Case Law Update
February 11, 2018
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

Ray v. Commissioner, Alabama Department of Corrections, 19-10405 (Feb. 6, 2019)

Ray sought a stay of execution and also appealed the dismissal of two claims raised under the Religious Land Use and Institutionalized Persons act of 2000, 42 U.S. C. s. 2000cc, et seq. (RLUIPA), and under s. 1983 and the Establishment Clause of the First Amendment.

Ray has been a devout, practicing Muslim, since 2006. Alabama policies during the administration of the death penalty include the presence in the chamber of a Christian Chaplain, who has witnessed nearly all executions since 1997. That chaplain is available to pray with the inmate if the inmate so desires; if not, the chaplain still remains inside the chamber. Up to six witnesses designated by the inmate, including any other spiritual advisor, can sit in the witness room, separated from the chamber by a large window.

Ray requested accommodation of his religious beliefs: "first, that his Imam be present in order to provide spiritual guidance for him at the time of his death; second, that the institutional Christian Chaplain be excluded from the chamber; and finally, that he not be required to undergo an autopsy because it conflicted with his religious beliefs. The prison warden denied the first two requests and had no authority as to the autopsy.

With respect to the exclusion of the inmate's chosen spiritual advisor, the Eleventh Circuit wrote: "What is central to Establishment Clause jurisprudence is the fundamental principle that at a minimum neither the states nor the federal government may pass laws or adopt policies that aid one religion or prefer one religion over another. And that, it appears to us, is what the Alabama Department of Corrections has done here." "Alabama's policy facially furthers a denominational preference."

A "law that advances a denominational preference may be upheld if the government can demonstrate that the policy serves a compelling interest and that it has been narrowly tailored to further than interest." While there is a compelling state

interest in the orderly administration of the death penalty, that must be accomplished by "the least restrictive means or narrowly tailored to further that interest." The Court did not accept Alabama's response that it would not be able to pre-screen Ray's Imam, "who, after all, has already been screened and allowed to visit Muslim inmates at [the prison] since 2015 and allowed to commune with Ray on the day of his execution, even in a holding cell next to the execution chamber."

The Court did not address the RLUIPA claim, but noted that it would present issues regarding the compelling government interest that are comparable to the issues under the Establishment Clause.

The Court concluded that Ray was likely to prevail on the merits of the Establishment Clause claim. The stay of execution was therefore granted.

First District Court of Appeal

Leonard v. State, 1D17-3861 (Feb. 5, 2019)

The trial court summarily denied a Rule 3.850 motion, finding that the allegation of "shackling was 'patently false' and contradicted by audio and video recordings. But those recordings were not in the record, so the record on appeal does not conclusively refute Leonard's allegations." The case was remanded to the trial court to either attach records conclusively refuting the claim to the court's order or to otherwise conduct an evidentiary hearing.

McCollum v. State, 1D17-3928 (Feb. 5, 2019)

McCollum was a juvenile at the time of the offenses to which he pled guilty in 2006 – armed robbery and attempted second-degree murder. He was sentenced to life without the possibility of parole. Through the postconviction process, he received three resentencing proceedings, with the most recent resulting in concurrent sentences of 50 years.

In 2017 he filed a further motion to correct illegal sentence based on Graham v. Florida, 560 U.S. 48 (2010), arguing an entitlement to relief based on Kelsey v. State, 206 So. 3d 5 (Fla. 2017), where the Florida Supreme Court held that for "a narrow class of juvenile offenders, those resentenced from life to term-of-years sentences after *Graham*, for crimes committed before [section 921.1402]'s July 1, 2014, effective date," resentencing is appropriate. This argument had been rejected in one of McCollum's prior postconviction appeals, and the First District found the

claim barred under the law-of-the case doctrine. The manifest injustice exception to that doctrine was also deemed inapplicable.

