Case Law Update
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First District Court of Appeal

Kitchen v. State, 1D17-3309 (Mar. 13, 2019)

The trial court summarily denied a Rule 3.850 motion, and the First District reversed and remanded for further proceedings as to two of the three claims.

Kitchen alleged that counsel was ineffective for failing to give adequate advice with respect to a plea offer of seven years in prison. He alleged that counsel failed to advise him that that was the minimum sentence he could receive under the guidelines. The claim was sufficiently pled, as Kitchen asserted that he would have accepted the offer, that the State would not have revoked it, that the court would have accepted it, and that he would have received a lesser sentence from the plea offer than the one he ultimately received. The trial court did not attach portions of the court record which conclusively refuted the claim.

In another claim, Kitchen alleged that counsel misadvised him that his testimony was not needed. His theory of defense was that an alleged sexual battery was a consensual sexual encounter, and that he would have so testified, adding that the victim initiated the sex and that she later expressed regret because she was afraid her boyfriend would find out. The voluntariness of the plea, however, was not the issue; counsel's alleged misadvice was.

On remand, the trial court must either attach portions of the record which conclusively refute the claim or conduct an evidentiary hearing.

Ford v. State, 1D17-3359 (Mar. 13, 2019)

Ford appealed his conviction and sentence for first degree murder. The First District affirmed and found that the evidence was sufficient.

The Court addressed the State's evidence under the circumstantial evidence standard of review. The Court's analysis is based on a highly-detailed presentation of the evidence adduced at trial:

Viewed in a light most favorable to the State, the evidence pointed to Appellant as the only possible suspect. In June 2016, the victim had accused Appellant—whom she knew through Appellant's grandmother—of stealing from her. Subsequently, Appellant was seen in possession of the murder weapon, a .22 Ruger with a laser sight that was stolen along with some checks during a vehicle burglary in August 2016. Appellant cashed two of those stolen checks three days after the burglary. After midnight on September 9, 2016, Appellant made three cell phone calls to the victim, the last of which ended at 12:48 a.m. Four minutes later, the victim's home security system indicated that the front door was opened and closed and that the alarm was deactivated. The front door was left open for one minute and ten seconds and then closed at 12:54 a.m. The next activity was at 1:05 a.m. when the front door was opened and closed.

For the next 33.5 hours, there was no activity detected until the victim's friend went to the victim's house after not hearing from her, found the door unlocked, and entered the house to find the victim dead in her bedroom with a fatal gunshot wound to the head. There were no signs of forced entry, and all the windows and doors were secured. The victim was known to be very safety conscious, was characterized as someone who would never open the door to strangers, and preferred that visitors call her before they came over late at night.

This circumstantial evidence connected Appellant to the crime through a firm timeline that established that the elderly victim admitted Appellant—a person she knew—into her home late at night within minutes of receiving a call from Appellant and that—no more than ten minutes later—Appellant shot her with a firearm that he acquired from a prior burglary. Although Appellant claimed that he was at the apartment of his friend, Shaniya James, on the night of the murder, and that he called the victim from James' apartment, this hypothesis of innocence was inconsistent with (1) James' testimony that she was not with Appellant on that night, Appellant did not have the

> key to her apartment, and Appellant did not have permission to be in her apartment when she was not there; (2) cell tower data showing that Appellant's cell phone was moving when he made the calls to the victim; (3) Appellant's Facebook messages to his friend, Joewaki Hamilton, suggesting that Appellant was not at James' apartment when the victim was murdered; and (4) the deleted calls to the victim on Appellant's cell phone as well as his messages to Hamilton on his Facebook account. Because this evidence was sufficient for a jury to find within "a reasonable and moral certainty" that Appellant and no one else committed the murder, the trial court properly denied the motion for judgment of acquittal. *See Kline v. State*, 223 So. 3d 482 (Fla. 1st DCA 2017) (holding that circumstantial evidence was sufficient for the jury to find within "a reasonable and moral certainty" that Kline, and no one else, murdered his wife where the evidence connected Kline to the crime through a firm timeline, he was the last person to see his wife alive, their marriage was unhappy, he made inculpatory statements in a letter to his ex-wife, and his hypothesis of innocence was implausible).

The Court further found sufficient evidence of premeditation: "the evidence established that Appellant arranged a visit with the victim after midnight, traveled to the victim's home armed with a firearm, pistol whipped the victim, shot her in the head with a firearm at close range, and took her purse and cell phone before he left. This evidence was inconsistent with a lack of premeditation because there was sufficient time for Appellant to be conscious of the nature of the act he was about to commit and the probable result of that act. Moreover, this evidence was sufficient to establish that Appellant robbed the victim of her purse and cell phone during the commission of the murder."

