Case Law Update
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Supreme Court of Florida

Campbell v. State, SC17-1725, SC18-260 (Nov. 29, 2018)

Campbell appealed the denial of his Rule 3.851 motion, and also sought habeas corpus relief alleging ineffective assistance of appellate counsel in his direct appeal from his conviction for first-degree murder and sentence of death.

Campbell alleged that trial counsel was ineffective for failing to seek suppression of multiple statements he made. The most problematic of the statements was one in which Campbell stated that he had been "thinking about killing his father for a few days." Defense counsel's strategy was to try to obtain a conviction for second-degree murder, and, failing that, obtain a jury recommendation for life. Defense counsel had a "difficult case to defend during the guilt phase." In addition to statements made to law enforcement, Campbell texted his former girlfriend, admitting that he killed his father with an ax. He used his father's credit cards after the murder. After the car was declined, he called the bank to try to have it reactivated.

"Trial counsel was not ineffective where a strategic decision was made to introduce a defendant's statements with the goal of negating or reducing the defendant's culpability." Counsel did not seek suppression of the critical statements "because they felt that during these statements, Campbell exhibited remorse for the killing of his father. A review of the recordings of the hospital statements reflects that at times, Campbell was emotional and crying." Further, counsel did not believe there was a basis for seeking suppression of the jail statement which suggested premeditation. The record reflected that "it was Campbell who initiated the discussion with Detective Atchison by *affirmatively requesting* he visit Campbell at the jail."

Another claim of ineffective assistance of trial counsel was rejected because an assistant public defender is not "ineffective for failing to communicate with [a defendant] prior to appointment and advise him not to speak to law enforcement." Campbell had not yet been formally charged with any crimes, had not had a first appearance, and the Public Defender had not yet been appointed.

Counsel was not ineffective for failing to seek an inquiry as to whether jurors heard an inappropriate comment by a prosecutor. During a sidebar conference, defense counsel informed the court that he heard the prosecutor refer to the defendant as a "manipulative ass." Counsel moved for a mistrial, stating it was possible the jurors heard it due to their proximity. The prosecutor admitted making the statement, but responded that there was no evidence anyone else heard the comment and offered the possibility of an inquiry of the jurors, but said there was no evidentiary foundation for a mistrial. Defense counsel did not ask for the inquiry and the mistrial was denied.

At the 3.851 evidentiary hearing, no evidence was presented to support the claim that a juror may have heard the statement. Defense counsel testified "that he did not request an inquiry because it would 'draw even more attention to the incident and take up more time while the client's on the stand, so I just elected to move on from there.'"

In addition to finding that counsel's strategic decision was reasonable, the Court found that Campbell did not prove prejudice, as there was no evidence that any juror heard the comment.

During closing argument, the prosecutor was addressing the defendant's testimony, including assertions that he was stressed, depressed, in a fog, and in shock. He then stated: "If you want to believe that, go right ahead. I can't stop you. *Let him walk out the back of that courtroom door*. I submit to you that flies in the face of the other evidence and the other testimony with regard to this case." Counsel was not ineffective for failing to object to this comment. Counsel testified at the 3.851 evidentiary hearing, that while he believed the comment to be objectionable, he thought it was "silly" and "absurd" for the prosecutor to say. The defendant himself knew, when he testified, that he was not getting out of this and was going to at least be sentenced to life.

The Supreme Court agreed with the trial court's findings that the statement did not shift the burden to Campbell "because it did not 'rise to the level of challenging the defendant's failure to refute the evidence or denigrate defense's theories.'" The challenged statement "was made in the context of the State contending that Campbell's testimony was inconsistent with the other evidence presented during trial. The gist of the statement was if the jury found Campbell credible, it had the opinion of acquitting him; however, the other evidence and testimony supported a conviction for first-degree murder. This argument did not

shift the burden of proof to Campbell to demonstrate he was innocent or guilty of a lesser offense."