Barbesco v. State, 1D18-0765 (Feb. 5, 2019)

When sentencing the defendant for a probation violation, the court rescinded over 400 days of credit for time served in jail that had previously been granted on one of the two cases that were subject to the probation violation. While it was true that the credit had erroneously been awarded at the time of the original sentencing, "[i]t is well established that a court may not rescind jail credit, even if it has been awarded in error." The rescission results in an increased penalty, violating double jeopardy principles. "Further, jail credit may not be withdrawn upon a resentencing as a result of a probation violation."

Forehand v. State, 1D18-1970 (Feb. 5, 2019)

Forehand was convicted and sentenced for two misdemeanors in county court. He appealed to the circuit court, which dismissed the appeal when he did not timely file his initial brief in accordance with the appellate rules. He received a 30-day warning, and on the 30th day after the order containing the warning was entered, counsel for Forehand filed a motion for extension of time due to the fact that the transcripts were still unavailable as Forehand had taken time to obtain the funds to pay for the transcript. The circuit court denied the motion for extension and dismissed the appeal based upon Forehand's delays in ordering the transcript and the failure to timely advise the circuit court of the problems.

Forehand filed a certiorari petition in the First District and that Court granted the petition. The scope of certiorari review is narrow – whether the lower court order "departs from the essential requirements of law when it violates a clearly established principle of law resulting in a miscarriage of justice." Here, dismissal was "an extreme sanction that is not warranted under the circumstances of this case."

Lantz v. State, 1D18-2029 (Feb. 5, 2019)

The First District affirmed a conviction for first-degree premeditated murder and addressed three issues.

First, the trial court did not err in excluding evidence that "the victim was argumentative when she was intoxicated and that she was intoxicated at the time of her death." Lantz's defense was that "he killed his mother after she provoked him."

"Evidence of a person's character is usually inadmissible to prove that the person acted a certain way on a particular occasion. . . . But where a defendant asserts that he acted in self-defense or there is doubt about who was the first aggressor, evidence of the victim's aggressive character may be admitted to show that the victim acted in conformance with that character trait at the time of crime. . . . Here, Lantz never argued that he acted in self-defense or that the victim was the first aggressor."

Lantz further argued that the issue was governed by Curtis v. State, 876 So. 2d 13 (Fla. 1st DCA 2004), where the constitutional right of a fair trial was found to have been violated by the exclusion of evidence of a third-party confession. Besides being an unpreserved argument, the principles of that case were limited to the context of confessions and the First District declined to extend those principles.

Lantz sought to modify the standard instruction on premeditation. The standard instruction includes the sentence that: "The decision must be present in the mind at the time of the killing." Lantz wanted to replace that with: "Premeditated design is more than mere intent to kill. It is a fully formed and conscious purpose to take human life formed upon reflection and deliberation and entertained in the mind both before and at the time of the homicide." There was no abuse of discretion in denying the requested modification. Lantz did not establish that the standard instruction did not cover his theory of defense and did not show how the standard instruction was insufficient.

The Court further found that the evidence of premeditation was sufficient. Hours before the murder, Lantz and his mother had been involved in a dispute requiring police intervention. Lantz was seen manipulating a front window lock on his mother's residence when escorted from the property by police. Hours later, he was observed driving erratically near a bridge, and his mother's body was seen floating in the water, "wrapped in a carpet, a short distance from where Lantz stood." His mother had been hit at least five or six times, while lying down. There were blunt force fractures of an eye socket and cheekbone, and defensive wounds to one hand. The victim had been placed in a chokehold and was strangled, and death would have taken between three and five minutes. Lantz also made statements, referring to himself as a murderer and stating that he dumped his mother's body in the water.

Lagi v. State, 1D18-4681 (Feb. 5, 2019)

A pretrial order denying a motion for psychological examination is not appealable by a defendant in a criminal case.

Casseus v. State, 1D17-1641 (Feb. 4, 2019)

The trial court did not err in denying a motion to withdraw a plea after sentencing. Casseus pled guilty to sex offense charges and his sentence of concurrent terms included a term of sex offender probation. His motion to withdraw plea alleged that "he was not told that he would be subject to mandatory electronic monitoring as a condition of probation." There was no dispute that the defendant was not advised of this.

