Case Law Update
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Eleventh Circuit Court of Appeals

Commissioner, Alabama Department of Corrections v. Advance Local Media, LLC, 18-12402 (Mar. 18, 3019)

A death row inmate filed a 1983 action challenging Alabama's lethal injection protocol as it applied to him under the Eighth Amendment "because he suffered from 'severely compromised veins' due to drug use, Hepatitis C, and cancer." Members of the media were permitted to intervene and sought access to the protocol. The district court granted access to a redacted version of the protocol.

On appeal, Alabama contended that the intervenors were improperly granted access to the protocol. The Eleventh Circuit affirmed the district court's ruling and found that there was a common law right of access to the document.

"The common law right of access to judicial records '"establish[es] a general presumption that criminal and civil actions should be conducted publicly" and "includes a right to inspect and copy public records and documents." It is "an essential component of court system of justice" and "is instrumental in securing the integrity of the process."'"

The Court found that the protocol qualified as a judicial record even though it was not formally filed with the district court and was not in the electronic docket. While the mere filing of a document does not transform it into a judicial record, such as documents filed as part of discovery, and such documents will be "'essentially a private process' meant to 'assist trial preparation,'" documents become judicial records "if they are filed with pretrial motions 'that require judicial resolution of the merits' of an action."

The Court emphasized that its holding was narrow and based on unique circumstances, and concluded that the protocol was "submitted to the district court to resolve disputed substantive motions in the litigation, was discussed and analyzed by all parties in evidentiary hearings and arguments, and was unambiguously integral to the court's resolution of the substantive motions in Hamm's as-applied challenge to the protocol." The Court also addressed multiple factors to determine

whether the common law right of access was overcome by a showing of good cause – factors which look to whether there is a sufficient interest in keeping the information confidential.

[Crain v. Secretary, Florida Department of Corrections](), 15-14347 (Mar. 22, 2019)

During the course of district court proceedings in a federal habeas corpus case, Crain filed several motions for the appointment of independent counsel or substitute counsel. He then appealed orders denying those motions. The Eleventh Circuit dismissed the appeals based on both a lack of subject-matter jurisdiction and the conclusion that an order denying a motion to substitute counsel was not an appealable order.

Under "the collateral-order doctrine, an order must 'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.'"

First District Court of Appeal

Steel v. State, 1D17-3978 (Mar. 20, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion which set forth five claims.

Counsel was not ineffective for failing to object to an in-court identification by the victim or by failing to suppress that identification prior to trial. There was nothing unduly suggestive about the in-court identification. The victim "testified to a lengthy encounter with Appellant and that he conversed with her before and during the attack. This satisfies the requirement that the victim's in-court identification was based on her independent recollection." And, even though the victim did not identify the defendant in a pretrial lineup, there was sufficient testimony at trial to establish that she had an independent recollection.

Counsel was not ineffective for waiving Steel's speedy trial rights without consulting him; that is a decision defense counsel is permitted to make. While Steel argued that the State would not have had time to conjure up collateral crimes witnesses if the case proceeded to trial sooner, the prosecution still had the victim's identification in open court and DNA evidence, such that Steel could not establish a probability that the outcome of an expedited trial would have been different absent the collateral crimes evidence.

Steel claimed that counsel was ineffective for failing to object that the jury panel consisted "of one African-American man and five white women." He did not argue racial bias of any individual juror; only that "any jury with five white jurors is inherently racially biased." "When a juror indicates during voir dire that he or she can be fair and impartial, the record will not demonstrate prejudice under *Strickland* that a biased juror served on the jury, and no evidentiary hearing is needed."

Last, a claim that counsel was ineffective for failing to investigate the State's destruction or mishandling of cigarette butts found at the crime scene, which potentially contained exculpatory DNA evidence, was deemed a challenge to the State's treatment of physical evidence, and was therefore procedurally barred as the claim should have been raised on direct appeal. Alternatively, it was conclusively refuted by the record as defense counsel informed the jury that the defendant's DNA was not found on cigarette butts recovered at the scene.