Appellate counsel was not ineffective for failing to argue the denial of the mistrial motion based on the above-noted comment about the defendant being a manipulative ass. There was no evidence that any juror heard the comment, and the trial court therefore could not have abused its discretion in denying the motion for mistrial. "Moreover, even if one or more of the jurors did hear the comment, that comment cannot be said to be so prejudicial as to vitiate the entire trial. While unprofessional and crass, the single comment was isolated and not part of opening statements, closing statements, or the State's cross-examination of Campbell. In whispering this comment to co-counsel, the prosecutor was not urging the jury to convict Campbell on the basis of Campbell's truthfulness or lack thereof."

Collateral offense evidence of a car crash and collision were admittedly "to some degree inextricably intertwined with the murder." The Court rejected the claim that they impermissibly became a feature of the trial. "Here, evidence of the chase and crash was necessary to provide the jury with an accurate picture of the events surrounding the murder. The evidence demonstrated how Campbell was apprehended by law enforcement. It reflects that law enforcement did not stop Campbell – Campbell fled from law enforcement, and it was he who ended the chase by crashing his vehicle into a deputy's marked car in an attempt to commit suicide. Further, evidence of the crash provided the jury with context as to why Campbell gave four of his five statements from a hospital bed."

Based on a review of the entire record, less than ¼ of the opening statements related to the chase and crash; only three of more than 12 guilt-phase witnesses testified to these events in any detail; and only a single statement in closing argument related to this.

A graphic photo of a brain injury was not improperly admitted into evidence, as it was "relevant to illustrate the nature and extent of the victim's injuries, as well as the medical examiner's testimony."

Eleventh Circuit Court of Appeals

United States v. Oliva and United States v. Uranga, Nos. 17-12091, 17-11497 (Nov. 30, 2018)

The defendants pled guilty to conspiracy to commit interstate transportation of stolen property and appealed the denial of a motion to dismiss the indictment based on a Sixth Amendment speedy trial violation. The district court found that the delay between the indictment and arrest was due to the government's gross negligence, but nevertheless denied the motion to dismiss. The Eleventh Circuit affirmed that decision.

The defendants were indicted in November 2013, about two years after the burglary related to the conspiracy charges. A police officer serving as an FBI Task Force Officer testified that he mistakenly believed the United States Marshals Service was responsible for locating and arresting the defendants; it was the first time he was serving as a solo investigator.

In January 2014, when he realized that nothing was happening, he conferred with another Task Force officer and asked that officer to communicate with the USMS about the defendants. That officer called someone with the USMS within one month and learned that the USMS was not responsible for executing arrest warrants when the FBI controls the case. The second officer met with the primary officer, Donnelly, about a month later to return the warrants. The second officer did not inform Donnelly at that time that he learned the FBI handles its own arrests, and Donnelly did not inquire about the procedures that would be followed.

There were no communications between Donnelly and the U.S. Attorney's Office, and the AUSA who secured the indictment left that office in September 2014. A new prosecutor was not assigned until October 2015, and Donnelly had no contact with the U.S. Attorney's Office during that two-year period.

Donnelly did not take any action until his supervisor informed him, around September of October 2015, that it was his responsibility to secure the arrests. Both defendants were then arrested within a few weeks.

The Eleventh Circuit evaluated the four factors of the constitutional speedy trial test set forth in Barker v. Wingo: the length of the delay; the reason for the delay; the defendant's assertion of his speedy trial right; and actual prejudice to the defendant.

On appeal, the defendant's made the following arguments: (1) they were not required to demonstrate intentional delay or bad faith; (2) pre-indictment delay should have been factored into the district court's analysis; (3) the attempt to arrest them was "so minimal that it cannot be characterized as 'diligent' or performed 'in food faith,' requiring that the second *Barker* factor weigh heavily against the Government"; (4) "that they did not have to prove actual prejudice because, under either theory, the reason for the delay weighs heavily against the Government and the Government conceded that the other two factors, length of the delay and assertion of the right, did so too." The defendants did not challenge the district court's finding of no actual prejudice, and the government conceded that the lengthy of delay weighed heavily against it.

