Case Law Update
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Prepared by
Richard L. Polin

Supreme Court of Florida

Thompson v. State, SC18-1435 (Jan. 7, 2019)

Hurst v. Florida, 136 S.Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016), did not apply retroactively in Thompson's case, as Thompson's sentence of death became final in 1993, prior to the United States Supreme Court's decision in Ring v. Arizona.

Allen v. State, SC17-1623 (Jan. 7, 2019) (on rehearing)

The Florida Supreme Court modified its opinion of December 20, 2018, which is discussed in the Case Law Update of December 24, 2018. The Supreme Court adhered to its previous conclusions.

Eleventh Circuit Court of Appeals

United States v. Campbell, 16-10128 (Jan. 8, 2019)

The Eleventh Circuit addressed the legality of a traffic stop and concluded, first, that a 'highway patrolman had reasonable suspicion to stop a motorist for a rapidly blinking turn signal," and second, that the "seizure became unreasonable when the patrolman prolonged the stop by questioning the motorist about matters unrelated to the stop's mission."

The officer observed the defendant's vehicle cross a fog line twice and noticed the left-turn signal blinking at "an unusually rapid pace," and then pulled the car over. ("The 'fog line' is the line on the side of the highway that separates the highway from the shoulder, marking the end of the highway's outside lane."). The officer issued a warning for failing to maintain signal lights in good working condition and failing to stay within the driving lane.

The officer then had Campbell exit the car while he wrote the ticket and had a dispatcher check the license. The officer then engaged Campbell in conversation, which touched on Campbell's trip to visit his family, Campbell's employment, a 16-

year-old DUI, and the lack of a firearm on Campbell. "Then he asked Campbell if he had any counterfeit CDs or DVDs, illegal alcohol, marijuana, cocaine, methamphetamine, heroin, ecstasy, or dead bodies in his car." When Campbell responded that he did not, the officer asked for, and obtained, consent to search the car for any of those items.

The officer continued writing the warning ticket and a second officer arrived and began the search. A semi-automatic pistol, ammunition, a black stocking cap, and a camouflage face mask were found. Campbell then admitted he lied about the firearm because he was a convicted felon. He was charged with possessing a firearm as a convicted felon.

A rapidly blinking turn signal notifies the driver "that a bulb is out or is about to go out. It can also mean that there is a problem with the wiring." As such, it provided "reasonable suspicion to believe that Campbell's car was in violation of the traffic code."

The conclusion that the detention was unduly prolonged was based on the Supreme Court's decision in Rodriguez v. United States, 135 S.Ct. 1609 (2015). Courts must "look at what an officer actually does: if he 'can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission"'" "And 'a traffic stop prolonged beyond that point is unlawful.' . . . Put differently, a stop can be unlawfully prolonged even if done expeditiously." To "unlawfully prolong, the officer must (1) conduct an unrelated inquiry aimed at investigating other crimes (2) that adds time to the stop (3) without reasonable suspicion."

Approximately two minutes were spent asking where Campbell was going and why; "these questions were related to the purpose of the stop." The travel plans were relevant to the malfunctioning signal, as that could have been a problem for a long drive.

The questions about contraband were not related to either of the stop's violations. These unrelated questions lasted 25 seconds. The officer "asked them before he had completed the stop by issuing the warning ticket." While the officer acted in objectively reasonable reliance on binding precedent, United States v. Griffin, 696 F. 3d 1354 (11th Cir. 2012), Griffin could not be reconciled with Rodriguez. The Government had relied on the good faith reliance exception in the district court, but did not assert it in the Eleventh Circuit appeal. While the Eleventh Circuit could have treated that as an abandonment, it chose not to, because the

exclusionary rule "is meant to deter unlawful conduct by the police." "If we ignored the good faith exception, we would be suppressing the truth to no end other than teaching the Government's counsel a well-deserved lesson. We decline to do so."

Thus, notwithstanding the unduly prolonged seizure, contrary to analysis mandated by the Supreme Court's decision, the denial of the suppression motion was affirmed. One judge dissented and would not have resorted to the good-faith reliance exception, deeming it waived on appeal.