Flanagan v. State, 1D17-5290 (Mar. 18, 2019)

After an adjudication of guilt for multiple offenses, Flanagan's driver's license was suspended for failure to pay fines and costs. Upon release from prison she sought and obtained a payment plan for the outstanding costs and fines so she could obtain reinstatement of her license. The clerk of the court set up a plan for $10 per month. Flanagan challenged the plan, arguing that under section 27.52(1)(a)1., a "reasonable" plan was limited to a maximum of 2% of her monthly net income.

The First District disagreed with her construction of the statute. The statute established a "presumption" of a person's ability to pay if the amount does not exceed 2 percent of annual net income as defined in the statute, divided by 12. That presumption does not limit what the trial court may consider in determining reasonableness. Here, "Appellant has benefited from substantial recurring family support in addition to receiving social security benefits. Regular support from family as well as social security benefits are matters which are to be considered in determining whether a party is indigent under section 27.52. That such assets may also be considered by a trial court in assessing the reasonableness of a payment plan is consistent with the statutory scheme." Such family support and disability benefits were not included in the statutory definition of net worth for purposes of the statutory presumption.

[Day v. State](), 1D18-1063 (Mar. 18, 2019)

Day was under the age of 18 when he committed and pled guilty to a murder. He was sentenced to life in prison in 1978. In 1991 he was paroled, but violated parole for failing to pay costs and absconding, and was paroled again in 1995 and violated a second time, for testing positive for drugs.

In a postconviction motion, he argued that he was entitled to relief under Miller v. Alabama, Based on recent Florida Supreme Court decisions, the First District disagreed. Day had an opportunity for release through parole and was, in fact, released twice. Day argued that he was still entitled to relief because his parole violations resulting in his reincarceration were "technical violations." "But the issue is not what led to a paroled offender's return to prison, but whether the original sentence was lawful. And the original sentence was lawful if it afforded a meaningful opportunity for release within Day's lifetime, which it did."

Second District Court of Appeal

J.D.P. v. State, 2D16-4072 (Mar. 20, 2019)

The juvenile court erred in departing from the recommended disposition of the Department of Juvenile Justice without making adequate findings on the record.

At an initial hearing, after reviewing DJJ's report which recommended a withhold of adjudication, the court concluded that DJJ had not adequately considered everything and ordered "a staffing." DJJ was directed to come up with a commitment level after hearing testimony from the victims' family.

DJJ then issued an amended report which recommended probation, along with an alternative recommendation for a nonsecure commitment level as a suspended sentence if J.D.P. "failed to comply with the treatment requirements of his probation." A successor judge reviewed the report "but concluded that in light of the prior judge's ruling on the record, she lacked the discretion to do anything but adjudicate J.D.P. delinquent and commit him to the custody of the DJJ."

Neither judge in this case determined that J.D.P. should be adjudicated and committed; neither made a specific finding setting forth reasons for the adjudication and commitment; and the court did not make adequate findings justifying the departure from DJJ's recommendation.

Although the initial judge stated that DJJ "had not considered the duration of the charged offense or the victims' statements," "the DJJ's representative stated that these factors were considered at the initial staffing."

Bailey v. State, 2D17-23 (Mar. 22, 2019)

Bailey committed a first-degree murder when he was a juvenile. After his 2009 trial, he received a mandatory life sentence, but that was reduced to 50 years in 2015, pursuant to the 2014 juvenile sentencing statutes. The sentence provided for review after 25 years.

Bailey argued that the court erred in imposing a sentence under section 775.082(1)(b)(1), "which provides for a forty-year minimum sentence with review after twenty-five years if the court finds that the juvenile had an intent to kill." He argued that intent to kill was not charged in the information or found by the jury. The First District disagreed. Bailey was charged with premeditated murder and the element of intent was therefore charged in the indictment. Additionally, he was found guilty of premeditated murder and the finding of intent was inherent in the guilty verdict.