Ogden v. State, 1D17-4040 (Mar. 13, 2019)

The trial court summarily denied a Rule 3.850 motion. The First District reversed as to one of the two claims, in which it was alleged that counsel was ineffective "for failing to advise Appellant that he was facing a mandatory life sentence as a prison releasee reoffender when the State made a plea offer of fifteen years in prison as a prison releasee reoffender, which it later withdrew." "Appellant

alleged that if defense counsel had advised him of the maximum sentence he faced when the State made the plea offer, he would have accepted the offer instead of leaving the offer open, which resulted in the offer being withdrawn. If true, defense counsel's failure to advise Appellant of the maximum sentence when discussion the plea offer constituted deficient performance."

The claim was not "conclusively refuted by the record of Appellant's subsequent plea because ""[p]rejudice . . . is determined based upon a consideration of the circumstances as viewed *at the time of the offer* and what would have been done *with proper and adequate advice*."""

Robinson v. State, 1D18-933 (Mar. 13, 2019)

In a second-degree murder case in which the defendant, a juvenile at the time of the offense, was sentenced under section 921.1401, the juvenile life-sentencing statute, the defendant received a life sentence with judicial review after 25 years. The First District, based on its prior decision in Dortch v. State, 44 Fla. L. Weekly D483 (Fla. 1st DCA Feb. 15, 2019), held that the trial court was not obligated to make specific findings as to each factor under that statute. The court must only review and consider all relevant factors.

Reid v. State, 1D18-1612 (Mar. 13, 2019)

The First District affirmed, without setting forth any facts, and citing cases for the propositions that "reasonable suspicion based on articulable facts that criminal activity is occurring justifies a detention beyond the time needed to issue a traffic citation," and "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."

Second District Court of Appeal

Edwards v. State, 2D18-807 (Mar. 15, 2019)

Edwards was convicted for selling heroin and fentanyl and argued that selling a mixture of the two counted only as one offense for double jeopardy purposes. The Second District disagreed.

The Blockburger "different elements" test was inapplicable because the "sale of mixed drugs involves only one act and only one statute. . . . Rather, this court

should 'apply the "allowable unit of prosecution" standard to determine whether a double jeopardy violation has occurred.' . . . By this standard, the legislature identifies the aspects of criminal activity that it intends to punish as separate, discrete violations of a single statute."

This was an exercise in statutory construction to determine legislative intent, and the Court focused on statutory reference to "a controlled substance," as reflecting a legislative intent "to punish a defendant for the sale of each type of controlled substance in sections 893.03(1)(a), [et al.]. . . ."

Tillman v. State, 2D16-5566 (Mar. 13, 2019)

Relying on the Court's own prior decisions, the Court held that the 2017 amendment to the Stand Your Ground law applied retroactively and the case was remanded to the trial court for reconsideration of a motion to dismiss the information based upon the revised burden of proof. As in prior cases, conflict was certified with decisions of other district courts of appeal.

Third District Court of Appeal

Edward v. State, 3D17-1486 (Mar. 13, 2019)

At a de novo resentencing, a successor judge found that Edward qualified as an HVFO and imposed the same sentence as did the original judge. On appeal, Edward argued that the successor judge "failed to exercise her discretion in fashioning the appropriate sentence at this 'clean slate' resentencing proceeding. . . ." The Third District agreed and remanded for resentencing before a new judge.

The record on appeal supported the conclusion "that the successor judge was indeed under the impression that, once it concluded that Edward qualified as a habitual violent felony offender, she should defer to the sentence imposed by the original judge."

Quotes from the resentencing judge included: "we're here today only because [the original judge's'] pronouncement of the defendant's sentence was not clear," and, "I don't see a reason, whereby, I can or should substitute my thoughts for that of the trial judge. . . ." After being reminded by defense counsel that it was a de novo resentencing hearing, the judge responded: "No. I think [the original judge] had ample opportunity to view the case and ample opportunity to be there for the

proceedings, so I don't see that you have presented sufficient evidence to have me change that[]."

"A de novo resentencing 'must be a "clean slate," meaning that the defendant's vacated sentence becomes a "nullity" and his resentencing should proceed de novo on all issues bearing on the proper sentence.'"

Baker v. State, 3D17-1881 (Apr. 10, 2019) (on motion for clarification)

The Third District withdrew its prior opinion and issued a new one.

The Court found that dual convictions for using a computer service or device to solicit the parent of a child to consent to the child engaging in unlawful sexual activity, and traveling to meet the child for that purpose constituted a double jeopardy violation, based on Lee v. State, 258 So. 3d 1297 (Fla. 2018). The solicitation conviction was vacated and the case remanded for resentencing.

Although the record established separate instances of solicitation underpinning the two charges, "the Florida Supreme Court recently held that, when determining whether separate acts of solicitation support the two convictions, a reviewing court's inquiry is limited to the *charging* document – here, the Second Amended Information." And, while "the Second Amended Information charging Baker with both offenses states two separate dates – March 2nd as the date of the solicitation offense and March 3rd as the date of the travel after solicitation offense – it is not clear from this charging document that the solicitation forming the basis of each charge is a separate and distinct act of solicitation."

