Case Law Update
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Eleventh Circuit Court of Appeals

Munksgard v. United States, 16-17654 (Jan. 30, 2019)

The Eleventh Circuit, with one judge dissenting, found that the evidence was sufficient to prove the offense of knowingly making a false statement in order to obtain a loan from a bank that was insured by the FDIC. The focus of the opinion is on the evidence related to the jurisdictional prerequisite – whether the institutional victim was FDIC-insured.

The majority acknowledged that the case presented a close question and that the evidence was not overwhelming. The opinion was used as "a warning to federal prosecutors: You are (as the author's mother used to say) cruisin' for a bruisin'. Don't apologize – do better."

After noting a lengthy history of problems regarding proof as to this issue, the Court concluded that the evidence was sufficient based on the following: "First, the government introduced a certificate of FDIC insurance issued when Drummond Community Bank was initially chartered in 1990 – evidence (in Wigmore's terms) or 'prior existence.' Second, David Claussen, Drummond's Senior Vice President and Chief Underwriter, testified that the bank was insured at the time of trial in 2016 – 'subsequent existence.' Finally, when asked whether Drummond's FDIC certificate is renewed 'every so often,' Claussen – who had spent 25 years at the small bank, and was therefore likely to be familiar with its administration and operations – testified that it isn't. We think it clear that a reasonable jury could conclude that his testimony provides additional evidence – beyond mere prior and subsequent existence – that Drummond was insured in 2013 and 2014, when Munksgard submitted the fraudulent contracts."

The Court also addressed an issue of statutory interpretation, as to the offense defined in 18 U.S.C. s. 1028A(a)(1), which makes it a crime for any person to "use[], without lawful authority, a means of identification of another person." The defendant "forged another person's name to a surveying contract that he submitted to a bank in support of his loan application." The defendant argued that the word "use" applied "to crimes in which the accused attempted to impersonate, or act 'on

behalf of,' someone else." The Court disagreed. "In sum, we conclude that the plain meaning of the term 'use,' particularly when understood in statutory context and in the light of relevant precedent, demonstrates that Munksgard unlawfully 'use[d]' Kyle Morris's name within the meaning of s. 1028A(a)(1)."

First District Court of Appeal

Roberts v. State, 1D18-0332 (Jan. 31, 2019)

Roberts appealed convictions for aggravated assault with a firearm. He argued that the trial court erred "in rejecting both his statutory and common law affirmative defenses of citizen's arrest regarding his use of a shotgun while attempting to detain two unarmed individuals, whom he believed had committed a felony."

The First District rejected Roberts' argument without providing the facts of the case, but stated: "While we agree with Roberts that he initially had probable cause to effect a citizen's arrest, the State presented evidence at trial contradicting Roberts' affirmative defense by showing that he did not act in a reasonable manner when he attempted to detain the two individuals."

Second District Court of Appeal

Hanania v. State, 2D17-4044 (Feb. 1, 2019)

The summary denial of a Rule 3.850 motion alleging three claims of ineffective assistance of counsel "related to a search of his motel room" were not conclusively refuted by the record and were either "legally sufficient or might be amended to make them so" was reversed and remanded for further proceedings.

In the trial court, the State conceded that two of the claims should be dismissed with leave to amend and another claim should be given an evidentiary hearing. The trial court denied the motion in its entirety. The various claims revolve around a dispute as to whether the defendant consented to a search of a motel room. His motion alleged a lack of consent; the trial court's order attached testimony from an officer at the prior probation revocation hearing in which the officer testified that there was consent.

Patterson v. State, 2D18-1824 (Feb. 1, 2019)

After Patterson's conviction and sentence were affirmed on direct appeal, he sought free copies of transcripts and other pleadings from the Clerk of the Circuit Court, eventually filing a motion seeking the same, which the trial court denied.