He further argued that the 40-year minimum of section 775.082(1)(b)(1) was unconstitutional based on Miller v. Alabama. The First District disagreed. "When imposed on a juvenile, the minimum sentence of forty years required by section 775.082(1)(b)(1) is not comparable to mandatory life in prison or the death penalty. And Bailey will be in his early forties when he receives review of his sentence after twenty-five years, and an opportunity for early release, under sections 775.082(1)(b)(1) and 921.1402(2)."

Last, it was clear that the trial court considered the relevant sentencing factors under section 921.1401(2). The judge referenced the statute and its list of factors, adding that the court was "mindful of these factors." The judge specifically referenced two of them before stating that life was not an appropriate sentence.

Williams v. State, 2D17-666 (Mar. 20, 2019)
Williams v. State, 2D17-666 (Mar. 22, 2019)

On March 20th, the Court issued an opinion affirming a conviction for tampering with a witness and addressing the sufficiency of the evidence. On March 22nd, on the Court's own motion, the opinion was withdrawn, stating that a substitute opinion was forthcoming.

Gomillion v. State, 2D18-1640 (Mar. 20, 2019)

The Court granted a petition for writ of certiorari quashing a subpoena of toxicology records for the purpose of criminal prosecution. Gomillion asserted a constitutional right of privacy under the Florida Constitution. The Court agreed "that the State failed to prove that the toxicology records are relevant to an ongoing criminal investigation – in this case, the only way in which it could overcome Mr. Gomillion's constitutional privacy right. . . ."

A vehicle rear-ended a taxi. The taxi driver and a passenger were seriously injured. The driver of the other vehicle fled. No one saw what happened, but a man fitting Gomillion's description was seen running from the scene. With a dog's help, Gomillion was found hiding under a trailer nearby. DNA from the rear vehicle's airbag was a match to Gomillion. Gomillion was charged with leaving the scene of an accident and carelessly or negligently causing bodily injury while driving on a canceled, suspended or revoked license.

The State announced its intent to subpoena Gomillion's medical records "regarding treatment he received at Bayfront Medical Center after the crash." A draft of the proposed subpoena requested, inter alia, "blood analysis, toxicology analysis . . . [and] the observations and notes of all treating physicians and nurses."

At an evidentiary hearing, the State submitted evidence including a recording of a jail call in which Gomillion responded negatively when asked if he had been "hit" with a DUI. The other party to the call stated that he "thought it would be . . . DUI. . ." Gomillion responded that it was just the driving and leaving the scene. The State claimed that evidence of Mr. Gomillion having been intoxicated at the time of the crash would be relevant for impeachment purposes were he to take the stand at trial and testify that he was not the driver." The trial court accepted this argument based upon possible impeachment.

The Second District emphasized that "the State did not argue or prove that there was some issue in an ongoing investigation into the crash that led to the offenses with which Mr. Gomillion was charged and to which the toxicology records were material. Nor did it argue or prove that Mr. Gomillion's toxicology records were relevant to any element of any offense with which Mr. Gomillion was charged or to any defense Mr. Gomillion might present to those charges."

While value of the medical records to possible impeachment at trial could provide a justification for the subpoena, "the State must at a minimum establish a nexus between the records and the ongoing criminal litigation by identifying a reasonable theory of impeachment and presenting evidence that makes it reasonable to expect that the records will produce evidence that supports the theory." The claim that DUI's alcohol or drug use might affect his ability to observe, remember or recount the events was insufficient where "the State presented no evidence making it reasonable to believe that the toxicology records will turn up evidence that Mr. Gomillion was under the influence of drugs or alcohol." The recorded jail call did not suffice, as it was the other party, not Gomillion, who referenced drugs or alcohol, "and only to ask if Mr. Gomillion was facing a DUI charge."

