Case Law Update
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Supreme Court of Florida

Jimenez v. Bondi, SC18-1975 (Dec. 12, 2018)

During the course of post-conviction litigation during an active warrant, the Florida Supreme Court issued an order prohibiting the filing of further proceedings in the trial court absent prior leave of the Supreme Court. Jimenez challenged the validity of that order, and the Supreme Court reiterated its authority to issue the order and emphasized that new claims could be filed only with leave of the Supreme Court and that it was therefore not an absolute bar to the filing of new claims if a good faith basis existed and was demonstrated to the Supreme Court.

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-10, SC18-1716 (Dec. 13, 2018)

The Supreme Court authorized the publication and use of amendments to several standard jury instructions:

> 10.20 ([Care] [Custody] [Possession] [Control] of [a Firearm] [Ammunition] While a Final Injunction for [Domestic Violence] [Stalking] [Cyberstalking] is in Effect)
>
> 14.8 (Unlawful Possession of a Stolen [Credit] [Debit] Card)
>
> 16.11 ([Possession] [Control] [Intentional Viewing] of Material Including Sexual Conduct by a Child)
>
> 20.18(a) (Unlawful Possession of the Personal Identification Information of Another Person)
>
> 22.10 (Possessing a Lottery Ticket)
>
> 22.11 (Possessing Rundown Sheets, Etc.)

22.15 ([Manufacturing] [Owning] [Storing] [Keeping] [Possession of] [Permitting the Operation of] [Selling] [Leasing] [Transporting] a Slot Machine)

Significant changes included the following:

Language addressing "possession" has been added to each of the instructions. "Firearm" has been re-defined in instruction 10.20, with respect to antique firearms. And instructions 22.10, 22.11 and 22.15 have replaced references to the repealed statute, section 849.161, with section 546.10, Florida Statutes.

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-08, SC18-1666 (Dec. 13, 2018)

The Supreme Court authorized for publication and use amendments to standard instructions 7.3 (felony murder – first degree), 7.4 (second-degree murder) and 10.7(d) (throwing, making, placing, projecting or discharging a destructive device). The more significant amendments are based on the recent decision in Williams v. State, 242 So. 3d 280 (Fla.2018), where the Court held that the jury had to make the "factual finding under section 775.081(1)(b), Florida Statutes (2016), as to whether a juvenile offender actually killed, intended to kill, or attempted to kill."

A note to the court as to when to use the new language was added, and the additional language on the two murder instructions requires the jury, when at issue, to "determine whether the State proved beyond a reasonable doubt, that [he] [she] [actually killed] [intended to kill] [or] [attempted to kill] (victim)."

Instruction 10.7 was amended to include a change in the title and to incorporate language as to "possession."

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-07, SC18-1478 (Dec. 13, 2018)

The Supreme Court authorized for use and publication two amended instructions, one new instruction and the deletion of one instruction. The amended instructions are 3.6(o) (transferred intent) and 3.9(c) (eyewitness identification). The new instructions are 8.27 (violation of an injunction for protection against exploitation of a vulnerable adult) and 8.28 (violation of a risk protection order).

The deleted instruction is 8.8, which pertains to aggravated stalking of a victim under 16.

The deleted instruction duplicated another existing instruction, which was more up-to-date – instruction 8.7(c). The eyewitness identification instruction was revised to make it "more readable." Instructions 8.27 and 8.28 were created to set forth the elements of offenses based on new statutes – sections 825.1036(4) and 790.40(11)(b), Florida Statutes.

Rodriguez v. State, SC18-1042 (Dec. 13, 2018)

A post-conviction appeal was affirmed, finding the motion to be procedurally barred and without merit. A Hurst claim was governed by Hitchcock v. State, 226 So. 3d 216 (Fla. 2017). A claim that the elements of "capital murder" existed prior to Hurst and resulted in a due process violation because the jury did not find Rodriguez guilty of "capital murder" was rejected based on the Court's recent decision in Rodriguez v. State, 237 So. 3d 918 (Fla. 2018).

Martin v. State, SC17-200 (Dec. 13, 2018)

The Supreme Court upheld the decision of the Fifth District Court of appeal and rejected overbreadth and void-for-vagueness challenges to the constitutionality of section 1006.63, Florida Statutes (2012), Florida's hazing statute.

