Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Harris, 18-12418 (Feb. 19, 2019)

Harris appealed a conviction for extortion under the Hobbs Act, 18 U.S.C. s. 1951(a), (b)(2). The Eleventh Circuit rejected challenges to the sufficiency of the evidence and a limitation on defense counsel's closing argument. The jury's verdict found extortion committed by "wrongful use of actual or threatened force, violence, or fear," and by being "under the color of official right."

Harris was a corrections officer and discovered a phone scam of inmates "in which they would masquerade as law-enforcement or court officials and dupe their victims into paying them for fake infractions." Victims paid the inmates with Green Dot numbers, numbers which could be used to load money onto a Green Dot debit card. The inmates wrote the numbers on pieces of paper, which they hid in their cells until they could load the money. Harris found these Green Dot numbers, and, after initially confiscating them and destroying them, he started loading the money onto his personal Green Dot cards.

Harris argued that the government failed to prove that he obtained the numbers from inmates with their consent, as the numbers were taken during shakedowns that the inmates could not refuse. The Court's opinion includes a lengthy discussion of the meaning of consent under the extortion statute, and ultimately quotes the Supreme Court's definition, that consent under the Hobbs Act "simply signifies the taking of property under circumstances falling short of robbery." Thus, a victim "who 'grudging[ly]' or 'reluctantly' gives up his property to a defendant consents for purposes of the Hobbs Act." "Consent does not mean 'free of all compulsion.'" Under those definitions, the "jury could have reasonably inferred that the inmates grudgingly agreed to keep quiet as Harris took their Green Dot numbers, and their grudging consent is all that is required for extortion."

"Under the Hobbs Act, '[o]btaining property requires not only the deprivation but also the acquisition of property.'" "So for Hobbs Act extortion, the victim's consent must be to the defendant's receipt of the property for his personal benefit." The inmates knew this, because Harris told them; and, the inmates did not report

Harris. "So the jury could have reasonably inferred that the inmates consented to Harris's receipt of the Green Dot numbers by not reporting him."

Harris also argued that the government "failed to prove a requisite means of extortion." The Court disagreed, finding sufficient evidence of the wrongful use of fear. Harris had a reputation in the prison as "the asshole"; he constantly berated and insulted inmates; the inmates tried to avoid him; and they had a code word for his presence which they yelled out to alert other inmates. "So the jury could have reasonably inferred that, because of Harris's reputation, the inmates were in a fearful state of mind when he discovered their green Dot numbers during shakedowns." The inmates also feared potential punishment for possessing the numbers, which were contraband.

Defense counsel was prevented "from arguing in closing that, although he might have committed theft, he did not commit extortion." This was deemed a "modest restriction" of closing argument and not an abuse of discretion or "a violation of his right to present a complete defense." Harris was permitted to argue that he did not commit the charged offense. Counsel did argue that extortion was not "just stealing or robbing," that it had more elements.

United States v. Pickett, 17-13476 (Feb. 20, 2019)

The government appeals the granting of relief under 28 U.S.S. s. 2255. The district court had vacated the sentence, finding that Pickett did not qualify and was not eligible for an enhanced sentence. During the pendency of this appeal, the Eleventh Circuit issued its controlling decision, Beeman v. United States, 871 F. 3d 1215 (11th Cir. 2017). Because Beeman was not available to the district court when it made its decision, and the case required further factual development, the district court's decision was vacated and remanded for further proceedings.

Beeman addressed the burden of what a movant needed to show to succeed on a s. 2255 motion. The "'movant must show that – more likely than not – it was use of the residual clause that led to the sentencing court's enhancement of [the movant's] sentence.'" The movant must demonstrate that it was more likely than not that the sentence was based "only" on the residual clause.

Two of the predicate offenses in this case were battery on a law enforcement officer and battery on a pregnant woman. Both of those entailed a consideration of the underlying elements of simple battery," a misdemeanor.

In this case, the "parties agree[d] that there is nothing in this record that tells us which clause the district court had in mind when it applied the ACCA enhancement." Different outcomes might ensue depending upon whether the offenses were analyzed under the elements clause or the residual clause of the ACCA. The Eleventh Circuit could not conclude that the district court relied only on the residual clause, and the Court acknowledged the existence of "uncertain precedential landscape." It could not be ascertained whether the district court even considered the elements clause as a basis for its decision.