"Different reasons for delay are accorded different weights." Negligence falls somewhere between intentional delays and delays based on good cause. The length of the delay also impacts the determination of whether the Government's negligence weighs against it.

Here, the "Government's conduct was therefore not purposefully dilatory as the term is used in the pertinent case law. We thus turn to whether the Government's negligence, in light of the length of the delay, was so great as to weigh heavily against it, and we hold that it wasn't." "The relevant length of the delay in this case is twenty-three months, the length of the post-indictment delay. The two-year pre-indictment delay is not factored into our analysis of whether the first two *Barker* factor weigh heavily against the Government. Pre-indictment delay is accounted for if it is 'inordinate.'"

Pre-indictment delay was deemed not inordinate based on the complexity of the crimes being investigated and the number of participants, witnesses, exhibits, search warrants, and nine states in which witnesses were located.

As to the nature of Donnelly's negligence, he "made at least a minimal attempt to follow up on the Appellants' arrest by conferring" with the second officer, and once he realized his mistake, "he quickly effectuated the Appellants' arrests." Compared to another case from the Eleventh Circuit, where no speedy trial violation was found, the Court concluded that "neither the length of the delay, nor the reason for it, weigh heavily against the Government. The Government's good-faith attempt to arrest the Appellants was diligent enough to avoid warranting the 'extraordinary remedy' of dismissing their indictments." As "two of the first three *Barker* factors

do not weigh heavily against the Government," the Appellants had to prove actual prejudice, which they did not do.

First District Court of Appeal

Kitt v. State, 1D14-5700 (Nov. 30, 2018)

In an appeal from convictions for first-degree felony murder and armed burglary, the First District held that the trial court did not err in denying a defense-requested instruction on the independent act doctrine.

Appellant and two cofelons participated in a plan to rob the victim of drugs and money. They entered the victim's apartment and ransacked it and, after discussion, forced the victim to leave with them in a plan to get ransom. "The victim was transported from the scene in the trunk of the victim's car. While Appellant was following behind the victim's car, the victim escaped from the trunk and was shot and killed by one of Appellant's cofelons."

Appellant was not entitled to the independent act instruction because "it was unquestionably foreseeable that someone could be shot or killed during the events set in motion by Appellant. In particular, it was foreseeable that the victim might flee in the course of the kidnapping and be shot and killed in order to prevent him from contacting the police."

Bennett v. State, 1D16-4184 (Nov. 30, 2018)

On appeal from a conviction for conspiracy to commit burglary, burglary and other offenses, Bennett argued that the trial court erred in giving the principals instruction as to the conspiracy charge without a limiting instruction advising the jury that the principals instruction applied only to the substantive offenses and not the conspiracy. As the defense did not request such a limiting instruction, this was deemed to be an invited error and the argument was waived.

Upon conviction for the four charged offenses, Bennett was sentenced as an habitual felony offender and sentenced to five years in prison on each of three felony counts, with the sentences to run consecutively, plus 60 days for criminal mischief. He argued that the consecutive sentences as an habitual felony offender could not run consecutively was the offenses arose out of a single criminal episode.

The consecutive sentences in this case were permissible because the sentences were not enhanced, notwithstanding the habitual offender designation. The five-year sentences for the felonies were all within the statutory maximums for those felonies. As the Appellant was given the "non-HFO statutory maximum" for each offense, there was no enhancement, and, absent any enhancement, the sentences could run consecutively.

Jenkins v. State, 1D16-4324 (Nov. 30, 2018)

When the trial court denied a motion for new trial, it referred to both the sufficiency of evidence and the weight of the evidence. The trial court, however, did not commit an error by referring to the incorrect standard. The defendant's motion for new trial had raised distinct arguments which implicated both standards.

Madison v. State, 1D17-741 (Nov. 30, 2018)

Madison appealed convictions for capital sexual battery and other offenses. His convictions were affirmed as the First District held that the defense opened the door for the admission of otherwise inadmissible evidence – "his refusal to submit a DNA sample at an interview before he was arrested."