Third District Court of Appeal

Helfrich v. State, 3D16-1941 (Mar. 20, 2019)

On appeal from convictions for grand theft and other offenses, Helfrich argued that the trial court failed to conduct a genuineness analysis when it permitted the State to make a peremptory challenge over the defendant's objection. In a short opinion, the Court noted that the objection did not specify the juror's race; the defense did not contend the State's reasons were pretextual ("as opposed to merely disagreeing with the characterization of juror Corn's responses by the State"); and there was nothing in the record to suggest non-race neutral treatment of the juror. One judge dissented.

State v. Herrera-Fernandez, 3D17-1481 (Mar. 20, 2019)

The Court affirmed, without written opinion, an appeal by the State. There is a specially concurring opinion addressing, at length, the appeal from a downward departure sentence in which the defendant accepted the court's below-guidelines plea offer. The concurring opinion found that while the general legal principles were "unremarkable, the context in which this particular plea arose is remarkable. The actions of the prosecutor suggest an ill-fated attempt to prevent the trial judge from becoming involved in plea negotiations. There is a correct method for accomplishing such an objective. I write to address problems that may arise when the incorrect method is followed in the hopes such method gains neither momentum nor popularity."

The facts set forth in the concurring opinion were: The State's pretrial plea offer was rejected and withdrawn. The defendant was facing a mandatory minimum

sentence of 15 years and a guidelines minimum of more than 10 years. After jury selection, a discovery violation on the part of the State was found. Prior to the hearing on the violation, the prosecutor announced that she would accept a defense counteroffer of 75 months in prison, but would not characterize it as a state offer. The court then extended an offer of 18 months in prison plus three years of probation.

The concurring opinion found that the State's invitation for a defense counteroffer indicated the prosecutor's willingness to accept it and was an "offer" by the State. Once the State extended a below guidelines offer, "the trial court was authorized to extend its own offer even if it was more favorable to the defendant than the prosecutor's offer."

Ruiz v. State, 3D18-193 (Mar. 20, 2019)

Convictions for battery on a law enforcement officer and other offenses were reversed because "the trial court abused its discretion in curtailing defense counsel's questions of the jury venire about the sole defense theory."

The defense theory was that the officers used excessive force during the arrest. Counsel tried asking questions about the jurors' views three times, and each time an objection by the prosecutor was sustained and the questioning ceased.

McClendon v. State, 3D19-152 (Mar. 20, 2019)

"[S]eparate charges and convictions are not required to support a substantive violation of probation based upon the commission of a new law violation.'"

Fourth District Court of Appeal

Brooks v. State, 4D17-3448 (Mar. 20, 2019)

In an appeal from convictions for first-degree murder and armed robbery, the Fourth District affirmed and found that the evidence was sufficient to establish the defendant was the shooter and that testimony from a detective did not improperly shift the burden of proof.

As to the sufficiency of evidence, "there was direct evidence in the form of eyewitness testimony, the controlled call, and a confession." One of the codefendants, Robinson, testified that he and the third defendant returned to their truck when Robinson heard a shot. While he did not see who shot the gun, he said

that a third defendant, Jerry, was on the truck driver's (fourth perpetrator) side and that the defendant was the last person Robinson saw with the gun. Jerry further testified at trial that the defendant shot the victim in the head.

During a controlled call which Jerry made for the police, Jerry told the defendant that he should not have done what he did. The defendant did not deny shooting the victim during that call. On appeal, the defendant argued that the testimony about his failure to respond to Jerry's statements during the controlled call shifted the burden of proof.

The testimony about the controlled call was admissible for two reasons. First, the defendant's silence was an adoptive admission. Second, it was relevant to "rebut the defendant's position that a co-defendant shot the victim."

Ayos v. State, 4D17-3840, 4D17-3857 (Mar. 20, 2019)

After entering a no contest plea to sex offenses and non-sex offenses, the defendant raised several issues related to the sentence on appeal.