Allegations of separate dates in the information are not necessarily sufficient. The information must make "clear that the State relied on separate conduct to charge the two offenses." Although the information provided separate dates for the two charges, as to the traveling offense, even though there were email solicitations on more than one date, including the date of the traveling, the information did not specify which emails from which date were being used as the predicate for the traveling offense.

State v. Mackey, 3D18-757 (Mar. 13, 2019)

The State sought certiorari review of an "order granting defendant's motion to enforce jury verdict." The Third District held that the order "effectively dismissed the information under section 924.07(1)(a) of the Florida Statutes (2018) and Florida

Rule of Appellate Procedure 9.140(c)(1)(A)," and that it was therefore "an appealable order that could be reviewed only if review were sought within fifteen days of rendition." As the certiorari petition was filed more than 15 days after the filing of the order, the petition could not be treated as a notice of appeal, and the certiorari petition was dismissed.

Mackey was charged with attempted premeditated murder for shooting the victim with a firearm. At trial, Mackey argued self-defense. The jury was instructed on attempted premeditated murder and the lesser included offenses of attempted second-degree murder and attempted manslaughter by act. The verdict form asked the jury to determine guilt as to one of the listed offenses or to find the defendant not guilty. The jury, during deliberations, asked the judge to explain reasonable doubt, which the court did. The jury then sent a note stating that it could not reach a verdict. The court gave the jury an Allen charge. The jury again sent a note stating that it could not agree on a verdict. The court inquired as to the jurors' vote, as to "numbers only." The jury responded – none in favor of attempted premediated murder; none for attempted second degree murder, one for attempted manslaughter, and five for not guilty. The judge then declared a mistrial.

Two months later, Mackey filed a "motion to enter the jury's verdict," arguing that he could not be retried on either attempted first- or second-degree murder because the jury had been unanimous in its rejection of those charges. A successor judge agreed with the State's argument that the "jury poll" did not constitute a verdict under Rule 3.440 because it "'was not read aloud in the presence of the jury, and the parties did not have an opportunity to poll the jury on the greater offenses of attempted first and second-degree murder in open court.'" However, the judge agreed with Mackey that although the jury poll did not constitute a jury verdict, it was an acquittal and that retrial was therefore barred. The State's petition for writ of certiorari sought review of that order.

The defendant's motion was akin to a pretrial motion to dismiss, and orders granting pretrial motions to dismiss are appealable under Rule 9.140(c)(3). As the order is one which is appealable, it must be appealed within 15 days by the State, and the State can not use a certiorari petition to seek review of an order that is otherwise appealable. Had the petition been filed within 15 days, even though that would have been the wrong remedy, the appellate court would have had the authority to treat the petition as if it were a notice of appeal under the correct rule of procedure.

State v. Griffin, 3D14-2460 (Mar. 13, 2019)

The Court affirmed the order under appeal by the State. No facts or analysis were provided, but the Court cited Born-Suniaga v. State, 256 So. 3d 783, 786 (Fla. 2018), for the point that "the State is not entitled to Florida Rule of Criminal Procedure 3.191(p)'s recapture period when the State terminates prosecution and files new charges based on the same conduct before speedy trial period expires, but fails to notify the defendant of new charges until after expiration of speedy trial period."

Fourth District Court of Appeal

Dippolito v. State, 4D17-2486 (Mar. 13, 2019)

The defendant appealed a conviction for solicitation to commit the first-degree murder of her husband. The Fourth District affirmed and addressed three issues.

The trial court did not err in permitting the State to introduce collateral offense evidence that the defendant "told her lover that she had previously tried to poison her husband with antifreeze." Although the trial court excluded the evidence in a pretrial ruling, the court had also announced that that ruling was subject to change during the trial based on how the trial proceeded. At trial, the defense opened the door to this testimony when it "elicited testimony from the lover that he didn't believe that appellant actually wanted to kill her husband."

The defendant next argued that "the law enforcement's conduct in this case amounted to objective entrapment as a matter of law," claiming that "treatment of her lover was outrageous conduct" and that police "participation in the 'Cops' television program constituted entrapment."

None of the circumstances addressed in prior Florida appellate court cases were found to be present here. "Although appellant asserts that the police threatened the lover to gain his cooperation, the trial court found that he was not threatened by police. It was the lover who first approached the police with his concern that appellant would kill her husband, not the other was around. The lover was not attempting to reduce his own exposure to a criminal sentence, nor was he being paid by law enforcement." Additionally, the alleged failure of police to supervise the lover in the capacity of a CI would not support dismissal "unless the lack of supervision results in unscrupulous conduct by the informant. . . . The mere fact that

the lover made repeated phone calls to appellant without the police monitoring them is insufficient to show entrapment."

