Case Law Update
January 21, 2019
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Supreme Court of the United States

Stokeling v. United States, 17-5554 (Jan. 15, 2019)

Stokeling received an enhanced sentence under the Armed Career Criminal Act, based on the existence of three prior convictions for a "violent felony." This case addressed the issue of whether his 1997 Florida robbery conviction qualified as a "violent felony" predicate.

The elements clause of the ACCA defines violent felony a crime punishable by imprisonment for more than a year and "has as an element the use, attempted use, or threatened use of physical force against the person." The Florida Supreme Court has stated that "the 'use of force' necessary to commit robbery requires 'resistance by the victim that is overcome by the physical force of the offender.'" The Supreme Court concluded "that the elements clause encompasses robbery offenses that require the criminal to overcome the victim's resistance."

The "force necessary to overcome a victim's physical resistance is inherently 'violent'" in that it exceeds "nominal contact" that the Supreme Court had elsewhere deemed insufficient in a case involving misdemeanor simple battery. The Court distinguished the force that suffices for both robbery and a "violent felony" under the ACCA from cases in which Florida appellate courts have found that the snatching of money from a victim's hand was insufficient to establish force for robbery. The Court also noted Florida's enactment of a distinct statute proscribing "sudden snatching," which entails a lesser degree of force than does the robbery statute.

Eleventh Circuit Court of Appeals

United States v. Maritime Life Caribbean Limited, 17-10889 (Jan. 16, 2019)

The Court addressed two forfeiture issues: (1) "whether the district court erred in requiring Maritime Life to prove the authenticity of the collateral assignment that allegedly granted it a security interest in the forfeited property by a preponderance of the evidence" and (2) "whether the district court erred in permitting the Republic

of Trinidad and Tobago to intervene in the forfeiture proceeding even though it had no legal interest in the property."

The criminal case giving rise to the forfeiture entailed wire- and bank-fraud charges "arising from a bid-rigging scheme involving the construction of an airport in Trinidad and Tobago." The forfeiture included the convicted offender's interest in real property in Coral Gables.

Trinidad and Tobago sought to intervene in the forfeiture, asserting that it was a victim of the bid-rigging and had an interest in forfeiture proceeds, "but it did not assert any legal interest in the property itself." The district court granted the motion to intervene.

When the United States government issued its Notice of Criminal Forfeiture, it was addressed to Steve Ferguson, the former CEO of Maritime Life. Ferguson had been a business associate of Gutierrez, the individual convicted in the bid-rigging prosecution. Maritime then filed "a third-party claim asserting an interest" in the Coral Gables property under the criminal-forfeiture statute. "To support its claim, Maritime produced an alleged collateral assignment that purported to memorialize a transaction in which Gutierrez granted a security interest" in the property to Maritime as collateral for a loan to his construction company.

The district court required Maritime to prove that the collateral assignment was an authentic document by the greater weight of the evidence. That was erroneous. Under Rule of Evidence 901, Maritime first bore the burden of establishing a prima facie case of authenticity. If that burden is satisfied, "'the evidence may be admitted, and the ultimate question of authenticity is then decided by the [factfinder].'" The district court erred by conflating the two-step inquiry into one step. The error was technical and was deemed harmless and did not require reversal.

Trinidad was erroneously permitted to intervene in the ancillary proceeding, as such intervention was not on behalf of the United States, and, under the provisions of 28 U.S.C. sections 541(a), 542(a) and 543(a), to "represent the United States, an attorney must either be a United States Attorney, an assistant United States Attorney, or a special attorney." "Nor did Trinidad have standing to intervene to defend its own interests. Congress has created one – and only one – means for interested third-parties to participate in a criminal-forfeiture proceeding: asserting a 'legal right, title, or interest' sufficient for standing in an ancillary proceeding." Trinidad did not attempt intervention under this statutory provision and would not have been able to

since it did not assert any "legal right, title, or interests" in the Coral Gables property. Here, too, the error was harmless.

First District Court of Appeal

Fleming v. State, 1D17-3493 (Jan. 14, 2019)

"[C]onsecutive sentencing under section 775.087(2)(d) is not available for a crime [sic] act that occurred during a single criminal episode involving a single victim or a single injury."

Cason v. State, 1D17-4376 (Jan. 14, 2019)

Dual convictions for resisting an officer without violence violated double jeopardy principles where they "were based on one continuous criminal episode, albeit involving two officers."

Varnadore v. State, 1D18-3814 (Jan. 14, 2019)

The 2015 amendment to section 782.04(1), Florida Statutes "does not apply when the arraignment occurred prior to the date of the statutory amendment. The amendment at issue pertains to the State's responsibilities after arraignment if the State intends to seek the death penalty. The opinion in Varnadore did not discuss the legal issue; it cited to its prior opinion addressing the issue, Jackson v. State, 43 Fla. L. Weekly D2343, 2018 WL 4997615 (Fla. 1st DCA Oct. 16, 2018).

Lagi v. State, 1D18-4447 (Jan. 14, 2019)

A pretrial order denying a motion to dismiss is not appealable in a criminal case.