The first two alleged errors related to scoresheet points for penetration: that the scoresheet should not have included 160 sexual penetration points because he pled to an information which charged "union and penetration" in the alternative; and that any stipulation by counsel to a factual basis, which may have constituted a stipulation to penetration, was insufficient to constitute a waiver of the defendant's right to a jury determination.

The victim's testimony at the sentencing hearing provided factual support for the finding of penetration. Any error under Apprendi was harmless.

The imposition of several costs was reversed. The trial court had included costs for traffic offenses even though none had been charged. Others applied only to misdemeanor charges, of which there were none.

Dedemonicis v. State, 4D18-596 (Mar. 20, 2019)

The Fourth District affirmed a conviction for lewd or lascivious exhibition in the presence of a victim less than 16 years of age. The Court addressed the issue of the sufficiency of evidence as to the defendant's age being over 18, which was an element of the offense.

The victim's mother, who had observed the defendant, testified that he was "an older man," "much over 18." Additionally, the Court emphasized the jury's ability to observe the defendant, in court, in a photo lineup, and in video surveillance. The defendant was in his sixties.

Salomon v. State, 4D18-679 (Mar. 20, 2019)

The defendant appealed a conviction for second-degree murder with a firearm. The Fourth District reversed because "of a fundamental error in the charge to the jury on his legal defense [self defense] and improper credibility bolstering of witnesses by a state 'expert.'"

The standard jury instruction includes language that "the danger facing the defendant need not have been actual." The transcript reflected that the judge stated that "the danger need have been actual." There was no objection. The appellate court noted its concerns based upon the omission of several words throughout the instructions, including the word not; and further noted concerns that this may have been a transcription problem as opposed to "an omission by the experienced trial judge." Additionally, while the parties approved the written set of instructions, they were not in the record on appeal. "The situation here underlines the importance of including in the record the written collection of instructions on the law that the jury takes into deliberations."

A state witness, referred to as an expert, testified that the defendant's use of force "was not objectively reasonable under the circumstances" at the pretrial stand-your-ground hearing. At trial, experts for both parties "in a roundabout way," "opined about the reasonableness of appellant's use of deadly force. Neither side objected to the other calling an expert, but they agreed that the experts would not refer to the credibility of witnesses."

Although there had been no objection to the use of such "experts," the Court, as a prelude to the issue of bolstering, seriously questioned the propriety of the use of such expert witnesses: "Here, the experts' opinions on the viability of self-defense necessarily involved their estimation of the credibility of the competing witnesses, a determination squarely within the wheelhouse of the jury as the finder of fact."

The Court's decision, however, was based only on those questions and answers as to which there were objections, and the Court agreed "that the state's expert was improperly permitted to comment directly ad indirectly on the credibility of witnesses."

Examples included the witness's assertion that "no one says that except for [Appellant]." The expert further referred to a state witness as a "totally independent witness that has no connection to either party. . . . One witness is independent in my opinion. . . it just adds more credence to somebody that does not have a connection." As to a non-testifying witness, the expert concluded that her prior statements were "consistent with everyone except for the Defendant." As to the basis for the expert opinion, the expert said "we really have to look at what the witnesses say, every single one of them, except for our Defendant, has the hands to the front."

The Court also rejected an argument that the evidence was insufficient to show that the defendant acted with a depraved mind:

> . . . Appellant overheard yelling and commotion while on the phone with his girlfriend. He rushed home, sped into the apartment complex, left his car running in the middle of the parking lot, and jumped out to confront the victim, believing that he saw the victim strike his girlfriend when he pulled in. He exchanged angry words with the victim and quickly engaged in a physical "tussle" with him until they were separated. There was time to cool off when the victim retreated to his apartment and appellant went to his car to get his firearm. Appellant's girlfriend tried to keep him from going after the victim, begging him to thin of their daughter. When the victim left the apartment, he approached appellant with his hands in front of him and without any weapon. Appellant waited until the victim was within close range before firing all 18 rounds of his gun. Seven of the 18 bullets struck the victim. Five of those seven wounds were located on the victim's back, buttocks, and back of his arm, which indicated that appellant continued to shoot the victim even after he turned away.