On cross-examination of an investigator, defense counsel queried the witness about the absence of DNA evidence. As a result, the trial court "allowed the State to introduce the rest of Investigator Osborn's interview where he told Madison that they would be able to determine the father through a DNA comparison and Madison refused to provide a DNA sample." In the portion of the interview that was previously introduced, Madison had "stated that he was shocked that the victim as pregnant and did not know who was responsible."

Nieves v. State, 1D17-2450 (Nov. 30, 2018)

Consecutive mandatory minimum sentences were reversed, and mandated to run concurrently, because the crimes stemming from a single episode involving a single victim or single injury may not be sentenced consecutively.

Channell v. State, 1D17-4966 (Nov. 30, 2018)

The trial court did not err in denying a motion to suppress evidence. The Appellant first argued that the trial court erred in finding the initial contact with police to be a consensual encounter. That argument was waived as the defense

argued that it was consensual in the trial court. Regardless, there was no merit as "the undisputed evidence was that the officers did not give Appellant any commands or draw their weapons and merely asked him if they could talk to him." Appellant fled and was chased, but that comes up after the initial encounter, which was consensual.

At that point, the officers had reasonable suspicion for a detention as flight plus an additional factor can justify an investigatory stop. The additional factor in this case was that the flight was in a high crime area. Additional factors existed and contributed to reasonable suspicion in this case as well:

> The officers had been informed by an ATF investigator that a white male with an outstanding warrant and some others were using room 137 and another room for illegal activities, they had large amounts of drugs and firearms in the rooms, and a Kia was involved. The officers saw Appellant, a white male, exit room 137 with a duffel bag; observed him walking in a peculiar manner, changing directions several times; and saw that he was walking toward the Kia parked behind the hotel. Appellant then engaged in unprovoked flight in a high crime area.

Based on the facts noted in the above-quoted paragraph, the Court further found that there was no error in concluding that reasonable suspicion existed for a protective sweep due to a safety threat and/or concern about the destruction of evidence.

Williams v. State, 1D17-4978 (Nov. 30, 2018)

The sentence was reversed and remanded in part to have the trial court amend the written sentence to conform to the oral pronouncement to add the provision for a judicial review hearing after twenty years to allow for the possibility of early release.

Boston v. State, 1D17-5190 (Nov. 30, 2018)

Boston appealed a conviction for battery. The parties stipulated that his motion for stand-your-ground immunity could be decided at the same time as the jury trial. However, the trial court, on the stand-your-ground motion, applied the pre-2017 burden of proof, which rested on the defendant.

The First District has previously held that the 2017 statutory amendment, placing the burden on the State, applied retroactively. Based on that prior decision, the instant case was reversed for further proceedings. The First District, however, provided the trial court with an option on remand. Because the defense had stipulated that the immunity motion could be determined on the basis of the trial evidence, the trial court had the option, or remand, of redetermining the immunity issue on the basis of the evidence presented at trial or of conducting a new evidentiary hearing.

Second District Court of Appeal

Martin v. State, 2D17-3503 (Nov. 28, 2018)

Martin appealed the summary denial of a Rule 3.850 motion in which he argued that counsel was ineffective for failing to call a witness. Martin was one of five individuals in his home when police arrived, on the basis of a tip that methamphetamine was being sold in the house. Martin consented to a search, while one of the others, Hoben, locked herself in the master bathroom. When a warrant was obtained, Hoben exited that bathroom, and a baggie with methamphetamine was found hidden under the trash can in that bathroom.

Martin argued that counsel was ineffective for failing to call Hoben, who allegedly would have testified that the drugs found in that bathroom belonged to one of the other occupants of the house. The trial court rejected the motion, finding that the evidence from Hoben would have been cumulative to testimony from one of the other occupants of the house. The Second District reviewed the portions of the transcript attached to the trial court's order and disagreed. The other witness testified "only that Hoben and Wallace had both been in the master bathroom on the day in question. He did not testify as to who owned the drugs that were found in the master bathroom trash can."