The Second District stated that the proper procedure for seeking such records when a convicted offender is indigent is through a petition for writ of mandamus against the former public defender. There is no general entitlement to such free copies, even when indigent, for use in postconviction litigation. However, the indigent individual has the right to obtain from prior counsel those copies of transcripts and other documents which counsel possessed. As no such requests of prior counsel had been made, and no petition seeking the documents from former counsel had been filed, the ultimate issue was not decided by the Second District.

Third District Court of Appeal

State v. Espinoza, 3D16-1860 (Jan. 30, 2019)

The State appealed an order dismissing three charges – one count of unlawfully engaging in the business of a money transmitter and/or a payment instrument seller without being registered with Florida, and two counts of money laundering. "The trial court erred in dismissing Count 1 because Espinoza acted as both a money transmitter and a payment instrument seller and, as such, was required to register with the State of Florida as a money services business. The court erred in dismissing Counts 2 and 3 on the basis that Espinoza lacked the requisite intent to be guilty of money laundering. Intent, or lack thereof, is a factual issue that should not have been resolved at the pleading stage."

The case involves transactions in Bitcoin, and the State's efforts to bring those transactions within the scope of sections 560.125, Florida Statutes 92013) and 896.101, Florida Statutes (2014), which do not contain any references to Bitcoin or "virtual currency."

The opinion is fact-intensive, and the basic nature of the offenses was summarized as follows:

> During the time leading up to the State's filing of the information, Espinoza was operating an unlicensed cash-for-bitcoins business. Espinoza came to the attention

> of law enforcement by way of an advertisement he posted on the internet for his services under the name "Michaelhack." During four separate meetings with an undercover law enforcement agent, Espinoza agreed to trade bitcoins in exchange for cash. During their initial encounter, the undercover agent made clear to Espinoza his desire to remain anonymous. Espinoza agreed to engage in these transactions even though the agent intimated to Espinoza that this cash was derived from engaging in illegal activity and that he was planning to use the bitcoins to engage in further illegal activity.

Section 560.125, Florida Statutes (2013), prohibiting unlicensed money services business, presented questions as to whether Espinoza was engaging in a money services business and whether the transactions in Bitcoin qualified as "payment instruments." The primary reason for concluding that "payment instruments" included Bitcoin was that the definition of a payment instrument included "monetary value," which is defined as "a medium of exchange, whether or not redeemable in currency." A secondary claim by Espinoza was that he did not qualify as a "money transmitter," "because he did not receive currency, monetary value, or payment instruments for the purpose of transmitting the same to a third party." The Third District concluded that "nothing contained within the definition of 'money transmitter' under section 560.103(23) includes, explicitly or impliedly, the words 'to a third party.'"

As to the money laundering charges, part of the statutory definition of the offense included an element of intent: "whether the person's conduct or attempted conduct is undertaken with the intent:1. to promote the carrying on of specified unlawful activity." As questions of intent are beyond the scope of a sworn motion to dismiss under Rule 3.190(c)(4), the trial court erred in dismissing those charges. The Third District further emphasized that the affidavit and deposition of a detective in the case noted that Espinoza had repeatedly been informed of the illegal nature of his activities.

S.H. v. State, 3D18-365 (Jan. 30, 2019)

S.H. appealed an order withholding adjudication of delinquency for having possessed or discharged weapons at a school-sponsored event or on school property.

S.H. argued that a photograph showing him and others with a firearm on school property was admitted in violation of the best evidence rule. The only contemporaneous objection was that the prosecutor was asking a leading question. The best evidence objection was not made "until after the State fully elicited testimony regarding the contents of the photographs and moved on to other areas of inquiry." The best evidence objection was therefore deemed untimely and the issue was not preserved for appellate review.

A corpus delicti argument as to S.H.'s confession was found to have been properly rejected by the trial court. There was substantial evidence, "independent of S.H.'s confession, sufficient to show that S.H. was a minor willfully and knowingly in possession of a firearm on the property of a school on the day charged in the petition." This included the photograph showing S.H. "in the school bathroom in the presence of a firearm." Additionally, S.H. had left school early and returned with his mother; he then "sat in the school office in close proximity to a backpack containing various school-related materials." He and his mother "were alone in the office with the backpack. S.H. confirmed his ownership of the backpack. A loaded semi-automatic firearm with a bullet in the chamber was discovered in the backpack."

