Case Law Update
November 19, 2018
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Supreme Court of Florida

Harvey v. State, SC17-170 (Nov. 15, 2018)

Harvey's Hurst claim in a Rule 3.851 motion was barred because his convictions and sentences became final in 1989 and "*Hurst* relief does not extend to cases final before the United States Supreme court decided *Ring v. Arizona*, 536 U.S. 584 (2002)."

Mungin v. State, SC17-815 (Nov. 15, 2018)

Mungin's death sentence became final in 1997 and his post-conviction claim based on Hurst therefore did not apply retroactively as it was final prior to the decision in Ring v. Arizona.

Reed v. State, SC17-896 (Nov. 15, 2018)

A judge presiding over Rule 3.851 proceedings should have granted a motion for disqualification:

> While Judge McCallum was not the assigned prosecutor on Reed's case, she was actively prosecuting capital cases during the time period when Reed's prosecution was ongoing. It was alleged that she was part of the team of capital prosecutors and that, "as part of the capital team during her tenure with the State Attorney's Office, each capital prosecutor including Judge McCallum had input in the decision making in each other's cases." Considering the unique aspects of death penalty cases, including the very decision to seek the death penalty, we conclude that, in these narrow circumstances, Reed's motion was legally sufficient to require Judge McCallum to recuse herself from Reed's case.

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-04, SC18-1113 (Nov. 15, 2018)

The Supreme Court authorized for publication and use amendments to the following standard jury instructions:

11.7	Unlawful Sexual Activity with Certain Minors
11.10	Lewd, Lascivious, Indecent Assault or Act Upon or in the Presence of Child; Sexual Battery
11.11	Lewd or Lascivious Offenses Committed Upon or in the Presence of an Elderly Person or Disabled Person
11.12	Incest
11.18	Sexual Misconduct by a Psychotherapists
11.21	Transmission of Material Harmful to Minors by Electronic Device or Equipment
29.13	Sexual Activity with an Animal

Several instructions "reverse the order of the elements pertaining to the victim's and/or the defendant's age and the defendant's conduct, so that the defendant's conduct is listed first in order."

Several instructions add definitions for "bona fide" and "union," and "the term 'enhancement' is replaced by 'reclassification' in several of the instructions, "because section 775.0862, Florida Statutes (2018), is a reclassification statute."

"[I]n instructions 11.10(e), 11.10(g), and 11.11, the statutory definitions for 'sadomasochistic abuse' and 'sexual bestiality' are changed from those in sections 847.001(13) and 847.001(15), Florida Statutes (2018), respectively, to those in sections 827.071(e) and 827.071(g), Florida Statues (2018), respectively." A special comment pertaining to the use of those definitions is also added.

Some of the instructions modify the element pertaining to the defendant's knowledge, adding "at the time of the offense."

Instruction 11.21 adds definitions for "prurient interest" and "morbid interest."

Eleventh Circuit Court of Appeals

United States v. St. Hubert, 16-10874 (Nov. 15, 2018)

The Court sua sponte vacated its prior opinion and issued a new opinion.

St. Hubert challenged firearm convictions under 18 U.S.C. s. 924(c), arguing that his predicate robbery and attempted robbery offenses did not constitute crimes of violence. The original opinion of the Court, reported at 883 F. 3d 1319 (11th Cir. 2018), concluded that the predicate robbery offenses qualified as crimes of violence under both the residual and elements clauses in s. 924(c)(3).

The new opinion readopts and reinstates in full "Sections I, II, III(A), and III(C)" of the prior opinion "just as previously written." Section III(B) of the original opinion had affirmed under the residual clause "based on the panel opinion in Ovalles v. United States, 861 F. 3d 1257 (11th Cir. 2017). Subsequent to the original opinion in St. Hubert, the Eleventh Circuit issued a new en banc opinion in Ovalles v. United States, 905 F. 3d 1231 (11th Cir. 2018) (en banc). Section III(B) of the new opinion in St. Hubert was therefore modified to include the analysis of the en banc Ovalles opinion. The convictions were still affirmed under the residual clause.

The difference was that in St. Hubert I, the panel, without the benefit of the en banc Ovalles opinion, rejected a void-for-vagueness challenge to the "risk-of-force" language in section 924(c)(3)(B), using a "conduct-based" approach of statutory construction, taking into consideration the "actual, real world facts of the crime's commission" "in determining if that crime qualifies under s. 924(c)(3)(B)'s residual clause." The district court had not applied that conduct-based approach in this case. Remand was not required because there was an adequate record to make the determination. "Specifically, at his plea hearing, St. Hubert admitted he robbed an AutoZone store on January 21, and that he brandished a firearm at store employees and threatened to shoot them, before stealing approximately $2,300." This qualified as admitted conduct that the "robbery involved a substantial risk that physical force may have been used against a person or property."