The definition of hazing covers an "action or situation that recklessly or intentionally endangers the mental or physical health or safety of a student." This encompasses "any brutality of a physical nature, such as whipping" or "beating." Felony hazing requires that "the hazing results in serious bodily injury or death" of the victim." Misdemeanor hazing requires only that the hazing create "a substantial risk of physical injury or death" to the victim. Consent of the victim is not a defense. Nor is it a defense that the hazing "was not officially sanctioned or that it 'was not done as a condition of membership.'"

The overbreadth argument was rejected because the focus of the criminal provisions of the statute is on physical injury or death or the creation of a substantial risk of either. And, any "impact on speech or expressive conduct is insubstantial and purely incidental to the purpose of preventing physical harm. Given the 'plainly legitimate sweep' of the hazing statute, it cannot be said that the statute 'prohibits a substantial amount of protected speech.' The strong medicine' of the overbreadth doctrine has no application in this context."

An as-applied vagueness challenge focused on the term "competition" in the definition of hazing, arguing that it lacked precision. The Court viewed this argument as nothing more that "run-of-the-mill ambiguity" that does not implicate application of the vagueness doctrine. "And no actual ambiguity in the terms of the statute has been identified by Martin that has any bearing on the offenses for which Martin was convicted. The conduct in which Martin was involved falls squarely and unambiguously within the statute's core proscription of 'brutality of a physical nature, such as whipping' or 'beating' that 'intentionally or recklessly' 'results in serious bodily injury or death' or 'creates a substantial risk' of such harms."

The conduct in this case involved a member of the university's marching band and the tradition known as "Crossing Bus C." This was described in the lower court's opinion:

> . . . The ritual consists of three components: 1) the hot seat, 2) the prepping, and 3) the crossing. During the hot seat, the participant takes a seat on Bus C (near the front) and is struck or hit repeatedly by others, including members of the percussion section. Next, the participant is prepped. During the prepping, the participant stands up and places his or her hands on the luggage rail and is then slapped a number of times with full force by the others on the bus. After the prepping, the participant crosses from the front of the bus to the back while others slap, kick, and punch the participant. [Martin], as bus president, decided when someone could cross Bus C.

The question was not whether the term competition as used in the statute was vague, but whether the term "similar competition" was vague. When compared to the phrase "customary athletic event," the crossing of Bus C did "not comport with any commonly accepted understanding of a 'competition[]' to any 'customary athletic event[].'" The "person crossing is not competing against another person or group of persons, no one keeps score during the crossing because there is no system of scoring, the crossing is not timed, no prize is awarded after the crossing, no referee oversees the crossing (either to enforce rules or protect the life of the participant), and the participant 'wins' the crossing by surviving a brutal beating."

First District Court of Appeal

Bass v. State, 1D14-2449 (Dec. 14, 2018)

Bass appealed his convictions for felony battery (a lesser included offense of aggravated battery with great bodily harm) and resisting an officer without violence, based on his lying to the officer about his identity.

The court did not err in refusing to give a requested instruction about character evidence, which would have told the jury to "'consider testimony that a defendant is a peaceful person along with all the other evidence.'" The defense in this case was that Bass did not commit the crime, and peacefulness was not an independent defense."

After the trial, one juror expressed concern "that the foreman had not presented certain questions to the court, and the juror wrote she 'was very rushed' and felt pressured to go along with the majority's decision." The trial court did not err in denying a motion to interview the juror. Judicial inquiry "'into emotions, mental processes, or mistaken beliefs of jurors'" is prohibited.

During the appeal, Bass reviewed trial transcripts and believed that they omitted a statement made by the prosecutor. Jurisdiction was relinquished to the trial court to consider this, and Bass submitted an affidavit, which the State did not respond to. The trial court, however, could not conclude that the statement was actually made. Even though the State did not file anything in opposition to Bass's affidavit, the trial court was not obligated to accept it if the court could not recollect the statement having been made.