The burden of proof for a motion to withdraw after sentencing is higher than that preceding sentencing. One way is to show a manifest injustice based on an involuntary plea. Failures to inform a defendant of collateral consequences do not render a plea involuntary. "The distinction between a direct and collateral consequence 'turns on whether the result represents a definite immediate, and largely automatic effect on the range of the defendant's punishment.'" A direct consequence must constitute punishment. The electronic monitoring requirement was found not to constitute punishment. Although there was no prior decision directly on point, the Court compared it to other analogous requirements, especially that of sex offender registration.

A Fourth District decision, Witchard v. State, 68 So. 3d 407 (Fla. 4th DCA 2011), had held that the electronic monitoring requirement on some sex offenders who violated probation applied only after the effective date of the statute, concluding that an ex post facto violation would otherwise exist, because an increase in "punishment" would otherwise exist. The First District distinguished this because that entailed ex post facto analysis and a different result ensued under the due process requirement that a defendant be advised of a particular sanction before entering a plea.

Banks v. State, 1D17-4687 (Feb. 4, 2019)

An order revoking probation was reversed because "the trial court did not make the findings required for revocation due to the failure to pay court costs, and . . . the community service option was not a mandatory condition of probation."

Condition 10 provided that Banks "will pay" court costs. Special condition 28 provided that she "may perform [community service hours] in lieu of court costs." She did neither.

The trial court declined to make the required determination as to ability to pay and the appellate court therefore could not affirm on that basis. Community service hours were a discretionary option, not mandatory, and that could not be a basis for affirming. A dissent engaged in an analysis of the meanings of "may" and "shall" and reasoned that the defendant had to choose one, but could not choose neither.

Young v. State, 1D18-0704 (Feb. 4, 2019)

Young appealed convictions for burglary of an occupied conveyance and unarmed robbery.

One element of burglary is an intent to commit an offense upon the unauthorized entry. Young argued that he wanted only to borrow some money. Here, a victim was inside the car and being detained without consent, and that supported an intent to commit, at least an offense of false imprisonment or robbery. Young's physical characteristics sufficed to make it likely that he could overpower the victim; he used "sternly-worded demands"; and he displayed a backpack that could hold a weapon.

The evidence was also sufficient as to the robbery element of putting the victim in fear. "Considering Appellant was brazen enough to enter the victim's car while she was in it, it was reasonable for her to fear that appellant, who had a backpack on his lap, was also willing to secure compliance with his demands by the use of force." He had demanded that the victim "take him to a destination of his choosing and give him money."

Fourth District Court of Appeal

Feliciano v. State, 4D17-3506 (Feb. 6, 2019)

The trial court erred in denying a Rule 3.850 motion following an evidentiary hearing.

The defendant was convicted of sex offenses committed against her son, who was about 10 years old at the time. The son testified at trial and the defendant denied the occurrence of the incidents and suggested a motive for fabrication. The Rule 3.850 motion alleged that counsel was ineffective for failing to call two witnesses – the appellant's sister and a long-time family friend – both of whom lived with the family.

The family friend would have expressly contradicted one claim of the victim, made during a deposition. Defense counsel stipulated to the exclusion of this witness based on a violation of the sequestration rule and did so without seeking a hearing as to the existence of prejudice to the state and did not seek a lesser sanction. The State conceded in the trial court that counsel was ineffective for failing to call the witnesses. The case was one which hinged solely on credibility determinations as to the victim and defendant.

Rincon v. State, 4D17-3830 (Feb. 6, 2019)

Rincon appealed an order revoking his probation, which was based upon the commission of three new offenses. The Fourth District reversed one of those violations – providing false verification of ownership to a secondhand dealer – and remanded for resentencing.

Rincon pawned items which his mother-in-law had loaned him. "The pawn receipts contain the appellant's signature and fingerprint but no statement verifying his ownership of the property." "Here, there was no testimony that the appellant claimed to be the owner of the property. The pawnbroker did not testify. The detective recounted his conversation with the pawnbroker, but nothing in that conversation established that the appellant verified his ownership of the property." Thus, the statutory element – "false verification of ownership" – was not established.

