5D18-103 (Nov. 2, 2018)

Davis appealed a conviction and order of restitution following his plea to burglar and grand theft. Although the State conceded as to the imposition of restitution, the Fifth District disagreed and rejected the concession, as the issue had not been properly preserved.

Davis challenged the sufficiency of evidence as to the amount of restitution. He tried to preserve the issue through a Rule 3.800(b) motion during the pendency of the appeal and prior to briefing. However, a claim of insufficient evidence is "not a sentencing error cognizable in a rule 3.800(b) motion, and therefore, that issue was not preserved by Davis's motion. . . . Ultimately, though, Davis's argument fails because he was present at the hearing and agreed to the amount of restitution ordered; therefore, he had the opportunity to be herd and declined."