Bass argued that a motion for judgment of acquittal should have been granted as to the charge of resisting an officer because he was not detained when he lied to the officer as to his identity. The First District recognized that the Second District has, in Sauz v. State, 27 So. 3d 226, 228 (Fla. 2d DCA 2010), found that such an element to the offense exists. The First District disagreed. While such statutory language exists for the offense, created in 1999, of giving false identification to a law enforcement officer, section 901.36(1), Florida Statutes, the same language does not exist in the offense of resisting an officer without violence.

One judge dissented as to the issue of granting judgment of acquittal as to resisting an officer based on detention as an element. The dissent includes a lengthy analysis of the issue.

Scott v. State, 1D15-3134 (Dec. 14, 2018)

For the purpose of scoring out-of-state convictions on the Criminal Punishment Code scoresheet, courts to not consider the underlying facts of the out-of-state conviction when determining if it is analogous to a Florida offense. Only the statutory elements of the out-of-state crime are considered.

Sims v. State, 1D17-1350 (Dec. 10, 2018)

Sims appealed convictions for armed robbery and petit theft.

Sims and another man, his roommate, Vaughn, were suspected of a series of armed robberies. Vaughn's truck had been under surveillance, and a week after this robbery, it was pulled over and both men were arrested. Sims, when confronted with surveillance video of this robbery confessed, and a subsequent search of Vaughn's truck and the apartment resulted in further incriminating evidence.

There was no abuse of discretion in introducing the evidence of surveillance of Vaughn's truck. Sims argued that its prejudice outweighed its probative value. The testimony explained "how officers first contacted Sims." Alternatively, its admission was harmless error.

Sims argued that trial counsel was ineffective for failing to move for judgment of acquittal based on the failure to introduce identity and corpus delicti prior to Sims' admission. The record on direct appeal refuted the claim of ineffective assistance: "Before the State introduced testimony about Sims's confession, it presented testimony from the robbery victims (the Quick Mart employees), and it introduced surveillance video showing two masked men robbing the store. This was sufficient."

Sims argued that double jeopardy barred dual convictions for armed robbery and petit theft. The First District rejected the State's confession of error. In McKinney v. State, 66 So. 3d 852 (Fla. 2001), the Supreme Court held that "double jeopardy does not prohibit dual convictions for robbery and theft." There is no bar against multiple punishments for different offenses arising out of the same transaction if the legislature intends to authorize separate punishments. One statutory prohibition arises were the two offenses involve a lesser offense, "the statutory elements of which are subsumed by the greater offense." However, McKinney rejected the application of this statutory provision to grand theft and robbery. Each of the offenses requires proof of an element lacking in the other.

Grand theft requires proof of value in excess of $300, an element lacking in robbery. Robbery requires proof of force, which theft does not.

While McKinney involved grand theft and the need for proof of value in excess of $300, the instant case involved first-degree petit theft, which required proof of value in between $100 and $300, and the rationale of McKinney still applied.

Sims received a life sentence as a prison releasee reoffender, which is defined "to include someone who commits robbery within three years after release from prison." Sims argued that the life sentence was unconstitutional under Alleyne v. United States, 570 U.S. 99 (2013), and that a jury had to determine eligibility for a PRR sentence. The First District previously rejected that argument in Williams v. State, 143 So. 3d 423 (Fla. 1st DCA 2014), and declined to revisit it. The Court further rejected the argument that Hurst v. Florida, 136 S.Ct. 616 (2016), required a different result. The Court did not address the merits of that argument, finding that it had reaffirmed Williams after Hurst, and the current panel was therefore bound by both Williams and its post-Hurst decisions to the same effect.

Gear v. State, 1D17-2425 (Dec. 10, 2018)

Gear appealed convictions for first-degree murder and kidnapping. On appeal, he challenged the admission of dog tracking evidence. The First District disagreed with the argument and affirmed.

Gear and the victim had custody disputes over their infant son. The victim's body was found in the woods. After denying involvement in the death, Gear eventually admitted covering up the body, but claimed the death was an accident. That was inconsistent with the medical examiner's findings, and injuries were consistent with having been dragged and the death being non-accidental. Dog-tracking was utilized to locate missing clothing. Gear argued that it was improperly recreating a track and that it was unreliable evidence.

