Case Law Update
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First District Court of Appeal

Andujar-Sanchez v. State, 1D17-3393 (Jan. 25, 2019)

The denial of one claim in a Rule 3.850 motion was remanded for an evidentiary hearing. The defendant's motion alleged that counsel was ineffective for failing to obtain a competency evaluation. The trial court had summarily denied the claim on the basis of the defendant's responses to questions during the plea colloquy, which did not ask specifically about competency. The written plea agreement, signed by the defendant, stated that he was not under the influence of any mental or emotional condition that would interfere with his appreciation of the plea agreement. The plea colloquy elicited that the defendant agreed that every word of the plea agreement was true.

The 3.850 motion, however, alleged that the defendant was incompetent due to numerous mental illnesses, that counsel was aware of this, and that counsel obtained an order authorizing an evaluation but failed to ensure that it was completed.

Rhow v. State, 1D18-0448 (Jan. 25, 2019)

The trial court dismissed a Rule 3.850 motion, finding that it lacked jurisdiction because an appeal was pending in a prior postconviction proceeding. The First District reversed. The motion at issue in this case raised different issues from those in the motion under appeal and there was therefore no jurisdictional bar to the subsequent 3.850 motion proceeding in the trial court while the prior appeal was in process.

State v. Searles, 1D18-1749 (Jana. 25, 2019)

The trial court dismissed two counts of drug possession pursuant to a motion under Rule 3.190(c)(4). The State argued on appeal that issues such as knowledge, direct versus circumstantial evidence, and hypotheses of innocence were beyond the scope of such a motion. While the First District agreed with those general principles, it affirmed the dismissal of the two counts because the State failed to make those

arguments in the trial court, and they were therefore not preserved for appellate review. The State further invited error in the trial court by presenting argument on the basis of Knight v. State, 186 So. 3d 1005 (Fla. 2016), in which the Supreme Court addressed the standard of review to be used when ruling on motions for judgment of acquittal in circumstantial evidence cases.

McCray v. State, 1D16-4651 (Jan. 22, 2019)

McCray appealed convictions for armed robbery, attempted armed robbery and attempted felony murder.

He argued that the evidence was insufficient for attempted felony murder. That offense requires proof of an act that could have caused death and that is not an essential element of the underlying felony. Here, the underlying felony was the armed robbery. McCray argued that "his act of putting a gun to Tipton's head and pulling the trigger was an 'essential element' of the robbery." The First District disagreed. Even before the gun was placed to Tipton's head, the two perpetrators had assaulted Tipton, by hitting him on the head with a baseball bat. The robbery, at that point in time, was established, and it preceded the subsequent acts of pointing the gun and pulling the trigger.

While a court cannot find competency based solely on the stipulation of the parties, in this case, the parties stipulated to the report and the judge considered the report itself, not just the stipulation. The Court found no error as to the competency determination. (One judge dissented, inferring that the trial court judge may not have read the report, because the transcript reflected that the report was tendered to the trial court judge a "moment" before the judge found the defendant competent.).

Gilliams v. State, 1D17-1594 (Jan. 22, 2019)

In an appeal from a conviction for second-degree murder, the First District held that the trial court did not abuse its discretion in preventing the defense "from cross-examining the medical examiner about other possible intervening causes of the victim's death."

The Court quoted the controlling principles from the Florida Supreme Court's decision in Johnson v. State, 59 So. 894, 895 (Fla. 2012):

> A defendant cannot escape the penalties for an act which in point of fact produces death, which death might

> possibly have been averted by some possible mode of treatment. The true doctrine is that, where the wound is in itself dangerous to life, mere erroneous treatment of it or the wounded man suffering from it will afford the defendant no protection against the charge of unlawful homicide.

In this case, "the medical examiner gave testimony in deposition and trial that the victim would have died had he not received medical attention and that the cause of death was a gunshot wound of the chest/abdomen. . . . The bullet wound was a life-threatening injury for which medical malpractice or lack of optimal medical care was not a legally valid defense under the circumstances."