United States v. Amodeo, 15-12643 (Feb. 21, 2019)

The Court held that Amodeo lacked standing to appeal a partial vacatur of a final forfeiture order because the partial vacatur "caused him no injury."

Amodeo pled guilty "to involvement in a criminal scheme to divert his clients' payroll taxes." A preliminary forfeiture order divested him of assets, which he had agreed to, including ownership of two shell corporations. When no parties asserted an interest in the corporations, a final forfeiture order was entered, transferring "ownership of them to the government."

"Years later, the corporations were named as defendants in a lawsuit brought by victims of Amodeo's scheme." The district court granted the government's motion to vacate the final forfeiture order as to the corporations. Amodeo appealed, arguing that the court lacked authority to enter the vacatur.

The Court applied the cases and controversies clause of Article III, Section 2 of the Constitution, and stated that to "establish appellate standing, a litigant must 'prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.'"

Once the preliminary forfeiture order had been entered, Amodeo's interest in the corporations had been completely extinguished. He had no right after that time to participate in any ancillary proceedings, which included the proceedings on the final order, when it is determined whether any third parties have potential interests in the property. Thus, the partial vacatur "did not revive Amodeo's ownership of the corporations." His status, as a result of the vacatur, would have put him back in the same position he entertained after the preliminary order and prior to the final order of forfeiture.

The appeal was dismissed.

First District Court of Appeal

Corbett v. State, 1D18-1186 (Feb. 20, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion and addressed all nine claims of ineffective assistance of counsel.

The second claim alleged that counsel failed to retain a firearms expert to testify about the cause of the victim's injuries. This claim was rejected for several reasons. First, a medical examiner testified that the wound was caused by a larger caliber bullet, not the .32 that Corbett was trying to demonstrate as the cause. Second, four witnesses testified that they saw Corbett shot into a crowd in a parking lot. "Thus, presenting a defense theory that James was struck by a .32-caliber bullet would require the jury to believe that despite the lack of testimony that anyone else was firing a gun at the time of the shooting, and the testimony that Corbett was observed shooting into the crowd, James was coincidentally struck by a .32k-caliber bullet that was fired at the very same time by an unidentified person." This was deemed "wholly speculative."

The sixth claim alleged counsel failed to retain a reconstruction expert to testify on the basis of the victim's position, height and injury, and Corbett's location. This, too, was speculative. "Because no gun was ever recovered, no expert could opine as to whether the victim's death was caused by Corbett's undiscovered and unexamined firearm." Nor was there any prejudice in view of the testimony of four eyewitnesses.

Bradshaw v. State, 1D17-4992 (Feb. 18, 2019)

Bradshaw was convicted for both dealing in stolen property and petit theft involving the same property. The First District reversed the conviction and sentence for petit theft, as such dual convictions for offenses occurring in connection with one scheme or course of conduct are contrary to section 812.025, Florida Statutes.

The evidence in this case was that Bradshaw stole sawblades from his place of employment and approached a customer of the employer about purchasing them, on the premises, and sold them to that customer later that day.

Second District Court of Appeal

Phillips v. State, 2D17-5444 (Feb. 22, 2019)

A claim that an improper jury instruction on self-defense was fundamental error was rejected because Phillips drafted it and the error was therefore invited and waived.

The instructions included the following language: "[The] use of threatened use of deadly force is not justified if you find that [Phillips] was attempting to commit, committing, or escaping after the commission of an aggravated battery or an aggravated assault." Phillips was charged with, and convicted of, both of those offenses. The instruction, as given, therefore included the circular language which the Florida Supreme Court held to be improper in Martinez v. State, 981 So. 2d 449 (Fla. 2008). The instruction at issue applies only "when a forcible felony independent of the one for which a defendant claims self-defense is committed."

K.H. v. State, 2D17-4376 (Feb. 22, 2019)

The Second District held that the evidence was insufficient for the offense of resisting an officer without violence, because the State failed to prove the officer was engaged in the lawful execution of a legal duty.

An officer responded to an anonymous call regarding trespassing and panhandling, without any information regarding the physical description of the two individuals, other than that they were female. As the officer approached the gas station that was the subject of the call, the officer saw two females, including K.H., and they walked away as the officer approached. They also ignored an order to stop. After a second order to stop, K.H. started running away.

The officer did not have any basis for detaining K.H. K.H. was not observed panhandling, and mere presence on the gas station was insufficient to give rise to a reasonable suspicion of trespass.

