Case Law Update
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First District Court of Appeal

Barry v. State, 1D17-2276 (Feb. 28, 2019)

The First District affirmed convictions for two counts of solicitation to commit first-degree murder.

The trial court did not err in consolidating two solicitation cases which were charged by separate informations. "Although the two inmates here were approached separately by Appellant, both were solicited at the Alachua County Jail while Appellant was awaiting trial. Both were asked to arrange the murder of the three witnesses against Appellant. The meaningful relationship between these two crimes is that they were both part of a single concerted effort to 'silence' the three people who could send Appellant to prison for child sex crimes." Additionally, the testimony from one inmate that he rejected the solicitation provided a motive for the solicitation of a second inmate, "showing an episodic connection."

Collateral offense evidence was properly admitted as it was inextricably intertwined with the charged offenses. The collateral offense evidence was the molestation of a girlfriend's daughter and it was "relevant to establish that [appellant] had a motive to solicit someone to kill the child and other witnesses who could testify against him regarding the molestation."

Lanier v. State, 1D17-4357 (Feb. 28, 2019)

The First District affirmed a conviction for child neglect of the defendant's infant daughter and found that the evidence was sufficient.

Lanier argued that he may have been negligent in not seeking medical attention for his daughter sooner, but that it did not amount to culpable negligence. The Court disagreed. "The length of time between L.L. sustaining multiple injuries and her receiving medical attention was anywhere between seven days and three weeks. L.L.'s symptoms of trauma, her persistent and worsening condition, and need for immediate medical attention would have been obvious to any reasonable person." "Several witnesses, including Lanier, testified that for at least three weeks

before the infant was admitted to the emergency room, L.L. cried inconsolably when picked up and could not hold her head up on her own. Lanier stated that L.L.'s neck felt 'loose.' The evidence showed that L.L.'s head was visibly swollen and that her body was covered in bruises. L.L. was a five-month-old infant – she was not walking or even crawling. The medical testimony established that a five-month-old could not injure herself to such an extent." There was evidence of skull fractures, and Lanier's argument that there was no evidence he was aware of them did not matter, as there is no requirement that a defendant know "the specific nature of the child's injuries."

While Lanier's mother told Lanier that she had taken the child to a doctor and all was fine, a false report, even then, Lanier was culpably negligent for not taking action during the next nine days to alleviate the suffering of which testimony established his awareness. And, medical testimony established blood in the brain indicating injury within a few days of the ultimate hospital admittance.

Smith v. State, 1D17-2771 (Feb. 27, 2019)

Smith appealed his probation revocation. The First District affirmed the revocation, but reversed for resentencing before a different judge.

Smith challenged the sufficiency of the violation affidavit. He was charged with two counts of sexual battery in a new criminal case, and the VOP affidavit alleged a violation of condition five by committing two counts of "sexual assault." The new criminal case and revocation case were tried at the same time. In the criminal case, the jury found the Smith not guilty, attaching a note saying that there was a consensus that Smith "had done some illegal act, but that the evidence did not prove the specific act." The court then found Smith guilty of the probation violation.

Smith challenged the VOP affidavit on the ground that sexual assault did not constitute a crime in Florida. While that was true, the details of the two alleged incidents were sufficient to provide the defendant with notice that it was the two counts of sexual battery on a victim under the age of 12 by a person over the age of 18.

The trial court announced its determination to impose the given sentence in the absence of argument. "A trial court's refusal to hear evidence and argument regarding a sentence constitutes a denial of due process and is fundamental error."

Grandison v. State, 1D17-4266 (Feb. 27, 2019)

The First District affirmed the denial of a Rule 3.850 motion after an evidentiary hearing.

The defendant was convicted of robbing a convenience store and fatally shooting one owner. The victim's wife was behind the counter at the time and the incident was recorded on surveillance video.

Trial counsel did not request Florida's special jury instruction on eyewitness identification, which instructs the jury to consider multiple factors as to such identifications. Counsel did not call an expert, discuss this during voir dire, or argue it during closing argument. The First District concluded that the defendant established neither deficiency of counsel nor prejudice. The Court's reasons included the following: Counsel spoke to the jury about the wife's identification and used portions of the special instruction. Counsel explained that he did not depose the wife for tactical reasons, which he explained. Counsel also explained that an expert would not be helpful in light of the surveillance video and the jury had both the video and still shots to make its own determination.