Johnson v. State, 1D17-4805 (Jan. 22, 2019)

Appellate counsel on the prior direct appeal was ineffective for failing to argue that the trial court erred by not conducting a required competency hearing. The court had ordered a competency evaluation, but did not hold the competency hearing that was required after a court-ordered evaluation. "At a subsequent hearing, the court asked whether the competency evaluation had been completed, but it never held a competency hearing, or made a finding that Mr. Johnson was competent to proceed."

Fales v. State, 1D17-4857 (Jan. 22, 2019)

Convictions were reversed on direct appeal because the trial court applied the wrong standard when it denied a motion for new trial. The motion alleged that the jury's verdict was contrary to the weight of the evidence. Such a motion permits the judge to act, in effect, as an additional juror and to consider the weight of the evidence. In this case, the judge, when denying the motion, said: "It was a good clean trial. I didn't see any error in the trial."

Second District Court of Appeal

King v. State, 2D16-3004 (Jan. 25, 2019)

King appealed a conviction for battery on a staff member of a detention facility for sexually violent predators.

After appointing experts to evaluate King's competency to stand trial, the court did not conduct the required hearing and did not enter an order finding King

competent. The Second District authorized the trial court to make, if possible, a nunc pro tunc determination of competency, as there were several witnesses who were in a position to provide testimony relevant to competency of King at the time of the trial.

The Second District also found error in the jury instructions regarding insanity, but concluded that the error was harmless. King had been adjudged insane in 1990, and he and never been judicially restored to legal sanity. The trial court gave two instructions. The first was to the effect that all persons are presumed sane and it then addresses the defendant's burden of proving insanity by clear and convincing evidence. The second stated: "If the evidence establishes that the defendant has been adjudged insane by a court, and has not been judicially restored to legal insanity, then you should assume the defendant was insane at the time of commission of the alleged crime, unless the evidence convinces you otherwise."

In this case, the trial court declined the defendant's request for a third instruction, to tell the jury that "[t]here was an order adjudging the Defendant insane on February 16, 1990." The trial court concluded that this would direct the verdict for the defense and that the issue of restoration should be left to the jury, with the defense being able to argue that point to the jury.

The trial court erred by giving both instructions in this case and then leaving it for the jury to decide what presumption to apply. However, the error was deemed harmless. The defense was permitted to argue the issue to the jury; the State presented its case "as if the presumption of insanity applied, and it told the jury that it 'embraced' the burden of rebutting that presumption. . . ."

Goudreau v. State, 2D17-4024 (Jan. 23, 2019)

The defendant's sentence was reversed because the trial court erred in denying him his right of allocution under Rule 3.720(b), Fla.R.Crim.P. After finding a violation of probation, the judge refused the defense request for the defendant to address the court as to sentencing, stating: "I've already made my decision on the sentencing. There's really nothing I wish to hear from this point forward."

Sutton v. State, 2D17-4073 (Jan. 23, 2019)

On appeal from convictions for attempted second-degree murder and possession of a firearm by a convicted felon, the Second District relinquished jurisdiction to the trial court for a nunc pro tunc determination of competency. The

trial court had appointed experts for an evaluation, but did not conduct the required hearing or make the determination of competency.

At a change of plea hearing, the court inquired as to the defendant's state of mind and the absence of a prior order of incompetency, and was advised that the evaluation had been done and came back competent and the defendant had previously been "reintroduced into the system as competent." There was nothing in the record showing that the judge was given the opportunity to review the experts reports.

State v. Lawrence, 2D18-261 (Jan. 23, 2019)

Lawrence was sentenced to life with the possibility of parole for a murder committed while a juvenile. The trial court granted him postconviction relief and ordered a resentencing pursuant to Atwell v. State, 197 So. 3d 1040 (Fla. 2016). Pursuant to State v. Michel, 43 Fla. L. Weekly S298 (Fla. July 12, 2018) and Franklin v. State, 43 Fla. L. Weekly S556 (Fla. Nov. 8, 2018), the Second District reversed. "As explained in Franklin, Lawrence's sentence of life with the possibility of parole for a murder he committed as a juvenile is constitutional under Miller and Graham."