Rodgers v. State, 2D16-4366 (Feb. 20, 2019)

Rodgers entered a plea to 20 counts of possession of child pornography and reserved the right to appeal the denial of a suppression motion. The Second District held that the search exceeded the scope of the search warrant by entering an RV that

was located on property at the given address but was not separately identified in the warrant.

The search warrant described the premises as a "single story, block residence," and authorized entry into the "premises" aforesaid and curtilage thereof, and any vehicles thereon." At the property, police discovered a "detached mother-in-law suite" behind the main house and several RVs behind it. One was registered to Rodgers. Its interior was blocked from view by window shades; it had an attached awning and a connected septic tank. A router cable ran from the main house to the RV. Although the RV was registered to Rodgers, the property that was the subject of the warrant was owned by a third party.

Officers "are not authorized to search a separate dwelling unit that exists on the premises but is not separately identified in the warrant." The issue here was whether it was "apparent that an RV located on the curtilage [was] being used as a residence." Based on the facts set forth above, the Second District found that "the police should have known that the RV was being used as a separate residence."

The Court rejected application of the inevitable discovery doctrine because "there was no evidence that the police were actively pursuing a search warrant for the RV at the time of the illegal entry into Rodgers' RV."

One judge concurred in part and dissented in part. The concurrence was with respect to the scope of the warrant having been exceeded. The dissent was a conclusion that discovery of the child pornography was inevitable "based on [the] shared internet connection and IP address with the main residence." The dissent would have concluded that the search warrant for the residence sufficed to establish the requirement of active pursuit of a warrant.

Lewis v. State, 2D17-1247 (Feb. 20, 2019)

Dual convictions for scheme to defraud and grand theft based on the same underlying conduct constitute a double jeopardy violation. The conviction for grand theft, the lesser offense, was stricken.

Third District Court of Appeal

Auerbach v. State, 3D16-2873 (Feb. 20, 2019)

On appeal from a conviction for second-degree murder and two counts of aggravated elderly abuse, the State conceded that the trial court failed to make an independent determination that the defendant was competent to proceed to trial. While appellate courts frequently reverse such cases with leave to the trial court to conduct a competency hearing, if possible, on remand, to determine whether the defendant was competent at the time of the trial, the Third District rejected that option in this case and remanded for a new trial after it is concluded that competency was restored.

The critical fact in this case was that the competency evaluations had been prepared about three years prior to the trial. As the evaluations were not in close proximity to the trial, a nunc pro tunc determination of competency would require the trial court to "'rely on a cold record.'"

Gonzalez v. State, 3D18-84 (Feb. 20, 2019)

The Third District rejected an argument that dual convictions for attempted aggravated battery and battery violated double jeopardy principles. Each offense required proof of a different element, and, the two convictions were based on separate acts.

Fourth District Court of Appeal

Toole v. State, 4D17-2115 (Feb. 20, 2019) (corrected opinion) (on motion for rehearing)

The Fourth District reversed and remanded this case for a new restitution hearing. Toole pled guilty to dealing in stolen property and false verification of ownership to a pawnbroker. The State nolle prossed the charge of grand theft. The plea agreement provided for restitution, in an amount to be determined by the court. At the hearing, the State sought restitution for all items taken, not only the pawned items. The victim's testimony consisted of a combination of original prices and "guesstimates" of replacement value.

The problem with the testimony in this case was that "there was no testimony about the manner in which the items were used, their general condition and quality,

and the percentage of depreciation." The State, as a result, did not prove fair market value.

The Fourth District previously urged the legislature to consider improvements to the process for determining restitution due to what the Court viewed as ongoing problems; the Court reiterated that request and certified to the Supreme Court a question of great public importance:

> Is *Hawthorne's* formula for determining restitution based on the fair market value of the victim's property still viable after the passage of Amendment 6 (Marsy's Law), or should a trial court no longer be bound by fair market value as the sole standard for determining restitution amounts, and instead exercise such discretion as required to further the purposes of restitution, including consideration of hearsay.

One judge wrote a lengthy specially concurring opinion, quoting verbatim much of a law review article: Adam M. Hapner, *Do You Know the Fair Market Value of Your Property?: A Call to the Legislature to Revise Section 775.089, Florida Statutes, Governing Restitution*, 20 Barry L. Rev. 151 (2015).