Counsel was not ineffective for failing to object to a comment by the prosecutor. The prosecution maintained that this defendant was the shooter and argued that the jury could find the defendant guilty only if he actually killed the owner. Defense counsel then argued that the principal instruction indicated that the State was not certain who the shooter was. The State on rebuttal then addressed "the defense proposition that the State is unsure of who did this," and "mentioned not supporting every instruction or lesser included instruction but agreeing with the instructions on the crime charged and that the State had always maintained Appellant was the shooter." "In context, the isolated comment about the principal instruction and not supporting every instruction is merely direct response to defense counsel's argument."

Askew v. State, 1D18-750 (Feb. 27, 2019)

The trial court denied a rule 3.850 motion without an evidentiary hearing, concluding that the claim was refuted by the colloquy regarding the waiver of the right to testify at trial. The motion alleged that counsel misadvised the defendant "that if he testified at trial, the jury would automatically learn the nature of his past crimes and the State could go into the specifics of his prior record on cross-

examination." The claim was facially insufficient and, as the colloquy did not refute it, it was remanded for an evidentiary hearing.

Martinez v. State, 1D18-1040 (Feb. 27, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion. The motion was untimely, as it was beyond the two-year limitations period for Rule 3.850 motion. Martinez sought to avoid that time bar based on his claim "that his mental illnesses, including dementia, render him 100% disabled." The Court rejected this argument because the instant motion was a second Rule 3.850 motion, and the fact that he filed a prior motion in a timely manner belied his argument that he was unable to do so.

The Court further rejected claims of newly discovered evidence. One was based on a statement from the defendant's wife, which statement was given in a deposition and which both the defendant and defense counsel were therefore previously aware of. Another claim of double jeopardy based on dual convictions for the same conduct was a reiteration of a claim asserted in a prior postconviction motion. And, another claim regarding the failure to communicate a plea offer was rejected because 1) the motion did not allege how or when the defendant came to know of the plea offers, and 2) the claim was refuted by the record, in which attorneys for both parties denied the existence of any plea offers.

Elliott v. State, 1D18-1877 (Feb. 27, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion which alleged multiple claims of ineffective assistance of trial counsel. The defendant had been convicted for the sexual battery of his 16-year old stepdaughter.

One claim related to the failure to obtain phone records of the victim and her boyfriend, which the defendant alleged "would have supported the defense's theory that the victim lied about the sexual battery to gain sympathy from Gossett [boyfriend] and that the victim slit her wrists because her scheme backfired when Gossett became angry with her." The defendant failed to establish prejudice. The victim's testimony was consistent with her report to the police and with her disclosure to Gossett, and the defendant confessed to a third person.

As to the failure to call three named witnesses, prejudice could not be established. Any "testimony regarding an argument between Gossett and the victim

the day she disclosed the sexual battery is a collateral matter that does not reflect on the veracity of the victim's allegations."

The defendant's friend, Christopher Smith, testified as to the confession. The failure to call Smith's wife as a witness regarding Smith's motive to falsely testify because Smith believed his wife and the defendant were having an affair, did not constitute ineffectiveness. Counsel had already attempted to elicit the same testimony on cross-examination of Smith, and the court excluded it as improper character evidence, even though defense counsel argued that it went to Smith's bias as a witness.

Counsel was not ineffective for failing to object to comments by the prosecutor in opening and closing arguments. One comment about Smith's girlfriend having been incarcerated at a particular time was shown to be relevant to establishing the age of the victim at the time of the offense. One comment about the honesty of a witness was not improper as the prosecutor was not suggesting that she had reasons to believe the witness that were not presented to the jury. Other comments were proper comments on the evidence. The comments referred to the victim's suicide attempt as a consequence of her disclosure of the sexual battery.

A claim of misadvice as to whether the defendant should testify was refuted by the colloquy with the defendant, which is quoted in full in the Court's opinion. A defendant "is not entitled to go behind his statements in the colloquy."

Second District Court of Appeal

Sammons v. State, 2D17-1953 (March 1, 2019)

Sammons waived his right to counsel at trial. His sentence was reversed because the trial court failed to renew the offer of counsel before proceeding with the sentencing. Under Fla.R.Crim.P. 3.111(d)(5), the offer of counsel must be renewed at each subsequent critical stage of the proceedings after the initial waiver.