R.M. v. State, 2D17-4409 (Nov. 28, 2018)

An adjudication of delinquency was reversed because the record did not "establish a proper waiver of the juvenile's right to counsel."

While the trial court did discuss the issue of counsel with the juvenile, including statements that an attorney "could 'advise him on whether or not [R.M.] should contest the charges,' 'help [R.M.] get [his] case ready for trial or for a hearing

if [R.M.] wanted one,' 'get [R.M.'s] witnesses to court,' and 'advise [R.M.] on what direction [R.M.] should take in [his] case,'" this did not go far enough.

There was no inquiry as to whether R.M. had an opportunity, or whether it was meaningful, to confer with an attorney about his right to counsel. And, "the trial court failed to inquire about R.M.'s comprehension of the trial court's offer of counsel, his capacity in making the choice of whether to waive counsel, or the existence of any unusual circumstances which would preclude the juvenile from exercising the right of self-representation." And, no parent, custodian or responsible adult was present "when the written waiver of counsel was submitted to the trial court at the change of plea hearing."

Third District Court of Appeal

Heredia v. State, 3D16-0136 (Nov. 28, 2018)

Heredia appealed from a guilty plea and sought review of the denial of his motion to dismiss under the stand-your-ground statute. He did not expressly reserve the right to appeal the denial of the motion to dismiss and the appeal was therefore affirmed without prejudice to seek relief pursuant to a motion under Rule 3.850.

Medina v. State, 3D16-383 (Nov. 28, 2018)

Medina appealed convictions for second-degree murder of his wife, and other offenses. The Third District affirmed and addressed several issues.

First, the trial court did not err in denying proffered expert testimony regarding the battered spouse syndrome. It "was not predicated upon facts in evidence, but instead upon hearsay evidence deemed inadmissible by the trial court." The "trial court ruled that it would permit the expert to testify in order to educate the jury about battered spouse syndrome and to answer certain hypothetical questions, if the defense established the proper predicate for such testimony. Because appellant chose not to testify, was not examined by the defense expert, and introduced no evidence to demonstrate that he suffered any cycle of battering by the decedent, the necessary predicate was not established and the trial court properly excluded the expert's proposed testimony."

Evidence of "bath salts" found in a kitchen drawer two months after the shooting was properly excluded. The defense sought to establish that the victim was under the influence of these pills on the day of the crime, causing her to be the

aggressor. While there was a video of the decedent opening that drawer on the day of the murder, it did not show her removing anything and there was no other evidence that she ingested or was under the influence of the drugs on the day of the crime. Additionally, the discovery of the pills was too remote in time, given the number of people who had access to the home during the two-month period.

The trial court did not err in excluding defense "expert testimony regarding 'shadow analysis' performed of the crime scene." A Daubert hearing was held. The appellant did not argue that the Frye test should have applied. The Third District found that the trial court properly applied the five factors of the Daubert test and listed those factors, but did not discuss how they applied to the "shadow analysis" evidence.

A comment by the prosecutor in closing argument "did not constitute an improper expression of personal belief or suggest he was aware of the existence of other evidence not presented at trial. Rather, read in context, the prosecutor was simply offering argument in reply to the defense's closing argument, which postulated that if the decedent had armed herself with a knife before appellant threatened her with a gun, she was justified in doing so under the circumstances."

Brown v. State, 3D16-1903 (Nov. 28, 2018)

Brown appealed his sentence for first-degree murder. The Third District affirmed.

Brown was 17 at the time of the offenses for which he was convicted – first-degree murder with a firearm personally used by Brown, and attempted robbery with a firearm personally used by Brown. In 1999 he was sentenced to life without the possibility of parole for the murder and a concurrent sentence of four years in prison for the attempted robbery.