Solomon v. United States, 17-14830 (Jan. 8, 2019)

A successive motion to vacate under 28 U.S.C. s. 2255 was properly denied. The motion raised a vagueness challenge, based on Johnson v. United States, 135 S.Ct. 2551 (2015), with respect to 18 U.S.C. s. 924(c)(3)(B), the residual clause of the Armed Career Criminals Act.

There had been significant case law changes, from both the Supreme Court and Eleventh Circuit, subsequent to Solomon's convictions, sentences and first motion under section 2255. Ultimately, the rationale of the Eleventh Circuit changed, in its opinion on rehearing en banc in Ovalles v. United States, 889 F. 3d 1259 (11th Cir. 2018). In that opinion, the court interpreted the residual clause to "incorporate the conduct-based" method of analysis, and under that interpretation, the residual clause was concluded to be not unconstitutionally vague. Given that opinion on rehearing en banc, Solomon's successive motion was properly denied.

First District Court of Appeal

Barber v. State, 1D17-3782 (Jan. 10, 2019)

The First District affirmed multiple convictions and sentences, addressing one issue – whether convictions for burglary of a conveyance with a person assaulted (count I) and battery (count III), violated double jeopardy.

"Both offenses involved the same victim and occurred during the same criminal episode, and both offenses were predicated on the same act: a beating administered to the victim while he was sitting in his car." The jury's verdict found the defendant guilty of both burglary with an assault and burglary with a battery on count I. As the ultimate conviction for battery with an assault includes the elements of assault, which differ from those of the elements for the conviction for battery under count III, there was no double jeopardy violation.

Foster v. State, 1D16-1830 (Jan. 8, 2019)

In an appeal from a postconviction motion, Foster raise an argument under Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 567 U.S. 2012), challenging a discretionary life sentence for second-degree murder. The First District, pursuant to Landrum v. State, 192 So. 3d 459 (Fla. 2016), reversed. *Landrum* had reversed a discretionary life sentence of life without the possibility of parole imposed on one who was a juvenile as the time of the offense, because Miller required "'a sentence to consider a juvenile offender's youth and attendant characteristics before determining that life withot parole is a proportionate sentence.'"

Aviles-Manfredy v. State, 1D17-3005 (Jan. 7, 2019)

The defendant was convicted on two charges arising from an instance of road rage in May 2016. His pretrial motion to dismiss based on the Stand Your Ground law was denied, and the trial court had applied the then-existing burden of proof which rested on the defendant. He then proceeded to trial and was convicted. The First District has previously concluded that the 2017 burden-shifting statutory amendment applies retroactively, and the Court therefore reversed the convictions for further proceedings and certified conflict with decisions of the Third and Fourth Districts.

On remand, the trial court must conduct a new immunity hearing, where the State bears the burden of proof. If the trial court concludes the defendant is entitled to immunity, an order of dismissal must be entered. If the trial court concludes, under the new burden of proof, that he is not entitled to immunity, the trial court will then reinstate the convictions and sentences.

Ellsworth v. State, 1D18-187 (Jan. 7, 2019)

Without providing any facts, the Court cited and quoted the Florida Supreme Court opinion in Presley v. State, 227 So. 3d 95, 107-08 (Fla. 2017), for the holding that "'law enforcement officers may detain a vehicle's passengers for the reasonable duration of a traffic stop without violating the Fourth Amendment.'"

Taylor v. State, 1D18-1768 (Jan. 7, 2019)

A notice of appeal filed after a timely-filed motion to withdraw plea under Rule 3.170(l) did not divest the trial court of jurisdiction to entertain the motion to withdraw. The trial court retained the authority to rule on the motion and file a signed, written order, during which time the appeal is held in abeyance.

Second District Court of Appeal

Freeman v. State, 2D17-5105 (Jan. 9, 2019)

Dual convictions for scheme to defraud and grand theft violated double jeopardy, and the grand theft conviction was vacated, where the convictions were based on the same course of conduct. The Court rejected the State's argument that the convictions were based on multiple transactions occurring on multiple days and that the jury could have found one transaction sufficient for grand theft and the other 20 for the scheme to defraud. The jury verdict form, however, did not make such a factual finding.