Steffen v. State, 4D18-3636 (Feb. 6, 2019)

"'[C]laims of entitlement to out-of-state jail credit must be raised in a timely motion under rule 3.850.'"

Fifth District Court of Appeal

Gould v. State, 5D17-2595 (Feb. 8, 2019)

The trial court erred in denying a motion to withdraw plea without giving the defendant an opportunity to be heard.

Gould's motion was made, ore tenus, at the sentencing hearing, without a prior written motion. The court denied the motion and instructed Gould to file a written motion at an appropriate time.

There is no requirement that a motion to withdraw a guilty plea be in writing and it may be raised at a sentencing hearing, but prior to imposition of sentence.

Howitt v. State, 5D17-2695 (Feb. 8, 2019)

Howitt appealed convictions for two DUI offenses and leaving the scene of an accident with death. Convictions for DUI causing damage to property or injury and DUI causing death/failure to render aid were reversed and remanded for a new trial. The trial court denied Howitt's motion to suppress evidence that he refused to submit to field sobriety and breath tests. The lead investigator testified at the suppression hearing that "the officers involved never read Howitt Florida's implied consent law relating to a breath test, nor did they inform him of any possible adverse consequences for refusing to perform the field sobriety tests."

Because the defendant was "not read any portion of the implied consent law or otherwise inform[ed] . . . of any consequences of refusing to take a breath test," "his refusal was insufficient to establish consciousness of guilt, and the trial court should have granted his motion to suppress his refusal to submit to a breath test."

Similarly, Howitt was not informed of any adverse consequences of a refusal to perform the field sobriety tests. Absent knowledge of such consequences, consciousness of guilt is not established, and the refusal is inadmissible.

Sanders v. State, 5D18-1133 (Feb. 8, 2019)

Evidence of one of multiple probation violations was found to be insufficient – the condition which prohibited Sanders from associating with a person known to engage in criminal activity. "[E]vidence of a positive drug test did not support a finding that Sanders violated this condition."

Espinoza v. State, 5D18-1190 (Feb. 8, 2019)

The trial court erred in imposing a 25-year mandatory minimum sentence under the 10-20-Life law. The sentence at issue was for a conviction of aggravated battery, which the jury found to have been committed "with a firearm or causing great bodily harm." A special verdict form found that Espinoza "did, possess and discharge a firearm causing great bodily harm."

The information must precisely allege the grounds for the sentencing enhancement. The 25-year mandatory minimum under the 10-20-Life law applies

where the firearm is discharged, causing death or great bodily harm. The information in this case did not allege the discharge of the firearm. It alleged that the defendant "did use a firearm, a deadly weapon, or did intentionally or knowingly cause great bodily harm, permanent disability or permanent disfigurement to [the victim], and in the course of committing said offense . . . did actually possess a firearm."

The problem here was that the allegation was in the alternative. And, while that defect could be cured by citing the appropriate specific subsection of the statute, the information here charged only a violation of section 775.087(2), not 775.087(2)(a)(3).

Denegal v. State, 5D18-1749 (Feb. 8, 2019)

In a Rule 3.800(a) motion, which the trial court denied, Denegal challenged the imposition of a life sentence, for aggravated battery with a firearm, pursuant to the 10-20-Life statute. As in the case discussed above, Espinoza, the information failed to include sufficiently specific allegations to support the imposition of the life sentence. The 10-20-Life law permits a minimum term of imprisonment of not less than 25 years and up to life based upon the discharge of a firearm causing death or great bodily harm.

The information in this case alleged that the defendant, "while in possession of a firearm, did actually and intentionally strike [the victim] . . . and in doing so used a handgun, a firearm and deadly weapon, contrary to Florida Statutes 784.045(1)(a)2 and 775.087(2)." There was no allegation as to the discharge of a firearm and the specific subsection for discharge was not set forth in the information.