The fact that the defendant had standby counsel at trial and the sentencing proceeded immediately after the end of the guilt phase did not make a difference and did not render the omission harmless.

Nelson v. State, 2D17-3650 (Mar. 1, 2019)

Convictions for carrying a concealed firearm, possession of cocaine and possession of marijuana were reversed for further proceedings. The trial court erred in denying a motion to suppress evidence.

Nelson was observed in a city park at 12:33 a.m., and the park had a posted closing time of 11:00 p.m. When the officers approached him Nelson told them he was in the process of leaving and walked towards his bicycle. One officer ordered him to stop and observed Nelson's hand "go toward his waistband area as he reached for his bicycle." The officer drew a weapon, grabbed the handle of the bicycle and stopped Nelson from leaving. Nelson was arrested for violating the city code with respect to his presence in the park after closing time.

The trial court denied the motion to suppress, finding that the officers had the right to be where they were. While correct, that was not relevant. "'[W]hen a person is charged with violating a municipal ordinance regulating conduct that is noncriminal in nature, . . . [a] full custodial arrest . . . is unreasonable and a violation of the Fourth Amendment and article I, section 12 of the Florida Constitution.'" Section 901.15(1), Florida Statutes, does not authorize a full custodial arrest, only a detention "'for the limited purpose of issuing a ticket, summons, or notice to appear.'"

Nor could the search be justified based on the good faith reliance of the officers on a municipal ordinance to justify the arrest. The Second District "has previously admonished law enforcement officers for continuing to conduct full custodial arrests for bicycle infractions after such action was found unlawful in Thomas[v. State], 614 So. 2d 468 (Fla. 1993) sixteen years prior."

Johnson v. State, 2D17-3707 (Mar. 1, 2019)

The trial court appointed three experts to determine competency. A hearing was held and the court orally found Johnson competent but failed to enter a written order. The court was found to have made an independent determination based upon its review of the reports. The trial court, however, was ordered to issue a written order nunc pro tunc on remand.

Murray v. State, 2D17-4225 (Mar. 1, 2019)

Murray was represented by counsel when he entered his guilty plea. Prior to a hearing on his motion to withdraw plea, he discharged counsel. After a Faretta hearing, he was permitted to represent himself with standby counsel. After the court denied the motion to withdraw plea, the sentencing proceeding commenced. The sentence imposed was reversed because the trial court failed to renew an offer of counsel prior to commencing the sentencing, which was a new critical stage for which Murray was entitled to counsel if desired. "Even where no intervening event occurs, the court must renew the offer of counsel prior to each critical stage of the proceedings."

Malamatos v. State, 2D18-1247 (Feb. 27, 2019)

The Court reversed one ground of violation of probation. Without setting forth any facts, the Court cited an earlier opinion for the proposition that a "'failure to submit documentation of his community service hours cannot support a finding that he violated condition 27 of his probation, which requires only actual performance of the work itself.'"

Third District Court of Appeal

A.A., et al. v. State, 3D17-2075, et al. (Feb. 27, 2019)

Two juveniles, through prohibition petitions, challenged "do not run" orders. A third juvenile, by appeal, conceded the validity of such an order, and challenged, by appeal, a contempt adjudication resulting from her violation of such an order. The Third District denied the prohibition petitions and upheld the do not run orders, but reversed the contempt adjudication based on procedural and evidentiary problems.

"A do not run order is a species of injunction generally requiring the juvenile to remain in the juvenile's home or placement." A violation can result in a contempt judgment. Trial courts do not consider the do not run order to be a form of nonsecure detention.

The two prohibition petitions argued that the trial court "does not hold the authority to issue a do not run order to a juvenile pending a finding of delinquency because no provision of chapter 985 of the Florida Statutes specifically provides for such an order."

Construing the provisions of chapter 985, the Third District found that if "a child is otherwise validly ordered into 'nonsecure detention,' then do not run orders, such as the ones entered against S.F. and N.A., are expressly authorized by statute as 'other requirements imposed by the court.'" S.F. and N.A. "argued that, under this statutory scheme, detention care may be imposed *only* when the child initially is taken into custody, and therefore, the trial court lacked specific statutory authority to enter subsequent do not run orders as to them." The Third District disagreed. "Section 985.255(1)(i) specifically authorizes the juvenile court to order 'continued detention' if the child is detained on a judicial order for failure to appear and has previously failed to appear. In essence, the detention process recommences as the product of an executed pick-up order." That was what had occurred under the facts of these cases.