Third District Court of Appeal

Talley v. State, 3D16-1500 (Jan. 9, 2018)

Talley appealed a conviction for first-degree murder and the Third District affirmed and addressed three issues.

"Several of the victim's family members became emotional during opening statements and exited the courtroom visibly and audibly crying." Talley's motion for mistrial based on a claim of prejudice was properly denied. The issue on the motion for mistrial was not merely whether there was prejudice, but whether "an error is so prejudicial as to vitiate the entire trial." The trial court made findings on the record, stating that "'two or three' family members left the courtroom when they became emotional during a portion of the prosecutor's opening remarks. The trial court emphasized that nothing was directed to any particular juror or the jury and that the upset family members 'acted in an appropriate manner by exiting the courtroom.' Moreover, a curative instruction was given to the jury at defense counsel's request."

The trial court did not abuse its discretion in denying a defense request "for a special jury instruction regarding the effect of drugs or alcohol on a witness's ability

to perceive and recall." Talley argued an entitlement to such a special instruction "because the State's case rested on the testimony of Tracy and Stacy, both of whom admitted to consuming alcohol on the day of the shooting, and both of whom testified they could sometimes hear or see dead people." Talley did not sustain his burden "to prove the standard instructions given did not adequately cover his theory."

The standard instructions to the jury addressing weighing of a witness's testimony include, inter alia, instructions on the opportunity to see, the accuracy of the witness's memory, the honesty and straightforwardness of the witness, agreement of the witness's testimony with other testimony and evidence in the case, and witness inconsistencies. Those standard instructions, coupled with "the juror's common sense, provided sufficient guidance in assessing the reliability of the witnesses' perception and the potential effect of contemporaneous alcohol use on the witness' perception and ability to recall."

Talley also challenged several comments of the prosecutor made during closing argument. The Court reviewed them to determine whether they collectively rose to the level of fundamental error. Although the Court affirmed and did not find fundamental error, the Court found that some of the comments were improper.

The prosecutor was addressing the courage of the State's witnesses to come from the neighborhood in which the lived and in which the murder occurred: "we had to put them on monitors, we had to get the Court involved to basically get them in here and cooperate *because they come from a neighborhood you don't snitch. You don't snitch* and you don't talk." The snitch comment, although improper, was isolated, and the trial court, on request of defense counsel, gave a curative instruction for the jury to disregard the comment.

The remaining comments were not objected to. In one, the prosecutor addressed the testimony of the State's witnesses: "For you to discount their testimony, you would have to discount Stacy, Tracy and Helen. You would have to find all three are liars and then he walks. You walk him. You acquit him he walks out the door. For you to acquit him you have to discount all three of those ladies and ask yourselves this. . . ." The next comment at issue was that "if you find that he did not commit a crime, then you will acquit him of everything and he walks out the door with you." The third comment was that if the jurors disbelieve testimony of certain state witnesses, "then walk him. Let him walk out that door acquit him."

The State conceded on appeal that the comment "you would have to find all three are liars" was improper pursuant to Atkins v. State, 878 So. 2d 460 (Fla. 3d

DCA 2004). The Court rejected Talley's argument that the "'walk out the door' references impermissibly appealed to the jury's community conscience and cumulatively constitute fundamental error." In the context of the entire closing argument, they were "not an improper appeal to the jury's community sensibilities or conscience. Further, contrary to Talley's assertion, the 'walk out the door' comments did not suggest that the jury pick a side, condone the victim's murder if returning a not guilty verdict, or convict Talley for the good of the community."

Talley also argued that the above-quoted statement that the jury would have to find all three witnesses were liars was an improper burden-shifting comment. "We recognize that this particular comment improperly suggested to the jury that acquittal was proper only if they found the State's witnesses to be dishonest." However, there was no objection and the comment did not rise to the level of fundamental error.