As to the "Cops" show, the police did not involve the show in surveillance or investigation "until after appellant had already taken all the steps to solicit the murder of her husband. It was only at the point that she was being arrested, after the crime was complete, that the television program filmed the arrest."

Last, as to objective entrapment, there was no entitlement to having that issue submitted to the jury; objective entrapment is a matter of law for the court to decide.

Several other pieces of evidence which implicated collateral crimes were also found to have been properly admitted as without references to those, "it would have been impossible to give a complete or intelligent account of the criminal episode and how it developed over time." These included: theft of money from the defendant's husband; the attempt to hire someone else to kill her husband; the planting of drugs in her husband's car to cause a probation violation; the attempted theft of a gun from her lover; the attempt to defraud the husband out of his title to his home; and her relationship with another lover and texts between them.

Moore v. State, 4D17-3462 (Mar. 13, 2019)

Moore appealed an order revoking probation. The Fourth District affirmed and addressed the argument that the sentence was imposed based "on an erroneous scoresheet and an improper determination that he qualified for sentencing as a violent felony offender of special concern."

The State conceded that there was a scoresheet error. The scoresheet included 12 points, rather than 6, because Moore was listed as a VFOSC. Moore argued that the trial court had failed to hold a hearing or make required findings and that in addition to a remand for resentencing based on the scoresheet error, the court should be precluded from resentencing him as a VFOSC. These arguments had been raised in a Rule 3.800(b) motion during the pendency of the direct appeal.

The Court held that resentencing as a VFOSC was not foreclosed. It was clear that Moore qualified as a VFOSC based on the statutory definition. A failure to make written findings does not mandate the striking of a designation. The finding as to qualification as a VFOSC posing a danger to the community "determines whether revocation of probation is mandatory or discretionary." "'[B]ecause a guidelines sentence 'would be legal irrespective of the findings made pursuant to

section 948.06(8)(e),' a trial court's failure to make the mandated written findings under section 948.06(8)(e) does not necessitate reinstatement of the defendant's probation. . . . Rather, 'the proper remedy is to reverse the sentencing order and remand for another sentencing hearing with directions that the trial court make the necessary written findings . . . when imposing its sentence.'"

Gooden v. State, 4D18-323 (Mar. 13, 2019)

The Fourth District reversed a conviction for a felon possessing a firearm. The prosecutor's closing argument included improper comments, shifting the burden of proof and arguing facts not in evidence.

First, the prosecutor "told the jury that the defendant was presenting his story for the first time at trial. This did not amount to a comment on silence because the defense had elicited from the detective that appellant had been interviewed after his arrest." This comment was proper.

Next, there were "repeated comments regarding the defense's failure to cross-examine the law enforcement officers." These comments improperly shifted the burden of proof. "'[T]he state cannot comment on a defendant's failure to produce evidence to refute an element of the crime, because doing so could erroneously lead the jury to believe that the defendant carried the burden of introducing evidence.'" . . . Only where the defendant asserts some affirmative defense or relies on facts not equally available to the State does the defendant have a burden of proof."

Last, after defense counsel argued that the State did not present any DNA evidence linking Gooden to the gun, the prosecutor provided an explanation based on the budgetary restrictions of Palm Beach County. This was an improper reference to facts not in evidence.

D.S. v. State, 4D18-516 (Mar. 13, 2019)

D.S. appealed an amended disposition order adjudicating him delinquent and imposing a sexual offender registration requirement based on factual findings that the original sentencing judge did not make. The Fourth District affirmed but remanded for a written order revoking post-commitment probation, specifying the conditions that were violated.

The relevant statutory language did not limit "the requirement of authority to make the statutory findings to the original sentencing judge." The judge made those findings at the violation of probation disposition hearing.

Fifth District Court of Appeal

Knapp v. State, 5D18-2596 (Mar. 15, 2019)

The trial court summarily denied a Rule 3.850 motion. The Fifth District reversed and remanded for an evidentiary hearing as to one claim of ineffective assistance of counsel.

Knapp alleged, and attached an affidavit from trial counsel, that counsel planned on presenting, in the alternative, a defense of entrapment and a defense that the defendant was not guilty because the State could not prove intent. It was further alleged that at an off-the-record bench conference, the judge told counsel that the defense of entrapment could not be asserted unless the defendant admitted all elements of the offense. As a result, it was alleged that defense counsel refrained from questioning jurors regarding the entrapment defense and that counsel was ineffective for not objecting to this ruling.

The trial court's denial of the claim was based on a portion of a transcribed proceeding in which counsel stated that they would not be arguing entrapment. That did not conclusively refute the claim in the 3.850 motion that the trial court forced the choice on the defense.