In 2016 he received a rsentencing hearing pursuant to Miller v. Alabama, and he was sentenced to 45 years in prison for the murder, with credit for all time served. The sentencing was pursuant to the 2014 juvenile sentencing statutes. "The question in this case is who must make the determination as to whether Brown actually killed, intended to kill, or attempted to kill the victim – the judge or the jury? The Florida Supreme Court has now answered that question in Williams[v. State, 242 So. 3d 280 (Fla. 2018)]. The Florida Supreme Court in Williams held that, based on the United States Supreme Court's decision in Alleyne v. United States, 570

U.S. 99 (2013), the jury must make this factual finding, but the Court additionally concluded that "'Alleyne violations' are subject to a harmless error analysis."

In this case, there was an error under Williams and Alleyne, as it was unclear whether the jury found that Brown actually killed, intended to kill, or attempted to kill the victim. The jury used a general verdict form, finding guilt for first-degree murder. The jury was also instructed, in the alternative, on premeditated and felony murder, and murder as a principal. Two of those theories did not require that the defendant actually killed, intended to kill or attempted to kill the victim.

The error, however, was harmless based on the facts of the case. Shots had been fired from Brown's gun at the scene. While Brown stated that he was aiming at the ceiling, no bullet holes were found in the ceiling, and Brown acknowledged that he hit the victim. An eyewitness provided testimony that Brown shot the victim after an argument.

Hales v. State, 3D18-692 (Nov. 28, 2018)

The Eleventh Judicial Circuit denied a habeas petition challenging a conviction from Broward County – the Seventeenth Circuit. The judge in the Eleventh Circuit was without jurisdiction to rule on the petition and should have dismissed it without prejudice to the defendant filing an appropriate collateral review motion or petition in the Seventeenth Circuit.

Fourth District Court of Appeal

Powers v. State, 4D17-1652 (Nov. 28, 2018)

Powers appealed a conviction and sentence for DUI manslaughter and the Fourth District reversed for a de novo resentencing due to several errors.

Under Rule 3.704(d)(14)(A), Fla.R.Crim.P., prior offenses are not scored as part of the prior record "if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release

from confinement, supervision, or other sanction, whichever is later, to the date of the commission of the primary offense."

A 1999 grand theft conviction, for which the defendant was sentenced to two years probation, was scheduled to end, according to the defendant, in March 2001, more than 10 years prior to the 2011 date of the primary offense in this case. However, records of the case reflected that the probation was not terminated until May 25, 2011, three weeks prior to the primary offense. An affidavit of violation of probation had been filed in February 2000, but no action was taken on it until its termination in May 2011. Powers contested the accuracy of those records. The statutory provision that provides for tolling of probation when an affidavit of violation is filed was not made effective until July 1, 2001, four months after Powers' probation would have expired without tolling.

State v. Meyers, 4D18-10 (Nov. 28, 2018)

The trial court suppressed results of a blood test obtained during a DUI investigation, finding that the blood draw did not comply with the implied consent law, section 316.1932(1)(c), Florida Statutes. The Fourth District reversed. The provisions of the implied consent law are inapplicable when the individual provides express consent, as was the case here. There was nothing in the record to suggest that the express consent was involuntary.

State v. Wooten and The Palm Beach Post, 4D18-2636 (Nov. 28, 2018)

The State filed a certiorari petition asking the Fourth District "to prevent the disclosure of information that it had redacted from search warrants and warrant applications related to this pending criminal investigation." The Fourth District denied the petition and mandated, as a matter of due process, "an unredacted disclosure of the search warrants and applications to the defendant." The Court also denied the petition "as to the other portion of the order and require[d] that there be an unredacted disclosure to the public and third parties."

Law enforcement officers "obtained search warrants authorizing electronic tracking of the defendant's cell phone and the cell phone of a friend

with whom the defendant allegedly was hiding." The warrants and supporting documents were sealed pursuant to court order. The defendant was apprehended, but the warrants and other documentation were not filed with the clerk of the court as required by chapter 933, Florida Statutes. The defendant sought discovery of these items and the State filed unredacted versions of the documents under seal and sought to provide the defense with redacted versions. The redacted information "related to the tracking of cell phones."