Second District Court of Appeal

Darwin v. State, 2D17-618 (Nov. 14, 2018)

A discretionary fine was imposed at a resentencing and the defendant was not present. As something that entails discretion is not a ministerial act, the defendant

had the right to be present at that resentencing. The case was therefore reversed and remanded for resentencing.

Aguilar v. State, 2D17-4086 (Nov. 14, 2018)

Aguilar entered a no contest plea to the charge of possession of a firearm as a felon. He reserved the right to appeal the denial of his suppression motion and the Second District reversed because the "State failed to establish that it discovered the weapon within the scope of the consent Mr. Aguilar voluntarily gave to search his home."

Shortly after 2:00 a.m., seven uniformed officers arrived near Aguilar's duplex in response to a 9-1-1 call that shots had been fired. The officers "were attempting to locate the source of the gunshots." A group of individuals standing in the street indicated that the shots came from the duplex. Another shooting had occurred at the same address a few weeks earlier, and someone had been shot and injured. There was also an odor of gunpowder in the immediate area.

For a few minutes, deputies completed a lawful sweep of the duplex "to locate potential shooters or victims, to clear the residence, and to secure the scene. At this point, the exigency had ended. As such, the police needed to obtain a warrant for Mr. Aguilar's consent in order to lawfully reenter and search the duplex."

One detective entered without a warrant and prior to Aguilar's signing of a consent form. While he testified that "one motivation was to get any remaining individuals out of the house in order to secure the crime scene and start the investigation, all other testimony indicates that no one remained in the house upon his arrival and that the scene had already been secured." This detective did not find anything while he was in the house.

This detective's illegal entry occurred about 20 minutes prior to the signing of the consent form by Aguilar. "However, in the interim, Mr. Aguilar agreed to walk [another detective] through the duplex in an effort to explain the circumstances surrounding the burglary [which had occurred]. Additionally, Mr. Aguilar's actions demonstrated that he was aware of his right to refuse to sign the consent form. First, his initial refusal to do so suggests that he knew he had that option. Second, by giving partial consent – limiting the areas of the home in which he allowed the officers to search – he acknowledged his right to refuse consent to areas he did not want to be searched."

The Second District then found that the consent was not the product of Detective Johnson's unlawful entry, thus "overcoming the rebuttal be presumption that it was involuntary." Voluntariness was then assessed under the totality of the circumstances.

Relevant factors in this part of the analysis included: Aguilar's arguable "vulnerable mental state when he signed the consent form." He had been in a state of panic when officers arrived and as many as 10 officers were going in and out of the duplex during the initial sweep. Aguilar's testimony regarding consent was deemed contradictory, with some supporting voluntariness, including knowledge of the right to refuse and knowledge of his ability to limit the scope of consent. As to the assertion of a "submission to a show of coercive police authority" the Court rejected that and viewed this as a situation of the police questioning Aguilar in his capacity of the victim of a burglary and "the circumstances of the alleged burglary and shooting," which he willingly explained.

Thus, based on the totality of the circumstances, consent was deemed voluntary.

Ultimately, however, the officers exceeded the scope of the consent. The question was "not whether the officers had a good faith belief that they were searching within the scope of the homeowner's consent. Rather, the courts must use the following objective reasonableness standard to measure the scope of consent: '[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect.'"

The trial court found that Aguilar had limited the search to certain areas. That was a factual finding which bound the appellate court, even though officers testified that they did not recall any conversation limiting the scope of consent. Aguilar testified that he consented only to searches of the front bedroom and living room – rooms associated with the burglary, "where the officers observed bullet holes, casings, and broken windows." There was some conflicting testimony as to whether the weapon in question was found in the front or back bedroom.

The Second District did not resolve that conflict, because the State "adduced no evidence that the law enforcement officers understood that the consent was limited at all, much less any evidence that their search was actually limited."

Ultimately, the trial court's finding that the officers' thought they acted in good faith as to the scope of the search "elides the State's burden to establish what

a typical reasonable person would have understood Mr. Aguilar's consent to have included and to prove the officers did not exceed it. More importantly, it cannot be squared with the facts adduced at the hearing – that the officers neither acknowledged nor observed any limitations on the consent whatsoever." Thus, "the state failed to meet its burden to establish that the search did not exceed the scope of Mr. Aguilar's consent."

Third District Court of Appeal

Silva v. State, 3D17-1054 (Nov. 14, 2018) (on rehearing)

The Third District modified its prior opinion from September 20, 2018, which is discussed in the Case Law Update of September 25, 2018.

The Third District reversed one of the convictions – second-degree murder – because the trial court used the wrong instruction as to self-defense murder and included language that improperly shifted the burden to the defense. The opinion on rehearing eliminated some of the language from the first opinion that referred to reversal for not using the correct pattern instruction when not providing a reason for not using the pattern instruction.