A motion for judgment of acquittal based on the contention that the two key state witnesses "were mistaken and lacked credibility because they admitted to consuming alcohol on the day of the shooting and their testimony raised questions as to their mental health" was properly denied. It is the jury's function to assess witness credibility, not the court's.

M.W. v. State, 3D18-400 (Jan. 9, 2019)

The judge did not "overstep his obligation to reman neutral and impartial." After a defense hearsay objection, the judge stated, "establish how he knows," and when the prosecutor responded that the witness has personal knowledge, the judge again stated, "establish." "In this instance, the trial judge merely told counsel for the State to lay a proper predicate for the evidence the State knew it was required to present. The trial judge neither asked a question of the witness nor told the State which question to ask of the witness. In other words, the trial judge did not cross a line and assume the role of the prosecutor."

Fourth District Court of Appeal

State v. Wesby, 4D16-4246 (Jan. 9, 2019)

The State appealed an order granting a defendant's motion to correct an illegal sentence. The defendant was a juvenile and had a life sentence with parole eligibility. The Fourth District reversed, pursuant to the Florida Supreme Court's

decisions in Franklin v. State, 43 Fla. L. Weekly S556 (Fla. Nov. 8, 2018) and State v. Michel, 43 Fla. L. Weekly S298 (Fla. July 12, 218).

The Fourth District rejected Wesby's argument that Michel did "not create binding precedent because only three justices joined in Justice Polston's opinion and Justice Lewis concurred only in the result. [citation omitted]. However, four justices joined the majority in *Franklin*, which recognized that *Atwell* is no longer good law and 'improperly applied *Graham* and *Miller*.'"

Johnson v. State, 4D17-845 (Jan. 9, 2019)

The Court addressed several alleged sentencing scoresheet errors. First, when an offense is reclassified on the basis of the use of a weapon or firearm, the scoring level is ranked one higher than the level for the offense without the firearm. However, an offense may not be reclassified under section 775.087(1), Florida Statutes, without establishing personal possession by the defendant during the offense. The State conceded personal possession was not established, and the scoresheet level for the offense therefore had to be reduced one level, and that resulted in a reduction of 24 points on the scoresheet.

The inclusion of victim injury points for "slight victim injury" was affirmed. The slight injury was based on the use of pepper spray on the side of the victim's face.

Stickney v. State, 4D17-1004, 4D17-1005 (Jan. 9, 2018)

The trial court orally pronounced a reason for finding the defendant posed a danger to the community as a violent felony offender of special concern under section 948.06(8)(e)1, Florida Statutes. Due to the absence of written findings, the case was remanded for a written order. Because the finding was orally pronounced, the defendant was not entitled to a new sentencing hearing.

Additionally, the trial court failed to issue a written order memorializing the conditions of violation which the court found the defendant to have violated.

Sol v. State, 4D17-1312 (Jan. 9, 2019)

The trial court's written order adjudicated he defendant a habitual felony offender and referenced an "enhanced sentence." The oral sentencing pronouncement found that an enhanced sentence was not necessary for the

protection of the public. As the oral pronouncement controls over the written order, the written sentencing order was remanded with directions to delete language referring to an enhanced sentence.

State v. Serfrere, 4D17-1374 (Jan. 9, 2019)

After sentencing for the offenses of trafficking in cocaine and possession of cocaine, the trial court granted a new trial based on an alleged Brady violation. The State appealed and the Fourth District reversed, finding that the "evidence at issue was neither material nor prejudicial to Serfrere."

The State had listed Detective D.J. on its discovery witness list, but did not identify him as a potential witness during voir dire. "While the jury was deliberating, Serfrere's counsel brought to the court's attention that the State had not called Detective D.J. during trial. Counsel informed the court that he contacted the clerk of court during a recess and learned that Detective D.J. was the subject of a *Brady* notice and '[was] under investigation by the State Attorney's Office and the SPU Unit for Grand Theft."