In seeking redaction, the State argued "that 'investigative techniques' should be deemed confidential to 'protect a compelling governmental interest,' referring to rule 2.420(c)(9)(A)(iii)[, Fla.R.Jud.Admin.]." As a general rule, warrants and supporting documents are exempt from disclosure only until execution of the warrant or execution is determined to be impossible.

The State's argument about a surveillance technique privilege was not preserved in the trial court. Even if it had been preserved, issues regarding the limitation of discovery rest within the discretion of the trial judge. Restricting disclosure under Rule 3.220 (discovery) "was not authorized because there was no 'substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from the disclosure." Thus, the defendant was entitled to full disclosure.

With respect to disclosure to third parties and the public, Rule 2.420 "does not recognize a surveillance technique exception." And, "the state did not offer any evidence that the redacted information contained 'surveillance techniques' under section 119.071(2)(d) nor did the state demonstrate that the alleged surveillance techniques were 'not widely known.' Therefore, there is no record upon which the state can rely. The state is simply advancing an 'it is because I say it is' position. This sort of *ipse dixit* reasoning is insufficient to support a finding that the trial court's ruling was an abuse of discretion, much less a departure from the essential requirements of law."

Additionally, chapter 119 was not applicable "because this case does not involve an agency public records request. Neither the defendant nor The Palm Beach Post made any public records request to an agency. The Post filed only a motion to intervene in the trial court proceedings."

Finally, the Court held that the public had a common law right to access search warrant materials.

Fifth District Court of Appeal

Linville v. State, 5D18-1975 (Nov. 29, 2018)

Linville sought a belated appeal from an order denying postconviction relief, stating that he timely provided a notice of appeal to corrections officials for mailing, but the notice of appeal was not received by the court. The notice bore a stamp, "provided to Gulf Mailroom," with what purported to be the inmate's initials and a date within the 30-day period for filing an appeal.

The State objected to the belated appeal, arguing that the certificate of service stated that the notice was mailed to the State Attorney's Office and Office of the Attorney General, but not to the clerk of the lower court. The Court rejected that argument. A certificate of service lists parties who are being served with the pleading. The Clerk of the Court is not a party and need not be listed in the certificate of service. The petition for belated appeal was granted.

Mitchell v. State, 5D17-2370 (Nov. 30, 2018)

The summary denial of a rule 3.850 motion was reversed for an evidentiary hearing. The motion was based on the recantation of a witness. The trial court's denial found that the recantation was not credible and that it was contradicted by other evidence at trial. "As the affidavit as not 'inherently incredible' nor 'obviously immaterial,' we conclude that the postconviction court improperly made these determinations without the benefit of an evidentiary hearing."

State v. Frank, 5D18-1374 (Nov. 30, 2018)

The State sought certiorari review of an order authorizing entry into a pretrial intervention program. The State argued that there was no consent and section 948.08(6)(a), Florida Statutes (2018), was inapplicable because the defendant "was neither identified as having a substance abuse problem nor

admitted to a substance abuse education and treatment program." The Fifth District agreed and quashed the PTI order.

Section 948.08(2) requires the State's consent. There is an exception to the consent requirement in section 948.08(6)(a), but that applies only to a defendant charged with a nonviolent felony (which was applicable in this case) and "is identified as having a substance abuse problem or is charged with a felony of the second or third degree for purchase or possession of a controlled substance under chapter 893," and has "not been charged with a crime involving violence" and "has not previously been convicted of a felony."

Hodges v. State, 5D18-1671 (Nov. 30, 2018)

The summary denial of a Rule 3.850 claim alleging ineffective assistance as to the decision of whether the defendant should testify was reversed and remanded for further proceedings. "The court records attached to the denial order do not conclusively refute whether, under the circumstances, a reasonable attorney would have discouraged or advised Hodges not to testify, nor does it appear that the postconviction court addressed this question."