As to the dog's reliability, a proper foundation was established. The opinion details the training of the dog, its record of hundreds of tracks with successful trailing "most of the time." She was trained to track scents up to 58-hours old. The crime scene had been secured and the handler had not been told of "the geography or significant locations," and Gear's scent had been tracked by the dog "continuously, without hesitation."

Gear emphasized that he had been present in that area in the past, suggesting that the dog picked up an old scent. Although the dog was capable of tracking scents up to 30 days old, she was only trained for scents up to 58 hours old. And, the tracking in this case had been continuous and "connected the significant areas of the crime scene, indicating that she was following Appellant's scent from the time of the crime."

As to the argument that the evidence "in this case was used in an improper and unprecedented manner because the dog essentially recreated [Gear's] alleged path instead of tracking with the goal of finding a suspect, corpse, or specific item at the end of the trail," that was "a distinction without a difference. In either scenario, the dog is tracking the scent a person had left behind and is, thus, recreating/following that person's path, and even when tracking to find a suspect or missing person, there is no guarantee that the person will be at the end of the trail."

Elswick v. State, 1D17-2591 (Dec. 10, 2018)

Elswick appealed a conviction for aggravated battery and argued that the trial court erred in finding him competent to stand trial and by failing to conduct an adequate Faretta inquiry. The First District affirmed.

In 2015, Elswick was found competent to stand trial. One year later, experts came to a contrary conclusion and he was found incompetent. After several months of treatment, the treatment facility concluded that he was again competent. An evidentiary hearing was held, and, after hearing conflicting testimony, the court found him competent. A few weeks later, and about three months prior to trial, Elswick waived his right to counsel. The court conducted a Faretta inquiry and Elswick was permitted to represent himself; standby counsel was appointed. In subsequent pretrial hearings, the court renewed the offer of counsel on several occasions, stressed the risks of proceeding pro se, and renewed the offer of counsel. Counsel was again offered at jury selection and prior to opening statements.

The competency evaluation relied upon by the State's expert at the evidentiary hearing was about three months old at the time of the hearing. The First District rejected an argument that it was stale and insufficient due to its age.

Elswick did not challenge the sufficiency of the Faretta inquiry held three months prior to trial. Rather, he argued that the court should have conducted another full inquiry at the start of the trial. The First District disagreed. The court was not obligated "to conduct another full *Faretta* inquiry each time Elswick appeared in

court during the trial phase. Further, Elswick willingly accepted and relied upon standby counsel throughout trial, a constant reminder of his right to court-appointed counsel."

Hill v. State, 1D17-3441 (Dec. 10, 2018)

The trial court summarily denied a Rule 3.850 motion alleging ineffective assistance of counsel. The First District reversed the denial of one claim and remanded it for an evidentiary hearing.

Hill alleged that counsel "failed to inform him that the State's evidence was legally insufficient to support a conviction of accessory after the fact to a homicide, a second-degree felony punishable by up to fifteen years' imprisonment, which is the sentence the trial court imposed." His guilty plea did not foreclose this argument. A guilty plea expressing satisfaction with counsel does not suffice to refute such a claim. "Here, Appellant alleged that defense counsel knew that being at the scene and not calling 911 was insufficient evidence to prove accessory after the fact to a homicide." The guilty plea "is not conclusive as to whether his attorney gave him improper advice."

Johnson v. State, 1D17-4743 (Dec. 10, 2018)

Johnson was convicted of acting as a bail bond agent with a suspended or revoked license, theft, and grand theft of a motor vehicle. He received a sentence of 14 months in prison plus 42 months of probation. On direct appeal, two convictions were reversed, and on remand for resentencing on the bail bond agent offense, the scoresheet total of 4.6 points, which, being less than 22 points, required a non-state prison sanction, under section 775.082(10), Florida Statutes, absent findings by the court that the defendant posed a danger to the public warranting an enhanced sentence. At resentencing, the court imposed a sentence of 383 days incarceration, with credit for time served, making that portion of the sentence complete, followed by 42 months of probation. The 383 days of credit was believed to be a DOC sentence, requiring release by DOC, and qualifying for PRR status.

In this appeal, the First District agreed that the trial court's findings were insufficient under section 775.082(10).