King v. State, 4D17-2770 (Feb. 20, 2019)

The Fourth District reversed a conviction for one of two counts attempted first-degree murder, with directions to reduce it to attempted second-degree murder. For an attempt, the State had to prove "the specific intent to commit first degree murder plus an overt act in furtherance of that intent. . . . On this record, appellant's only intent was to kill the club operator, not the bouncer. We agree with those courts that have held that the doctrine of transferred intent does not apply to the 'crime of attempted murder of the unintended victim.'"

Dorsey v. State, 4D17-3617 (Feb. 20, 2019)

Dorsey was a minor when he committed a robbery. Upon revocation of community control, he was sentenced to prison for 40 years. On appeal, the Fourth District held that he was not entitled to sentencing under the 2014 juvenile sentencing statutes because he was 20 years old when he violated community control. Additionally, the 40-year sentence was not contrary to either Graham v. Florida or Miller v. Alabama, as Dorsey "has been given a meaningful opportunity

for release." The 40-year sentence was imposed after Dorsey had already been released on community control.

Serna v. State, 4D18-1619 (Feb. 20, 2019)

Serna appealed convictions for multiple charges of fraudulent practices and theft.

The Fourth District reversed the sentence because "it was error to deny Appellant an opportunity to present mitigation testimony to rebut issues raised by the State and the trial court during sentencing."

At sentencing, defense counsel argued that Serna had a drug problem and was amenable to treatment and otherwise qualified for mitigation based on that factor. The State responded that there was no evidence that Serna had a substance abuse issue or that she was amenable to treatment. When the court asked defense counsel for the "last word," counsel requested that Serna be placed under oath, which the court denied.

"Determining an appropriate sentence is 'the most important matter upon which [a court] is called to judge.' [citation omitted]. Defendants are entitled to present matters in mitigation pursuant to rule 3.720(b) and the requirements of due process."

Office of the Attorney General v. Bilotti, et al., 4D18-1645 (Feb. 20, 2019)

The Office of the Attorney General obtained injunctive relief based on alleged fraudulent and deceptive acts of the appellees "in collecting millions of dollars in up-front legal fees from delinquent home-loan borrowers for loan modifications and foreclosure rescue services." The trial court froze assets. The appellees moved to dissolve a temporary injunction, which the trial court granted, based on its conclusion that the AG could not bring an action solely for an injunction under section 501.207(1)(b), Florida Statutes, without pleading "actual damages."

The AG appealed, and the Fourth District reversed and reinstated the injunction and asset freeze and clarified its prior case law. "To establish a substantial likelihood of success on the merits, the AG must show that 'the practice was likely to deceive a consumer acting reasonably in the same circumstances.' [citation omitted]. Therefore, regardless of whether actual harm has materialized, the AG can

seek an injunction to stop an unfair and deceptive trade practice that violates FDUTPA."

State v. Thomas, 4D18-1646 (Feb. 20, 2019)

The jury returned a verdict of guilty on the charge of delivery of cocaine, the trial court granted a post-verdict motion for judgment of acquittal, and the State appealed. The Fourth District reversed, finding the evidence was sufficient. Much of the Court's opinion describes what was seen on surveillance video of the transaction, which involved an undercover officer.

The video clearly showed the codefendant delivering the cocaine to the undercover officer; the only issue was the sufficiency of evidence that the defendant was a principal, aiding the codefendant to deliver the cocaine. The video was sufficient: "The video shows that the defendant had a conscious intent that the crime of delivery of cocaine be done, based on his approaching the vehicle side-by-side with the co-defendant, with both of them asking the officer "How much soft?'"

At that time, the hands of the codefendant and defendant were empty; they both backed away to engage in a conversation with one another; the defendant then retrieved something from a nearby trashcan, the codefendant returned to the undercover officer's car, the defendant went back to the codefendant, and the codefendant "faced the defendant while saying to the officer, 'I got that powder right here.'" The codefendant delivers the cocaine one second after the defendant walked back to him. The codefendant made the delivery and held up two $20 bills, and the defendant appeared to take one. The defendant then tells the undercover office, "Goldie go the 'soft.'"

Simmons v. State, 4D18-2101 (Feb. 20, 2019)

Competency evaluations were conducted about three years prior to the court's acceptance of a plea, after defense counsel advised the court that the defense expert found the defendant competent; no hearing was held and no independent determination was made. The case was remanded for a nunc pro tunc competency determination, if possible. If not, the trial court must vacate the judgment and sentence and then proceed anew after competency is restored.