Gorman v. State, 1D17-5266 (Jan. 14, 2019)

Gorman was convicted for 1991 offenses involving sexual assaults on his then six-year-old daughter. The daughter was seven at the time of the trial and she has recanted her trial testimony twice. On the basis of the latest recantation, Gorman sought a new trial based on newly discovered evidence. The now 32-year old daughter testified at the evidentiary hearing and stated that Gorman never molested her. Her brother testified, stating that she had long told him there was no molestation. She blamed her trial testimony on the influence of her mother. The

trial court denied the motion for new trial, concluding that the recantation was untrue, noting the daughter's poor memory, inconsistent statements, an expert's trial testimony about "sex-abuse victims' efforts to forget," and statements the daughter made to others about the abuse.

The First District affirmed the trial court's order based on the lower court's credibility determination. The appellate court emphasized that the trial court "benefitted from seeing the daughter testify in person."

The First District did not decide the issue of whether the evidence was truly newly discovered, in light of its ruling based on credibility.

Second District Court of Appeal

State v. Boston, 2D17-4814 (Jan. 18, 2019)

The Second District reversed a trial court's suppression order, concluding that the arresting deputy had a valid basis for stopping Boston.

A deputy testified that he saw Boston drive northbound through an intersection and drive on the wrong (southbound) side of the road for about 100 feet before returning to the proper lane. He further testified that there were no other vehicles or pedestrians present. After the stop, the deputy observed slurred speech, an unsteady gait and the odor of alcohol. The trial court's suppression order found that there was no traffic violation, focusing on the prompt correction of course and the "intersection's confusing configuration."

"All that was relevant in this criminal case was whether Deputy Schultheis had probable cause to believe Mr. Boston violated a traffic statute. Uncontroverted evidence established that Mr. Boston drove his vehicle in the wrong lane. He thus violated section 316.081 and provided Deputy Schultheis with an objectively valid reason to stop him."

Morris v. State, 2D16-4084 (Jan. 16, 2019)

The Second District reversed one conviction for possession of a conveyance for trafficking. Although the issue was unpreserved, it rose to the level of fundamental error.

"Here, the only evidence about the vehicle was that Mr. Morris drove the vehicle to a house. His wife waited in the vehicle while he went inside. A few minutes later, Mr. Morris placed the package in the vehicle and left. There was no evidence that the vehicle itself was a necessary component of trafficking in a controlled substance. Nor was there anything about the vehicle, or his wife's presence in it, that indicated it was intended for such use."

Section 893.1351(2), Florida Statutes (2016) "prohibits knowingly possessing a 'conveyance with the knowledge that the . . . conveyance will be used for the purpose of trafficking in a controlled substance.' To sustain a conviction for this offense, this court has held that the State must present sufficient evidence of a nexus between the use of the vehicle and the crime. . . . In other words, the presence of a controlled substance in a conveyance must be shown to be more than happenstance before the conveyance can be considered being used for trafficking in the controlled substance."

Vidana v. State, 2D17-5061 (Jan. 16, 2019)

Vidana failed to appear for a deposition in a criminal case in which he was an alleged victim of a shooting, and he was held in contempt of court after being subpoenaed twice. The trial court's contempt order was deficient, as it failed to recite specific facts that would support the adjudication for "direct" criminal contempt.

Additionally, the evidence would not support a finding of "direct" criminal contempt. The contemptuous conduct took place at a jail, where Vidana was when served both times. Three deputies tried taking him to the depositions but he refused. Direct criminal contempt, however, must be something that the judge sees or hears in court.

Third District Court of Appeal

Walter v. State, 3D18-146 (Jan. 16, 2019)

The trial court correctly concluded that a Rule 3.850 motion was an unauthorized successive motion. A Rule 3.850 motion is successive if the prior Rule 3.850 motion was adjudicated on the merits. In this case, "[w]hile the trial court's June 28, 2017 order initially indicated that it was unnecessary to address the merits, the order plainly and unequivocally determined that the affidavit upon which

Walter's February 2017 motion was based lacked credibility. This constituted a reaching of the merits. . . ."

Garcia v. State, 3D188-1485 (Jan. 16, 2019)

For a Rule 3.800(a) motion to correct illegal sentence, the "burden is on defendant to demonstrate an entitlement to relief on the face of the record; State has no burden to establish defendant is not entitled to relief." And, Rule 3.801 "is the exclusive method for seeking a correction of jail credit, and a motion seeking such relief may not be considered if filed more than one year after the sentence becomes final."

Fowler v. State, 3D18-1917 (Jan. 16, 2019)

Burglary of a dwelling with an assault or battery is a first-degree felony punishable by life imprisonment and is a qualifying offense under the prison releasee reoffender statute.

Fourth District Court of Appeal

Terry v. State, 4D16-3978 (Jan. 16, 2019)

Terry's sentencing arguments were rejected in a direct appeal of his conviction and sentence because he did not pursue steps to reconstruct the record as to the sentencing proceeding in accordance with Rule 9.200(b)(4), Florida Rules of Appellate Procedure.