First, the Court rejected the argument that the appeal was moot because the entirety of the sentence had been served already. It was possible in this case that adverse consequences could befall Johnson as a result of the sentence. There is

currently a conflict among Florida courts as to whether a sentence of county jail time triggers PRR status. The lesser sentence of 364 days in county jail might not subject the defendant to the PRR status that the sentence of 383 days did. Thus, the sentence of 383 days, with credit, qualified for PRR status, while a sentence of 364 days in county jail might not.

On the merits, the findings of danger to the public in this case were: Johnson continued acting as a bail bond agent after revocation of his license; he was late for court appearances; he failed to appear for one hearing; his PSI report noted that he and his mother did not cooperate with the investigation; the report stated that he behaved in a paranoid fashion; and the report noted that on his prior probation sentence there had been allegations of multiple violations for illegal drug use.

The findings of dangerousness can not rely on facts inherent in the current offense. And, failures to appear or late appearances do not establish a basis for finding danger to the public. The same held true for the failure to cooperate with the investigation. As to the VOP allegations, there was "no record support for the court's implicit finding that one year of incarceration in the county jail, or 364 days as requested by the defense, would constitute a significantly lesser deterrent for appellant than the 383 days the trial court imposed."

Second District Court of Appeal

Bravo v. State, 2D17-1873 (Dec. 12, 2018)

Bravo's community control was revoked for violating the condition requiring her to remain confined to her approved residence subject to several exceptions, as approved by her community control officer. It was alleged that, without such permission, she left her residence. The Second District reversed the revocation due to insufficient evidence that the violation was willful and substantial.

Bravo had been staying at her boyfriend's house, but he did not want her to stay there, and she did not have resources to move elsewhere. It had, however, become the approved residence. Three days after the CCO met Bravo there and approved the residence, the officer returned and Bravo was not there. The boyfriend's mother said that Bravo and her son had an argument and Bravo left. The CCO called Bravo, who said she was on her way to her daughter's grandmother's home. She said she tried calling the CCO's office, but had been unable to reach anyone. At the revocation hearing, she testified that due to problems at the approved

residence, she felt she had to leave before the situation got worse and something happened.

The events of that day occurred right around 5:00 p.m. Testimony established confusion on some issues, but it appeared that Bravo had been given two phone numbers, including an alternate, but only tried the office number. "At most, the evidence established that despite having two telephone numbers, Bravo had tried to call only one of them." The failure to call the alternate number was nothing more "than negligence attributable to the circumstances in which she left," and a violation can not be based on negligence or ineptitude.

Bing v. State, 2D17-4952 (Dec. 12, 2018)

A motion for DNA testing under Rule 3.853 was denied for failure to satisfy rule 3.853(b)(4). The Second District affirmed due to a failure to satisfy the requirements of Rule 3.853(b)(2), but granted leave to refile a facially sufficient motion.

Rule 3.853(b)(4) requires "a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received." That was satisfied in this case due to allegations of Bing that "he was linked to the crime only by the victim's identification of him as the perpetrator."

Subsection(b)(2) requires "a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime."

Drossos v. State, 2D17-280 (Dec. 14, 2018)

Drossos appealed a conviction for manslaughter with a weapon. He argued he was entitled to a new pretrial immunity hearing under the Stand Your Ground law, based on its amendment during the pendency of his appeal, changing the burden of proof and placing it on the State. Based on the Court's prior decision in Martin v. State, 43 Fla.L. Weekly D1016 (Fla. 2d DCA May 4, 2018), the Court agreed and reversed and remanded with directions to conduct a new hearing under the amended

statute. The Court certified conflict with contrary decisions of the Third and Fourth Districts as to the retroactivity of the amendment of the burden of proof.

Third District Court of Appeal

Sweeting v. State, 3D17-959 (Dec. 12, 2018)

The Third District reversed a conviction for battery of a law enforcement due to an comment by the prosecutor in closing argument that improperly shifted the burden of proof.

During closing argument, the prosecutor stated: "This case comes down to who you believe. Do you believe Ms. Sweeting who has everything to lose? . . . Or do you believe the police officers?" An objection, based on "misstatement of the law," was overruled.