As to the contempt adjudication, the trial court entertained improper testimony. One witness was permitted to testify over speakerphone, resulting in a violation of the right to confront witnesses in a contempt proceeding. Another witness, a case manager, "gave testimony that amounted to inadmissible hearsay when she provided information about A.A.'s status as a runaway on specific dates without having personal knowledge of A.A.'s whereabouts on those dates."

Fourth District Court of Appeal

Warthen v. State, 4D17-961 (Feb. 27, 2019)

The Fourth District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence.

In 1990, Warthen was sentenced to 15 and 25 year terms for two nonhomicide offenses. He committed a second-degree murder while on furlough for the prior sentences and was sentenced to 40 years for the murder. He was a juvenile at the time of the commission of the offenses. He argued that aggregating the sentences for the two cases resulted in a violation of the Supreme Court's decisions in Graham v. Florida and Miller v. Alabama. The Fourth District disagreed.

The Fourth District stated that the Florida Supreme Court, in a plurality decision, State v. Purdy, 258 So. 3d 723 (Fla. 2018), decided "that a defendant's aggregate sentence arising from the *same case* did not implicate *Graham* and *Miller*." And, as to the homicide, a 40-year term does not violate *Miller*.

The Court certified conflict with decisions of the Second and Fifth District Courts of Appeal.

Thompson v. State, 4D17-3871 (Feb. 27, 2019)

Thompson pled no contest and received a negotiated sentence of five years in prison and 10 years' probation. He violated the probation and, at the sentencing hearing, the scoresheet showed a lowest permissible prison sentence of five years. Counsel objected to the inclusion of a four-point assessment for a legal status violation and the court sentenced Thompson to 30 years in prison with credit for time served. In a Rule 3.800(b)(2) motion during the direct appeal, he presented further sentencing claims which were then raised on appeal.

Thompson argued that he was improperly designated as VFOSC under section 948.06(8), a designation the State did not request. The defendant qualified for the designation "because he was on felony probation and violated probation by committing the qualifying offense of transmission of child pornography. His designation as a VFOSC was imposed as a matter of law; it did not depend on a finding that he posed a danger to the community. Thus, the twelve points [on the scoresheet] were correctly added to his scoresheet."

"However, under the second part of the statute, the court was required to consider the factors under section (e) and make written findings as to whether the defendant was a danger to the community." As that was not done, the case was remanded for a new sentencing hearing.

Additionally, the state conceded that the scoresheet should not have included the four points for legal status violation. That error, however, was harmless, as the court imposed the maximum sentence, rendering the four points irrelevant. On remand, the points will still be deleted.

Martinez v. State, 4D18-638 (Feb. 27, 2019)

Martinez appealed convictions for DUI and resisting an officer with violence. He argued that the trial court erred in denying his motion to suppress statements he made about the President of the United States at the time of his arrest. The Fourth District affirmed the lower court.

The statements in question, referring to President Trump, are quoted in detail and include a mixture of extensive profanity, references to Mexico, and expressions

of "thanks" and "love" directed towards the president. The statements included an assertion, "I'm not resisting," which was directly relevant to the resisting charge, and the remainder of the statements were relevant to Martinez's state of mind.

The prejudice did not exceed probative value. "Even assuming Martinez is correct about the President eliciting an emotional reaction – a statement we neither agree nor disagree with – he fails to explain how the mere reference to an elected official renders that evidence unduly prejudicial."

Fifth District Court of Appeal

Gilchrist v. State, 5D18-3545 (Mar. 1, 2019)

Gilchrist, 17 years old at the time of the armed robberies he committed, was sentenced to concurrent terms of 25 years in prison. The trial court partially granted his Rule 3.800(a) motion to correct illegal sentence, to provide for judicial sentencing review hearings.

The Fifth District "previously held that it is error to modify a juvenile defendant's sentence to allow for a review hearing without also holding a resentencing hearing under sections 775.082, 921.1401 and 921.1402, Florida Statutes." The case was therefore remanded to allow for a full resentencing hearing.