State v. Walk, 4D18-921 (Mar. 20, 2019) (on motion for clarification)

The Court withdrew its prior opinion and substituted the March 20th opinion in its place.

The State appealed an order removing the mandatory probation condition "preventing Christopher Walk from having unsupervised contact with a child under the age of eighteen more than sixty days after the sentence was imposed." "Because the trial court failed to comply with section 948.30(e), Florida Statutes, it lacked the authority to remove the mandatory condition."

The trial court "eliminated the mandated condition of 'no contact' without considering the statutorily-required prerequisites for allowing even supervised visitation. For this reason, we must reverse."

The Court treated the state's notice of appeal as a petition for writ of certiorari, as "a petition for writ of certiorari is the proper vehicle by which to challenge a trial court's order modifying a sentence." The Court did not address the argument based on the modification being made more than 60 days after imposition of sentence. On remand, the trial court was directed to either comply with the statutory requirements regarding consideration of supervised contact or to otherwise reinstate the original mandatory condition.

K.O. V. State, 4D18-2546 (Mar. 20, 2019)

K.O. was adjudicated delinquent for using a false name and resisting without violence. The Fourth District found the evidence insufficient as to using a false name, but sufficient as to resisting without violence.

"Because K.O. was neither arrested nor lawfully detained by the officer when he gave the officer the false name, he cannot be guilty of a violation of section 901.36(1)," which prohibits a person who has been arrested or lawfully detained from giving a false name. At the time in question, officers "did not make any show of authority, touch K.O., or use language which would suggest that K.O. was not free to leave." The confrontation at that time was therefore no more than a consensual encounter.

As to the resisting charge, the "officer was investigating a call regarding trespassers on the church property. By responding to the call, the officers were engaged in the lawful execution of a legal duty. . . . At least two of the officers testified to seeing a 'No Trespassing' sign on the building, although no one testified as to the size and location of the sign. The officers suspected the K.O. was trespassing. . . . When asked for his name, appellant gave the officer a name which the officer could not confirm. Then the appellant fled. Flight is a relevant factor in determining reasonable suspicion. . . . Although the encounter began as a

consensual one, by the time that the officer ordered K.O. to stop, considering the totality of the circumstances, she had reasonable suspicion of criminal activity, and K.O. resisted by continuing to run away."

Fifth District Court of Appeal

Jones v. State, 5D17-3924 (Mar. 22, 2019)

The Fifth District affirmed a conviction for a severed charge of possession of a firearm by a convicted felon, rejecting the argument that the prosecution was collaterally estopped by a prior jury acquittal for murder with a firearm.

"The trial court denied appellant's motion to dismiss, finding that the jury could have believed Sims' testimony that he saw Appellant in possession of a firearm five minutes before hearing gunshots, while it found that Appellant was not guilty of murder because of that five-minute gap in time and the lack of evidence proving beyond a reasonable doubt that Appellant shot the victim."

State v. Phillips, 5D17-4041 (Mar. 22, 2019)

The Fifth District reversed an order suppressing evidence obtained from a probationary search of Phillips' cell phones. The "search was reasonable because the government's interest in supervising Appellee while he was on probation for sex offenses against a child outweighed Appellee's privacy interest in his cell phone data."

The express terms of Phillips' probation were expansive, but did not include express authorization to search his cell phone data. During a visit to Phillips' home, a probation officer conducted a forensic download of his cell phones. There was neither a warrant nor reasonable suspicion to believe Phillips had violated probation or committed any crime. The phones were not internet enabled when probation was imposed. The search "revealed two online identifiers that Appellee had allegedly failed to report in violation of section 943.0435(4)(e), Florida Statutes (2017)."