Defense counsel argued that the defense had not previously been aware of the Brady notice regarding D.J. The State's response indicated that the Brady notice had been filed by a prior prosecutor and scanned with a bar code, but there was no verification that the notice was docketed. The defense argued that D.J. was one of only two individuals who "could confirm whether a purported confidential informant was documented with the police department, an issue relevant to Serfrere's objective entrapment defense. He also brought attention to Serfrere's missing cell phone, which was in Serfrere's possession at the time of the arrest but was lost and never logged as evidence."

While the State's creation of a Brady notice as to D.J. acknowledged potential materiality and prejudice under Brady, "since voir dire, Serfrere was on notice that the State did not intend to call Detective D.J. as a witness. As such, this is not a case of an undisclosed material witness. Instead, it involves a witness the State disclosed and later stated would not be called to testify." And, a defendant can not call a witness "mainly to impeach him." "Because the State did not intend to call Detective D.J. as a witness, there could have never been an opportunity for Serfrere to impeach him."

Ortiz v. State, 4D17-2418 (Jan. 9, 2019)

The case was reversed and remanded for resentencing because the trial court "erred by considering acquitted conduct during sentencing."

The defendant was charged with first-degree murder, but convicted on that count for the lesser offense of second-degree murder. The judge, during sentencing, commented on the jury's rejection of the self-defense claim and said "there was actual reflection on your actions when you committed this murder. Your reflection in the time that you spent thinking about this . . . ." The references to "actual reflection" denoted the court's consideration of the acquitted conduct of premeditation. The case was remanded for resentencing before a different judge.

Although the defense did not object to the court's comments during sentencing, "'[a] trial court's consideration of a constitutionally impermissible sentencing factor is a fundamental error in the sentencing process" which is reviewable for the first time on direct appeal.'"

Bean v. State, 4D17-2419 (Jan. 9, 2019)

The defendant argued that the scoring of "slight victim injury", based on Alleyne v. United States, 133 S.Ct. 2151 92013), required a jury to make the factual determination as to the injury. The Court disagreed. Alleyne was inapplicable because there was no mandatory minimum sentence involved in this case, and Alleyne applied only when the factual finding was required to increase the sentence the court could impose by establishing a mandatory minimum.

Additionally, the plea agreement referenced the slight injury points, and a statement by the prosecutor, informing the court "that the six tellers were 'pistol-whipped' or beaten with a gun" was not objected to and was confirmed by the victims' statements "and admitted by the appellant in his motion for downward departure." There was also record documentation that three victims "were transported to the hospital for attention to their injuries." "Further, the appellant specifically stated that part of his reason for pleading guilty was to spare the victims from testifying and to not further traumatize them. He can hardly complain that there is insufficient evidence of slight injury to the victims when he affirmatively expressed his intent not to require them to testify." Thus, there was no abuse of discretion in scoring slight victim injury points.

Machin v. State, 4D17-2787 (Jan. 9, 2019)

Convictions were reversed due to the failure of the court to hold a hearing to evaluate incompetency after appointing a competency expert. On remand, the court may make a nunc pro tunc competency determination if possible.

McKinley v. State, 4D17-2822 (Jan. 9, 2019)

Two convictions for attempted first-degree murder were reversed because the trial court "erred in failing to respond to [the defendant's] requests to represent himself.

During voir dire, the transcript reflects that McKinley stated: "'Judge, I want to represent myself.'" Neither the court nor counsel responded to this. And, just prior to opening arguments, McKinley asked if could go "pro se," adding 'I don't want him and me'." The judge then asked if McKinley was asking to represent himself, and he responded affirmatively: "[Y]eah," and "I will represent myself," and "I will represent myself because I ain't got my witnesses." The trial court found that the defendant "had not made an unequivocal request for self-representation and proceeded to trial." The Fourth District disagreed, found the request was unequivocal, and reversed because the trial court failed to conduct the required hearing under Faretta v. California, 422 U.S. 806 (1975), to determine if the defendant was knowingly and intelligently waiving his right to court-appointed counsel.