In this case, "multiple comments describing Sweeting's testimony as 'ridiculous' were invited in light of defense counsel attacking the officers' credibility during closing. . . . However, the prosecutor went beyond questioning Sweeting's credibility, and instead, shifted the State's burden of proof onto Sweeting when the prosecutor argued that '[t]his case comes down to who you believe,' either the officers or Sweeting. This statement impermissibly implied that the jury had to believe Sweeting's story over the officer's story in order to acquit her."

The trial court's subsequent instructions to the jury on the burden of proof did not render the prosecutor's comments harmless, especially as the objection by defense counsel was overruled. Nor did the prosecutor attempt to correct the burden shifting comment.

Fourth District Court of Appeal

Brown v. State, 4D17-1110 (Dec. 12, 2018)

Brown was convicted and sentenced in adult court for offenses committed as a juvenile. He challenged the jurisdiction of the lower court.

Brown was 15 at the time of the incident. He was charged with vehicular homicide, fleeing and eluding, and driving while a license was suspended or revoked causing serious bodily injury or death. The State direct filed the information. Brown

did not file any objection and counsel filed a waiver of arraignment, plea of not guilty and demand for jury trial.

Section 885.557(1)(a), Florida Statutes, provides that the State Attorney may direct file an information as to a child who was 14 or 15 at the time of the alleged offense when the offense charged is for the commission of, attempt or conspiracy to commit murder or manslaughter. Lesser included offenses are not included within that statutory provision, and vehicular homicide was not included.

As the direct filing of the information was not authorized by statute, the Fourth District next considered whether Brown waived any challenge. "[T]he right to proceed by trial in juvenile court is not a substantive fundamental right guaranteed to a defendant, but is one that can be waived by mere inaction." "A defendant who is permitted to make a belated challenge to jurisdiction *after* being found guilty effectively seeks to substantially benefit from sitting on his hands, 'confident that an unvoiced objection will garner a new trial if the verdict is unfavorable.' . . . That would be improper." Thus, the challenge was waived.

Brown alternatively argued that counsel was ineffective for failing to raise the challenge to the direct filing of the information. Ineffective assistance claims generally can not be raised on direct appeal, except when the alleged ineffectiveness is apparent on the face of the record. The exception was inapplicable here and the claim therefore had to be raised in a post-conviction motion.

One judge dissented, finding that there was no waiver because "the trial court was made aware of the improper direct-filing of the case at the trail level before sentencing."

Fifth District Court of Appeal

Clarke v. State, 5D16-1986 (Dec. 12, 2018)

Clarke appealed two of his three convictions for sexual battery on a mentally defective person, "arguing that the evidence was insufficient given the victim's equivocal testimony at trial regarding the alleged acts giving rise to these convictions."

The victim was 16, and the defendant was the 29-year old brother of her sister. The victim "functions developmentally at approximately a seven-and-a-half-year-old level." The three charges were based on allegations of vaginal touching or

penetration by the defendant's finger, mouth and penis. As trial, the victim testified to having been touched by the defendant's finger, but denied that the other acts occurred. A prior recorded statement to a detective, in which the victim described all three acts as having occurred, had been introduced into evidence under the child hearsay exception. The victim did acknowledge that her memory was better during the prior recorded statement and said she had been truthful when she gave the statement.

The Fifth District reversed the two counts pursuant to Baugh v. State, 961 So. 2d 198 (Fla. 2007). There, a recorded statement of the victim had been introduced into evidence, describing 12 separate sexual acts. The Supreme Court found that none of those instances either individually or collectively, corroborated the victim's statement to the detective as to the acts performed.

Similar acts, which the State relied on, in this case, were likewise deemed insufficient corroboration. They included: "(1) K.H.'s testimony that she could not find Appellant anywhere inside the house at the time [the victim] asserted that Appellant was hiding in her closet; (2) K.H.'s testimony that she heard [the victim's] bedroom door opening and closing at around the time the assault occurred; (3) [the victim's] repeated text messages to [Mother], begging her mother to come help her as Appellant sexually assaulted her; (4) [Mother's] testimony that [the victim] came to her room crying and upset immediately after the assault, and; (5) the similar fact testimony of [L.F.] and K.H."