The Court considered to general principles – a probationer's "substantially diminished expectation of privacy" and the "heightened privacy interest in a person's cell phone data." In balancing those principles, the Court started with the point that a nonconsensual search of a probationer's residence, "even without an express search condition or individual suspicion, is reasonable where the results of the search are only used in probation proceedings." The greater privacy interest in

cell phone data than in one's residence still did "not tip the scales much in Appellee's favor."

The Court's balancing act concluded "that the seriousness of Appellee's underlying offenses against a child, combined with the new opportunities to find child victims presented by today's technology, drastically increased the government's interest in conducting a probationary search of Appellee's cell phone data." The Court certified a question of great public importance to the Florida Supreme Court:

> DOES THE SEARCH OF A PROBATIONER'S CELL PHONE DATA BY A PROBATION OFFICER VIOLATE THE FOURTH AMENDMENT WHERE THERE WAS NO INDIVIDUALIZED SUSPICION FOR THE SEARCH AND THE PROBATIONARY SEARCH CONDITIONS, ALTHOUGH BROAD, DID NOT EXPRESSLY AUTHORIZE A SEARCH OF CELL PHONE DATA, BUT THE PROBATIONER IS A SEX OFFENDER, HIS UNDERLYING OFFENSES ARE FOR SEXUAL ABUSE OF A MINOR, AND THE RESULTS OF THE SEARCH ARE ONLY USED IN VIOLATION OF PROBATION PROCEEDINGS.

Carroll v. State, 5D18-98 (Mar. 22, 2019)

Following the entry of a final judgment and sentence, a pro se notice of appeal filed by a defendant represented by counsel divested the trial court of jurisdiction. Thus, the pro se motion to withdraw plea that was filed after the notice of appeal was filed at a time when the trial court did not have jurisdiction to rule on the motion. The trial court dismissed the pro se motion to withdraw; the proper action would have been to strike it.

Negron v. State, 5D18-1401 (Mar. 22, 2019)

The trial court, after a guilty plea, awarded over $1,000 in investigative costs to the County Sheriff's Office. The trial court had reserved jurisdiction, and at an evidentiary hearing, testimony was presented seeking reimbursement at the rate of $38 per hour for time rendered by three detectives. One detective testified that he was paid about $23 per hour; there was no testimony as to what the others were paid.

The judge stated on the record that benefits typically account for 50% of a salary and factored that in to justify the $38 per hour. The Fifth District reversed, as there was no evidence adduced to support that.

Horvatt v. State, 5D18-1912 (Mar. 22, 2019)

Horvatt appealed the denial of a motion to return property seized during his criminal prosecution. Section 705.105(1), Florida Statutes, provides that title in seized property vests with the law enforcement agency "60 days after the conclusion of the proceeding." The Fifth District defined conclusion of the proceeding as when "'the mandate issues from the appellate court on a direct appeal of a defendant's judgment and sentence.'"

Keene v. State, 5D18-3353 (Mar. 22, 2019)

The Fifth District reversed the summary denial of a Rule 3.850 motion. The motion alleged that Keene was arrested for DUI on July 2, 2015, and that he entered a plea to a violation of probation, and that on February 12, 2016, the court revoked his probation and sentenced him to 106.65 months on both of the original counts in the underlying criminal case. His motion alleged that counsel was ineffective because he had completed his sentence on one of the counts on June 6, 2015, prior to the July 2015 arrest and that the court lacked jurisdiction to modify the sentence as to that count; he also argued that the scoresheet for the VOP would have been less without points for having violated probation as to a second count.

If the allegations and calculations presented by Keene were correct, the lower court would have lacked jurisdiction as to the count at issue. The trial court did not attach documents to its order to refute Keene's time line.

The detailed allegations included facts that an affidavit of violation filed in December 2013 had been dismissed in March 2014. And, while it is correct that the filing of an affidavit of violation of probation generally tolls the probationary period, the subsequent dismissal of that affidavit nullifies the tolling mechanism. As a result, Keene's allegations, if true, would have entitled him to credit towards the prior probationary term for the period between December 2013 and March 2014.