Third District Court of Appeal

Smith v. State, 3D18-0991 (Jan. 23, 2019)

The Third District reversed convictions for possession of a controlled substance, possession of drug paraphernalia, and resisting an officer with violence, finding fundamental error, and agreeing with the State's confession of error, where the trial court failed to "instruct the jury as to Florida Standard Jury Instruction (Criminal) 3.7 Pea of Not Guilty; Reasonable Doubt, and Burden of Proof, or any similar instruction."

J.A. v. Housel, 3D19-0090 (Jan. 25, 2019)

A habeas corpus petition challenging an order finding ten instances of indirect criminal contempt and imposing a sentence of 100 days in secure detention was denied.

J.A. was on probation and required to live at her mother's residence and "accept reasonable controls and discipline in that home." A "Do Not Run" order expressly put J.A. on notice that she was facing five days for the first day that she

was "on the run" and up to 15 days for each subsequent day; each day was designated as a separate offense of contempt.

J.A. argued, in part, that the failure to remain at home for 10 days should constitute only a single act of contempt, not 10 acts. "As the Do Not Run Order effectively required J.A. to remain home each day, we conclude that each day that J.A. refused to adhere to the court's requirement constituted a separate violation. To hold otherwise would vitiate the express language of the statute [section 985.037], undermine the trial court's order, which clearly advised J.A. that each day away from home would constitute a separate incident of contempt, and render the court powerless to reasonably distinguish between absconding and fleeting absence in meting out an appropriate punishment." "Indeed, if we were to adopt the construction urged by J.A., there would be no incentive for a juvenile to return home at all, knowing, for example, that the trial court could punish a ten-day absconder no more harshly than an overnight violator."

Fourth District Court of Appeal

Cammalleri v. State, 4D16-3518 (Jan. 23, 2019) (on rehearing)

The defendant filed a Rule 3.800(b) motion pending the direct appeal, challenging the assessment of an assessment of $50 per day of incarceration as damages under section 960.293(2)(b), Florida Statutes. The trial court did not rule on the motion within 60 days, which meant that it was deemed denied. The defendant then filed a motion for rehearing from that denial, and the trial court did not rule on it within the required 40-day period, meaning that it was denied. On the 42nd day after the filing of the motion for rehearing, the trial court entered an amended final judgment with relevant changes, and the defendant challenged that in the direct appeal. Because the trial court lacked jurisdiction once the 40-day period for ruling on a motion for rehearing expired, the amended judgment was a nullity and another corrected, amended final judgment imposing the civil lien had to be entered pursuant to the mandate from this appeal.

Ramos v. State, 4D17-1924 (Jan. 23, 2019)

The trial court summarily denied a Rule 3.850 motion with multiple claims. The Fourth District reversed and remanded as to one claim because the trial court failed to hold an evidentiary hearing "to evaluate [the] claim that a witness at trial recanted her testimony."

The trial court's summary denial of the claim was based on the finding that the statements in the recanting witness's affidavit were "not credible." A determination of the reliability of recantation testimony, which is viewed with suspicion, generally must be made after an evidentiary hearing. In this particular case, while detailed facts are not provided, the Court noted that "there was no physical evidence presented in the underlying trial and the recanting witness was one of the main witnesses for the State. The jurors also asked questions during trial seeking medical evidence and asked the court to reread the witnesses' testimony." The Fourth District could not conclude "that the statements in the affidavits in support of Ramos's motion were 'inherently incredible or that [the] trial testimony was obviously immaterial to the verdict, so as to allow the trial court to reject [the] recantation without holding an evidentiary hearing.'"

Henry v. State, 4D17-2501 (Jan. 23, 2019)

A conviction for grand theft was reversed because the evidence was insufficient to prove that the fair market value of the stolen items exceeded $300. "In this case, the victim offered only estimates of what he paid for the stolen property. Without any testimony regarding the manner in which the items had been used, their age, their general condition and quality, or the percentage of depreciation, the victim's testimony was insufficient to prove that the present value of the stolen items was at least $300. A guesstimate of purchase price, without more, is generally insufficient to establish value in a theft case, especially one involving electronic components."