The Court certified to the Supreme Court the following question of great public importance:

> Whether *Beber v. State*, 887 So. 2d 1248 (Fla. 2004) and *Baugh v. State*, 961 So. 2d 198 (Fla. 2007), require a court to grant a judgment of acquittal where a developmentally disadvantaged or child victim confirms the truthfulness of a prior out-of-court statement admitted pursuant to section 90.803(2), Florida Statutes, and confirms that some criminal sexual act occurred, but also offers contradictory testimony at trial as to some of the specific acts that purportedly occurred during the same encounter.

Smith v. State, 5D17-1228 (Dec. 14, 2018)

Smith appealed a conviction for first-degree murder and argued that a recorded telephone conversation was erroneously admitted in violation of Florida's wiretap statute. The Fifth District agreed that it was admitted in error, but found the error was harmless.

The victim was the 20-month-old child who was in Smith's care the day she died. The phone conversation was between Smith and the child's mother on the day of the death. The mother recorded the call on her cell phone with a recording app. While the mother's words on the recording could be understood, Smith's were unintelligible. In a statement to a detective, Smith acknowledged being aware of the app on the mother's cell phone.

Section 934.03(1), Florida Statutes, generally prohibits the interception of oral communications. An oral communication intercepted without consent violates the statute and is inadmissible in any court proceeding. There was no evidence of consent in this case.

The State argued that Smith's admission to the detective that he knew the mother recorded conversations constituted implied consent. "However, the dialogue relied on by the State does not indicate when Smith learned of Mother's practice to record all cell phone conversations. Moreover, no other evidence eliminates the ambiguity."

The Court's harmless error analysis emphasized that Smith's words were unintelligible and that the defense actually used the recording to accuse the mother of being the perpetrator of the murder and to support Smith's defense. Additionally, the Court detailed the other evidence in the case and found it to be extensive and compelling.

One judge dissented as to the harmless error analysis of the majority.

State v. Archer, 5D17-2423 (Dec. 14, 2018)

The State appealed an order suppressing evidence found in plain view "after law enforcement officers entered Travis Archer's house and backyard due to exigent circumstances." Archer cross-appealed, challenging the authority of the officers to enter the home based on exigent circumstances. The Fifth District reversed the order suppressing evidence and upheld the entry based on exigent circumstances.

Police responded to a call regarding possible animal abuse. Upon arriving, they heard someone in the backyard appearing to give an animal instructions to sit or lay down, plus the possible sound of striking flesh. The officers knocked on the door and advised Archer of the animal abuse complaint. Archer said his dog bit him so he hit it a couple of times. Archer declined the officers' request to enter and look around, but invited them in to observe the mess the dog created. The officer followed Archer towards the backyard, and when Archer pointed to the dog, in the area where the prior sounds had been heard, the officer observed a dog tied up by the fence with his tongue hanging out and bloodied. The officer concluded the dog was dead. When the officer asked Archer, "Seriously," Archer responded that the dog bit him. Archer was then arrested, and, after receiving his Miranda warnings, gave incriminating statements.

As to the initial entry into the residence, the Court found that the feared medical emergency rationale, which is a form of exigent circumstance, was applicable to animals, not just persons. During the course of this lawful entry, the plain view doctrine authorizes law enforcement to seize items in plain view when "(1) the seizing officer is in a position where he has a legitimate right to be, (2) the incriminating character of the evidence is immediately apparent, and (3) the seizing officer has a lawful right of access to the object."

The plain view doctrine covered the officer's observation of the deceased dog. The trial court had also suppressed photos and bodycam footage obtained after Archer was placed in the patrol car. The officers re-entered the home to take the photos and video. Although the exigency was over at that time, "no warrant was required where the evidence ultimately seized was first observed and discovered in plain view."

S.S. v. State, 5D18-454 (Dec. 14, 2018)

A restitution order was reversed because the evidence was insufficient to show that S.S. caused the damages in question.

S.S. entered into a negotiated plea to trespass in a conveyance, as a lesser offense of grand theft of a motor vehicle. The agreement required restitution. The car, when stolen, was in perfect condition, but, on return, had extensive damage. An expert testified that the damage exceeded $3,300. There was no testimony as to the cause of the damage, however. And, the police report did not state that the vehicle had been found in damaged condition.