The opinion also certifies conflict with a decision of the First District in Knight v. State, 43 Fla. L. Weekly D404 (Fla. 1st DCA Feb. 19, 2018), review granted, No. SC18-309 (Fla. June 25, 2018), on an issue regarding waiver by defense counsel. The Third District applied its own prior decision in Philippe v. State, 795 So. 2d 173 (Fla. 3d DCA 2001), which held "that in order for defense counsel's agreement with a defective jury instruction to constitute a waiver, defense counsel must be aware of the defect 'and affirmatively agree to it.'" The First District, in Knight, found that objections to an erroneous instruction were waived, "noting among other factors 'the existence of a plausible strategic reason for allowing the erroneous instruction to go to the jury,'" and "defense counsel's 'active involvement in developing the jury instructions.'"

Peoples v. State, 3D18-693 (Nov. 14, 2018)

A habeas corpus petition was filed in the Eleventh Judicial Circuit, challenging a conviction from the Thirteenth Judicial Circuit. The Eleventh Circuit erred by denying the petition as successive and untimely. The Eleventh Circuit lacked jurisdiction, as the petition should have been filed in the Thirteenth Judicial Circuit as only that court had the authority to review the conviction that it entered.

Rodnez v. State, 3D18-1948 (Nov. 14, 2018)

The two-year limitations period for filing a motion to withdraw a plea due to a failure of the court to advise as to the consequence of deportation "'commences when the judgment and sentence become final unless the defendant could not, with the exercise of due diligence, have ascertained within the two-year period that he or she was subject to deportation.'"

Grant v. State, 3D18-2283 (Nov. 16, 2018)

A bench warrant was quashed because the defendant was not given sufficiently clear notice that an appearance would be required after execution of a written waiver of appearance.

Fourth District Court of Appeal

Pierre v. State, 4D16-3863 (Nov. 14, 2018)

In an appeal from a conviction for second-degree murder and a 40-year sentence, the Fourth District held that the trial court erred "when the trial court considered a lack of remorse at sentencing."

At the sentencing hearing, the judge stated: "I believe that this was a cold-blooded killing . . . a crime for which the jury found you guilty and of which you've shown no remorse." In a Rule 3.800(b) motion to correct sentence, the defendant argued both that the reference to lack of remorse was improper and that the reference to a cold-blooded killing showed that the court considered a higher degree of murder than second-degree.

The trial court's denial of the motion to correct sentence was based, in part, on a case in which the defendant had waived his right to a jury trial by entering a plea and admitted commission of the crimes. Under the facts of that case, the court could consider a lack of remorse when rejecting mitigation.

The Fourth District remanded for resentencing before a different judge.

Joseph v. State, 4D17-1651 (Nov. 14, 2018)

The defendant moved to suppress statements made during an interrogation, arguing that the interrogation continued after he requested counsel. The trial court denied the motion, and the Fourth District agreed, finding that "the defendant's musings quoted above amounted to thinking out loud about 'maybe' retaining an attorney, not an unequivocal request for a lawyer that would have required that interrogation cease."

The most significant portion of the questioning at issue was the following:

> Defendant: I don't think it will be – I don't know the word for it, but I don't think it will be, like – I don't want to say smart, but – 'cause I don't want to try to make it seem like I'm here trying to be slick or something. So I don't really want to use the word smart, but I don't think it will be something for me to be, you know, maybe discussing certain things until maybe I get a lawyer.

After a continuation of this response, the detective responded that "that's your prerogative," and the defendant twice asked the detective for advice as to what to do. The detective responded that he could not tell the defendant what to do and eventually said: "If you want to speak to a lawyer, then I'm done. Bu then you – you know, you don't get another chance to talk to me. So I' m out, okay?"

Before any questioning about the offense, the detective inquired whether the defendant wanted to continue talking or wanted to talk to a lawyer. The defendant responded: "I mean, it depends what we're – what we're talking about." The detective responded that he was going "to talk about why you're in here and what charges." The defendant responded, "Okay," and after a further inquiry if he wanted to talk to the detective, he said: "I can talk to you about it. I mean, like I said, we can talk and, I mean, if I feel like it's something, I'll just say, you know, I don't feel like I should or not."

The Fourth District described the colloquy: "The defendant here was contemplating his situation. He talked about perhaps not answering certain questions until maybe getting a lawyer. He did not request an attorney. He did not refuse to answer questions without an attorney."

As to a secondary argument that the detectives "failed to give him honest and accurate answers to his bona fide questions about his right to an attorney," the Fourth District found this argument to be both unpreserved for review and without merit. The defendant, on appeal, "fails to pinpoint any 'bona fide question' asked by the defendant any improper response by the detective. At the pages quoted in appellant's brief, the single question the defendant asks the detective is whether she would advise him to get an attorney. She repeatedly states that she cannot give him legal advice, and entirely proper response."