Terry was tried and convicted separately on severed charges of possession of cocaine and possession of a firearm by a convicted felon, which resulted in the first of the two convictions. He appealed that conviction and sentence, and the Fourth District affirmed in 2017.

After the verdict for the cocaine possession charge and sentence of four years, consecutive to the earlier sentence, Terry filed a Rule 3.800(b)(2) motion, during the pendency of the second appeal, alleging sentencing scoresheet errors. The court granted that motion and stated that a resentencing hearing would be held.

A resentencing hearing was held on September 20, 2017 and the same sentence was imposed. When Terry sought to supplement the record on the pending appeal with it, a transcript could not be obtained because the hearing had

inadvertently not been recorded. Terry then filed a second motion to correct sentencing error under Rule 3.800(b)(2), claiming an entitlement to it due to the failure to record and preserve transcription. At that time, the court, on its own, scheduled a hearing to recreate the record. This was done, and the trial court's order did not refer to the second 3.800(b)(2) motion.

At the hearing to reconstruct, defense counsel stated that he did not save his notes and did not have an independent recollection of the proceeding and asserted "it would be more appropriate to have a completely new resentencing hearing on the record." The trial court then orally stated that it was resentencing Terry to the same four-years of imprisonment consecutive to the earlier sentence. The appellate court brief challenging the sentence was then filed.

It was the appellant's burden to demonstrate error in the trial court and to submit an adequate record to support the appeal. While there was an obligation under criminal and administrative rules of procedure "to create a recording of the resentencing conducted," and while it is true that an appellant is entitled to a full transcript of the trial record, once the appeal was taken, and the transcript could not be obtained, the appellant's remedy was to pursue reconstruction in accordance with Rule 9.200(b)(4), Florida Rules of Appellate Procedure.

"In the instant case, upon discovering there was no transcript of the resentencing on September 20, Appellant did not seek to obtain a statement of evidence and proceedings pursuant to rule 9.200(b)(4). Instead, Appellant sought relief by filing a second rule 3.800(b) motion. Because there is no transcript of the September 20 resentencing or an adequate substitute, Appellant has not demonstrated he is entitled to relief under rule 3.800(b)."

The Fourth District also rejected Terry's argument that the trial court "lacked jurisdiction to enter the *sua sponte* order and conduct the November 21 proceeding," at which the trial court was attempting to recreate the record. The absence of an order of relinquishment was not an impediment to the trial court proceeding with the reconstruction effort. However, the trial court did not follow the proper procedure. Under Rule 9.200(b)(4), one of the parties must first serve a written statement of facts on the other party, who may then serve objections or proposed amendments, which the lower court then considers for approval.

Davis v. State, 4D17-3955 (Jan. 16, 2019)

A 30-year sentence imposed at a de novo resentencing hearing by a new judge was longer than the original sentence. Davis claimed that the new sentence was vindictive. The Fourth District disagreed.

There was no presumption of vindictiveness because the latest sentence at issue was not imposed by the same judge, whose sentence had previously been reversed and remanded for resentencing before a different judge. Thus, Davis had the burden of proving "actual vindictiveness," and he failed to do so.

At the resentencing hearing at issue, the new judge explained the sentence that was being imposed "and nothing that he said suggested that the sentence was vindictive." The judge did not limit either party's presentation at that sentencing hearing, and "indicated that the sentence was also based upon a review of the court transcripts, everything provided to him by both the defense and prosecution, and the Pre-Sentence Investigation."

The Appellant's reliance on Kramer v. State, 868 So. 2d 1246, 1249 (Fla. 4th DCA 2004) for the contention that the Fourth District adopted a standard of an "appearance of vindictiveness" was rejected, and the Court viewed the language in Kramer as dicta, "without any citation to authority." It was not an abandonment of "principles established by the Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711 (1960), *Alabama v. Smith*, 490 U.S. 794 (1989), and *[Texas v.]McCullough*, [475 U.S. 134 (1986)]."

Robinson v. State, 4D18-1657 (Jan. 16, 2019)

A malfunctioning recording device resulted in the total loss of ability to prepare a trial transcript, and the trial court was unable to reconstruct the trial record. The State conceded, and the Fourth District agreed, that Robinson was entitled to a new trial.

Fifth District Court of Appeal

McKinnon v. State, 5D18-11 (Jan. 18, 2019)

McKinnon's probation was revoked for three violations, including one for moving residences without notifying and obtaining the consent of his probation officer. The Fifth District agreed that that violation was in error, because the

violation the court found differed from the language of the condition of probation allegedly violated.

Condition Three of probation "states that he would remain in a specified place and not change his residence or employment without the consent of his probation officer. Yet, the Violation of Probation (VOP) affidavit charged a violation of Condition Three for failure to report for his July 2017 appointment at the probation office." This conduct did not amount to a violation of the actual condition of probation. That violation was stricken from the trial court's written order, but the revocation of probation was affirmed because it was clear from the record that the court would have revoked probation and imposed the same sentence on the basis of the remaining violations that were not at issue.