An anonymous tip that S.H. possessed the firearm on school property was improperly admitted into evidence as hearsay. The Third District applied the harmless error standard for bench trials, as set forth in Petion v. State, 48 So. 3d 726 (Fla. 2010), and concluded that the error was harmless: "Here, the trial judge did not articulate reliance upon the contents of the tip in orally pronouncing factual findings. Moreover, the contents of the tip were referred to in a fleeting and isolated manner. Thus, we find that this is a case '[w]here the proof of guilt is so convincing that a person would clearly have been found guilty even without collateral evidence introduced in violation of the evidence code, [thus] the violation of the code may be considered harmless.'"

Thomas v. State, 3D18-611 (Jan. 30, 2019)

Without providing any facts of the case, the Third District provided a parenthetical citation noting: "Factors to be considered in determining whether an object is drug paraphernalia include 'the proximity of the object to controlled substances' and 'expert testimony concerning its use.'"

Fourth District Court of Appeal

Berrocales v. State, 4D18-476 (Jan. 30, 2019)

A motion to withdraw a plea was improperly denied without an evidentiary hearing. The defendant alleged that the plea was involuntary because counsel did not advise him that there would be a mandatory revocation of his license. During the plea colloquy, "the trial court informed appellant that his driver's license may be suspended 'for additional periods' if he was pleading to a drug offense. The court said nothing about any other type of revocation" "Although the prosecutor made reference after the plea colloquy to a mandatory license revocation, appellant might well argue that he was misled by the judge's reference to a drug offense and the advice, or lack of it, from his attorney. He might be able to prove that the revocation issue was crucial to his decision to enter a plea. These issues need to be fleshed out at an evidentiary hearing."

State v. Walk, 4D18-921 (Jan. 30, 2019)

Walk filed a motion seeking clarification of a condition of probation; the motion, in reality, was one asking for the removal of the condition, and the court granted it. On appeal, the Fourth District held that a motion seeking reduction or modification of a sentence is governed by Rule 3.800(c), and as the 60-day period for such a motion had expired, the trial court lacked jurisdiction to grant the motion, which had been filed more than one year after the imposition of the probationary sentence.

Fifth District Court of Appeal

O'Hare v. State, 5D18-157 (Feb. 1, 2019)

In an appeal from a nolo plea to multiple counts of possession of child pornography, video voyeurism and possession of a short-barreled shotgun, O'Hare challenged the denial of his motion to suppress evidence seized during a warrantless search of his residence.

The trial court relied on the inevitable discovery doctrine when denying the motion. The Fifth District, applying the Florida Supreme Court's decision in Rodriguez v. State, 187 So. 3d 841 (Fla. 2015), reversed the order denying suppression. In "order to rely on the inevitable discovery doctrine, the state was required to show that law enforcement officers were seeking a search warrant prior

to the police misconduct." Here, "the State failed to show that law enforcement was in pursuit of a search warrant at the time of the improper entry into Appellant's residence." The search, based on nonconsensual entry into the residence, proceeded for an hour before the detective left, after observing a relevant laptop, to secure a warrant. Probable cause for the warrant had existed prior to the entry into the residence.

The State argued, in the alternative, that the trial court's order should be affirmed under the independent source doctrine, which provides that the exclusionary rule is inapplicable "'where the government can show it has learned of the challenged evidence from an 'independent source.'" The Fifth District refused to apply this alternative rationale because it had not been developed in the trial court and the trial court's order did "not set forth all of the factual findings that would permit us to fully and independently address the application of the independent source doctrine in this case."

Andrews v. State, 5D18-2759 (Feb. 1, 2019)

The trial court partially granted a motion to correct illegal sentence under Rule 3.800(a), by striking a habitual felony offender designation. The court then reimposed a life term without the designation. In doing so, the court erred, because that was not a ministerial act and it required a resentencing hearing with the defendant and representation by counsel.