Ramsay v. State, 4D18-34 (Nov. 14, 2018)

The trial court failed to conduct a competency hearing before a jury trial, after ordering an evaluation. On appeal, Ramsay argued that the jury verdict and sentence should be reversed, with a remand for a competency hearing before a new trial could occur.

The Fourth District disagreed as to the remedy. Pursuant to prior decisions, including Dougherty v. State, 149 So. 3d 672 (Fla. 2014), the Court remanded to allow a nunc pro tunc competency determination. If the trial court finds that it is unable to conduct such a nunc pro tunc determination, the trial court must then grant a new trial.

Fifth District Court of Appeal

Baker v. State, 5D13-1249 (Nov. 16, 2018) (on remand from the Florida Supreme Court)

Baker was 16 years old at the time of the commission of the offense for which he was convicted and sentenced – attempted second-degree murder of a law enforcement officer. He was sentenced to 54 years in prison.

The Fifth District originally affirmed the conviction and sentence based on its own prior case law, that an aggregate sentence of 90 years imposed on a juvenile did not violate the Eighth Amendment. The Florida Supreme Court overturned that earlier precedent – Henry v. State, 175 So. 3d 675 (Fla. 2015) – and quashed the Fifth District's decision in Baker.

On remand, pursuant to Lee v. State, 234 So. 3d 562 (Fla. 2018), the Fifth District ordered a resentencing proceeding under the provisions of chapter 2014-220, Laws of Florida.

Berger v. State, 5D17-1313 (Nov. 16, 2018) (On motion for rehearing en banc)

Berger argued that the trial court erred in denying a motion for judgment of acquittal "on the charge of attempted sexual battery because he did not commit an overt act." Berger relied on the Fifth District's decision in State v. Duke, 709 So. 2d 580 (Fla. 5th DCA 1998).

The Fifth District concluded that he did commit an overt act and receded from its decision in Duke. The facts of the case are set forth in the opinion:

> Appellant responded to an advertisement on Craigslist for a sexual encounter with a man and woman. Although the ad itself made no reference to a minor, it was posted as part of an undercover sting operation looking for child predators.
>
> A detective, posing as the father of a ten-year-old girl, responded to Appellant's e-mail explaining that he was looking for someone who would teach his ten-year-old daughter about sex. Although Appellant emphasizes that he initially thought he was responding to an ad for an encounter with an adult couple, he nevertheless promptly indicated his interest in the detective's proposal, stating "[w]hile your request may be unusual by most people's standards," "I am very intrigued" and "am [a] very open-minded and nonjudgmental person."
>
> Over the course of his e-mail conversation with the detective, Appellant was quite specific about the sexual acts he would perform with the child. Appellant then spoke with the detective twice by phone about both the logistics of his drive from north of Ocala to Clermont and the specific sexual acts that he intended to perform with the child. Appellant also promised that he would bring "protection."
>
> Appellant drove more than an hour to a decoy residence in Clermont being used by law enforcement,

> knocked on the door, and was immediately arrested. He had three condoms in his pocket.

Duke had previously held that an agreement to meet a person the defendant believed was a minor for a sexual encounter was not an overt act. The Fifth District now concluded that Duke "was wrongly decided and recede from its holding." The Court now emphasized that "an overt act does not require 'the last possible act toward consummation of the crime.' . . . Rather, the crime of attempt is complete where a defendant 'does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof.'"

The acts described above demonstrated that the defendant "clearly acted in pursuit of his criminal intent, 'going beyond mere preparation to the actual commencement of the crime.' . . . In fact, Appellant took every step necessary to commit the crime of sexual battery except enter the decoy residence and come into physical contact with a real victim."

Minix v. State, 5D18-1432 (Nov. 16, 2018)

In a Rule 3.850 motion, Minix "alleged that his plea was involuntary because his trial counsel failed to investigate and raise a prescription defense to the charge of trafficking in a controlled substance." The trial court relied on Stano v. State, 520 So. 2d 278 (Fla. 1988), to deny the claim, "finding that Minix's voluntary plea waived his right to present defenses to a jury."

Reliance on Stano was misplaced "in that a general waiver of defenses is insufficient to refute a more specific claim. . . . In this case, there was no specific discussion of the prescription defense during the plea colloquy and no indication that Minix was aware that a prescription defense could be a viable defense to the trafficking charges."

The denial of the motion as to this ground was reversed and remanded for further proceedings, including leave for Minix to amend his motion to state a sufficient claim.

Duncan v. State, 5D18-2486 (Nov. 16, 2018)

Duncan filed a motion for relief from judgment under Rule 1.540(b), Florida Rules of Civil Procedure. That rule is limited to civil cases. The trial court should have treated the motion as one filed under Rule 3.850.