Clark v. State, 4D17-3166 (Jan. 9, 2019)

In an appeal from a first-degree murder conviction, the Fourth District rejected Clark's argument "that the trial court erred in admitting a latent fingerprint card into evidence over his objection, and in allowing a witness who did not create the card to read from it during trial." The murder occurred in 1987 and remained a cold case for 25 years.

The officer who lifted the print and compiled the fingerprint card had passed away before a DNA match linked Clark to the murder. The State therefore used other witnesses. Detective Waites "testified to the contents of the latent print card and how such evidence was collected." Latent print examiner Gary Mosely "discussed the general process of examining latent prints" and was permitted to "refer to notations on the back of the card written by Sergeant Cook [deceased],

which indicated that the print was lifted from the outside of the passenger-side rear window of Fader's vehicle."

"Here, the State laid a sufficient predicate through the testimony of Detective Waites and print examiner Mosely to support that the latent prints were what they were purported to be. . . . Additionally, there was no evidence of tampering or any break in the chain of custody. Therefore, the court did not abuse its discretion in allowing the prints into evidence."

"The trial court also did not abuse its discretion in ruling that the latent print card was relevant. Detective Waites testified he saw a latent print on Fader's [victim's] vehicle and alerted Sergeant Cook to its existence. Even if the notation about where this print was lifted from the vehicle was redacted, as the defense requested, the other notations on the card, along with the print itself, tended to establish its relevance to the instant case."

Any error under either the business records exception to the hearsay rule or the Confrontation Clause, as to identifying information on the fingerprint card – victim's name, crime date and location of print – was harmless beyond a reasonable doubt, and the Court therefore did not reach the merits of the claim.

Paul v. State, 4D17-3469 (Jan. 9, 2019)

Pursuant to an open plea, Paul was sentenced for multiple offenses, including a first-degree felony, and multiple second- and third-degree felonies. Paul was sentenced to 140 months (11.67 years) in prison, followed by 10 years of probation, with all sentences served concurrently.

Paul filed a motion to correct illegal sentence under Rule 3.800(a), arguing that the combined total of prison plus probation exceeded the statutory maximum for second-degree felonies. After the trial court denied the motion, on appeal, the State conceded error and the Fourth District agreed and remanded for resentencing on the second-degree felonies; the opinion did not disturb the sentence for the first-degree felony.

In the trial court, Paul then sought resentencing on the first-degree felony as well, arguing that there was a scoresheet error on the original scoresheet that would affect all offenses, including the first-degree felony. The trial court imposed new sentences only for the second-degree felonies referenced in the Fourth District's opinion. On appeal from the new sentence, the Fourth District found that the trial

court was correct in not resentencing for the first-degree felony, because the Fourth District's prior mandate to the trial court extended only to the second-degree felonies. The Fourth District further found that the scoresheet used on the resentencing was correct and therefore did not affect the new sentences for the second-degree felonies.

E.G. v. State, 4D17-3957 (Jan. 9, 2019)

After adjudicating E.G. delinquent, the trial court placed him in a residential commitment program, concurrent with dispositions in other cases. The trial court erred, however, by "failing to consult a predisposition report (PDR) prior to issuing the commitment order, as required by Florida Statutes." Although defense counsel had stated that it was not necessary, the court did not advise the juvenile of his rights or the significance of waiving them, and there was no valid waiver of the PDR.

Perry v. State, 4D18-460 (Jan. 9, 2019)

Perry, a juvenile at the time of the offenses for which he was convicted, was sentenced to 65-year prison sentences for armed kidnapping, armed carjacking, and sexual battery. The Fourth District reversed the denial of a Rule 3.800(a) motion to correct illegal sentence, based on Kelsey v. State, 206 So. 3d 5 (Fla. 2016).

Perry's sentence was imposed before July 1, 2014, when the 2014 juvenile sentencing statutes became effective. Kelsey had been sentenced in the same posture, receiving concurrent sentences of 45 years, and the Florida Supreme Court had reversed and remanded for resentencing under the 2014 juvenile sentencing statutes, having found that the 45-year sentences violated Graham v. Florida, 560 U.S. 48 (2010).