Nelms v. State, 4D17-3089 (Jan. 23, 2019)

In 2016, Nelms received a resentencing pursuant to Miller v. Alabama, 567 U.S. 460 (2012) and Atwell v. State, 197 So. 3d 1040 (Fla. 2016), for the 1985 sentence of life without parole for his conviction of first-degree murder, an offense committed while he was a juvenile. His new sentence of life, with judicial review after 25 years was then appealed and affirmed.

"Nelms' new sentence was not a life sentence without the possibility of parole or without an opportunity for release based on maturation and rehabilitation, which places this case outside the apparent boundaries of *Graham*, *Miller*, and *Montgomery*. In addition, because the resentencing court did not impose the uncommon sentence of life without parole, the court did not need to find that Nelms was the rare juvenile whose crime reflects incorrigibility or irreparable corruption."

State v. Fonseca, 4D17-3726 (Jan. 23, 2019)

The State appealed an order suppressing the defendant's confession. An officer stopped the defendant's vehicle based on observations of swerving across lanes and speeding. The defendant was subsequently arrested for DUI, fleeing or eluding, resisting without violence, and leaving the scene of a crash. During the stop, the defendant spontaneously said, "I'm sorry." The defendant sought suppression of the confession for lack of corpus delicti – i.e., that there was no independent evidence, aside from her confession, that she committed the charged offenses.

At the suppression hearing, the State presented only the arresting officer, who described the incident, but "failed to identify the defendant in court." The officer identified the defendant's sister as the driver of the car. The trial court granted suppression based on the identification of the sister.

The identity of the defendant as the guilty party is not a necessary predicate for the admission of a confession; corpus delicti requires proof only of the fact that a crime has been committed by someone.

Fifth District Court of Appeal

Recco v. State, 5D17-2648 (Jan. 25, 2019)

Convictions for multiple sex offenses were reversed because the trial court "improperly limited [the defendant's] right to fully cross-examine the alleged victim by denying him the opportunity to inquire into, or demonstrate, prior inconsistent statements."

The alleged victim was a five-year-old child, who provided differing versions of what occurred during several interviews – by her father, by a forensic interviewer, in a videotaped deposition, and at trial. There was no physical evidence and there were no eyewitnesses other than the defendant and the child. The defense sought to challenge S.B.'s credibility wit the differing accounts she gave.

"The court ruled that it would not follow the normal impeachment procedure of confronting S.B. with her prior inconsistent statements because the court found she lacked the intellectual and emotional capacity to understand that process. Instead, the trial court advised that it would allow the defense to play for the jury's consideration any portion of S.B.s videotaped deposition that contradicted her trial

testimony." The defense then showed the court the relevant portions of the prior statements, which the trial court deemed to deal "with collateral matters rather than material issues and did not permit the defense to play any portion of the deposition for the jury." "Despite the fact that the discrepancies encompassed several aspects of how this alleged criminal episode occurred, Appellant was left with neither an opportunity to explore the inconsistencies with the accuser on the witness stand, nor the chance to fully demonstrate to the jury the extent of the inconsistencies between her current and prior testimony."

The discrepancies included descriptions of "variations on who initiated the game-playing, where each person was located, whether clothing was worn or had been removed, as well as [] descriptions of Appellant's anatomy." While there were points in the trial court testimony establishing that S.B.'s story had changed over time, "the trial court unduly limited Appellant's 'absolute right to conduct a full and fair cross-examination of the witnesses called by the State.'"

Archie v. State, 5D18-665 (Jan. 25, 2019)

The Fifth District reversed one of three violations of probation, finding that the evidence did not establish that it was willful and substantial. The condition in question restricted Archie from leaving the county of his residence without permission of his probation officer.

"To support the allegation that Appellant violated this condition, the State presented that Appellant was a passenger in a friend's vehicle when he left Marion County and entered neighboring Sumter County to pick up another friend from her job. While Appellant had permission to travel outside of Marion County for work purposes, the trip to Sumter County to pick up a friend was neither work related nor sanctioned by his probation officer."

While Archie wore a GPS device that tracked his location and was capable of alerting him if he left Marion County, the alert function was not enabled on that day and "it did not notify Appellant when he left Marion County." The only evidence proving knowledge was the probation officer's testimony that when she spoke to Archie the next day about leaving Marion County, he did not deny it.