James v. State, 4D18-2152 (Feb. 20, 2019)

The defendant's convictions included grand theft of the same vehicle that was involved in the carjacking. The grand theft conviction was reversed as it constituted a double jeopardy violation, as all of the elements of grand theft were also elements of carjacking.

The defendant's sentence was also reversed because the trial court took into consideration the defendant's maintenance of innocence of the carjacking charge. The judge stated at sentencing: "First, as to [the armed carjacking and robbery case], it doesn't sound like Mr. James has taken any responsibility. He's plead[ed] to this case by virtue of this plea. He's admitted to having committed this crime. He has a history here. He cut off his monitor while he was on release. The court is gong to deny the youthful offender sentence."

Taylor v. State, 4D18-2439 (Feb. 20, 2019)

Taylor appealed a sentence for aggravated assault with a deadly weapon which was entered after a no contest plea. He challenged the lower court's acceptance of "the victim's unsworn statement at sentencing in violation of section 921.143(1), Florida Statutes (2018)." The Fourth District affirmed because the issue was not preserved by objection and did not constitute fundamental error.

Before concluding that fundamental error did not exist, the Court noted the conflict between the First and Second Districts as to whether the acceptance of a victim's unsworn statement was error at all. While noting the conflict, the Fourth District did not decide which conclusion it would come to, as it was unnecessary, in light of the conclusion that any error would not have been fundamental. It was "not apparent from the record that the circuit court relied on the victim's unsworn statement in sentencing the defendant to prison, rather than to probation as the defendant requested. The circuit court just as easily could have relied on victim's wife's testimony at the sentencing hearing, which also discussed the victim's injuries and trauma from the assault. Or the trial court could have relied upon the very violent nature of the assault itself. Additionally, the three-year sentence was well within the court's discretion to impose and less than the maximum of five years allowed by statute and recommended by the state."

Fifth District Court of Appeal

Duxbury v. State, 5D17-3917 (Feb. 22, 2019)

Duxbury appealed convictions for first-degree murder, attempted sexual battery with physical force and burglary of an occupied dwelling with an assault or battery. The Fifth District affirmed.

Duxbury sought suppression of his recorded statements. He was given Miranda warnings and signed a waiver of those rights, but argued that his statements were not voluntary under Garrity v. New Jersey, 385 U.S. 493 (1967). Although Duxbury claimed he had a subjective fear that he would be fired from his security guard job if he did not cooperate with police, he admitted that neither his supervisor nor the police explicitly or implicitly suggested that. Duxbury further relied on section 493.6118(1)(o), Florida Statutes, "as providing a legal obligation to cooperate with police, arguing that it crated a de jure threat that he would be fired if he refused to speak with the authorities." However, that section "only requires security guards to cooperate with investigations conducted by the Department of Agriculture and Consumer Services, which is the licensing and disciplinary body overseeing security guards. That statute does not coerce a security guard to provide statements to police under threat of losing his job."

The Fifth District also found that there was sufficient evidence of attempted sexual battery. The "victim had numerous abrasions on her body consistent with an attempted sexual battery, and Duxbury's DNA was found on her breasts."

Wallace v. State, 5D17-4069 (Feb. 22, 2019)

The Fifth District held that the trial court properly concluded that a Rule 3.850 motion was untimely.

In 2006, Wallace, a Nigerian national, pled guilty and the plea form stated: "I understand that if I am not a citizen of the United States, I may be deported." In September 2016, the federal government rejected Wallace's green card application and initiated removal proceedings based on the 2006 plea. Wallace filed his Rule 3.850 motion in January 2017, alleging misadvice from counsel regarding immigration consequences. He argued that the motion s timely because it was filed within two years of the initiation of the removal proceedings.

While case law to that effect had existed in the 1990's and early 2000's, the Florida Supreme Court receded from that in Peart v. State, 756 So. 2d 42 (Fla. 2000), "where it held that defendant had two years, beginning from when they had or should have had knowledge of the threat of deportation, to bring claims that the trial court failed to inform them of possible deportation after entering a guilty plea."

Rivera v. State, 5D18-2814 (Feb. 22, 2019)

The summary denial of a Rule 3.850 motion alleging ineffective assistance of counsel was reversed as to one claim, as to which the trial court based the denial on trial strategy. It "is impossible to determine from the record and without an evidentiary hearing whether trial counsel's decisions were reasonable trial strategy."