Case Law Update
April 1, 2019
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First District Court of Appeal

Vereen v. State, 1D16-5189 (Mar. 28, 2019)

Vereen was convicted of two counts of sexual battery. On appeal, he challenged the inclusion of victim injury points on the Criminal Punishment Code scoresheet for penetration. The argument was based on Alleyne v. United States, 570 U.S. 99 (2013). Vereen argued that the finding must be made by the jury, and that the jury did not do so, because the information alleged penetration or union, in the alternative, and the jury did not specify which of the two was the basis of its verdict.

The First District did not decide whether Alleyne's requirement of a jury finding applies to victim injury points, although it noted that the Fourth and Fifth Districts were divided on this question. Rather, the First District found that based on the evidence, any possible error was harmless.

Additionally, there was no procedural due process violation with respect to the PSI report and testimony from the victim at the sentencing hearing. The PSI report recommended a downward departure, but noted that the officer who prepared it had not spoken to the victim. At the sentencing hearing, the victim testified and the officer noted that if she had previously spoken to the victim, the recommendation would probably have differed. The PSI report had noted that the victim intended to testify at the sentencing hearing, and the defendant therefore had notice and an opportunity to be heard in a meaningful manner.

Brown v. Williams, 1D17-1475 (Mar. 28, 2019)

A forfeiture of seized property was upheld based upon a finding of probable cause.

Law enforcement was investigating the creation, distribution and sale of synthetic cannabinoids. Smokers Video argued that "the trial court, in determining illegal drugs were *capable* of being 'misbranded' or 'adulterated' in violation of Chapter 499, inappropriately made a forfeiture-stage determination in the seizure

stage of the proceedings by making an improper finding of criminal guilt." The First District disagreed. "The trial court determined only that such a violation *could* occur even if the drugs being sold were already illegal." Smokers Video argued "that for drugs to be governed by Chapter 499, those drugs must have a legitimate/medical use in the market place. In short, the drugs must be legal for Chapter 499 to apply. However, this argument is contradicted by the plain meaning of the Chapter 499." The relevant statutory provisions used the phrases "any drug" or "a drug."

Waters v. State, 1D17-3653 (Mar. 28, 2019)

The First District reversed the summary denial of one claim of a 3.850 motion for an evidentiary hearing. As to the claim at issue, the State's position was that counsel was not ineffective because the "decision not to pursue immunity was likely strategic because a motion for immunity could have resulted in additional inculpatory evidence at trial. Evaluation of whether counsel's decision was strategic typically requires an evidentiary hearing unless the strategy is so apparent on the face of the record as to preclude it."

Second District Court of Appeal

Linen v. State, 2D16-3691 (Mar. 29, 2019)

A conviction for leaving the scene of a crash with property damage was reversed, as it was based on a true inconsistent verdict.

> Linen "twice rear-ended a vehicle driven by his wife. The second impact caused the victim to lose control of her car, veer off the roadway, and strike a utility pole." Linen left the scene of the crash on foot. The victim suffered bodily injury and her car sustained property damage. The jury found him guilty of leaving the scene of a crash with injury and leaving the scene of a crash with property damage.

The evidence supported a finding of leaving the scene with injury. "But because the plain language of section 316.061(1) allows for a conviction under that section when the crash results only in property damage, a jury finding that the crash resulted in physical injury to the victim necessarily negates that required element of section 316.061(1); in other words, if the crash resulted in physical injury, in cannot have resulted only in property damage."

Agenor v. State, 2D17-3759 (Mar. 27, 2019)

Multiple mandatory minimum sentences imposed under the 10-20-life statute pursuant to a no contest plea were reversed. The information did not allege the possession of a firearm or destructive device. Rather, the State alleged a "deadly weapon" or "dangerous weapon," "and although a firearm may qualify as a deadly or dangerous weapon, not all deadly or dangerous weapons are firearms." One count specified a BB gun, but a BB gun "cannot qualify as a 'firearm' for purposes of imposing a mandatory minimum sentence under the 10/20/life statute." Additionally, at the nolo plea, the defendant did not stipulate to possession of a firearm or the applicability of the 10/20/life statute.

Third District Court of Appeal

Francois v. State, 3D18-0218 (Mar. 27, 2019)

Francois was 17 at the time of the commission of two armed robberies for which he received 30-year sentences. The Third District affirmed the denial of his postconviction claim based on Graham v. Florida and Miller v. Florida because he was guaranteed release at the age of 47.

Berry v. State, 3D19-246 (Mar. 27, 2019)

A juvenile sentence of life in prison with the possibility of parole after 25 years for first-degree murder and other non-homicide offenses was upheld in a postconviction appeal pursuant to State v. Michel, 257 So. 3d (Fla. 2018) and Franklin v. State, 258 So. 3d 1239 (Fla. 2018).

Fourth District Court of Appeal

Rivera v. State, 4D16-4328 (Mar. 27, 2019)

On appeal from convictions for first-degree murder and other offenses, the Fourth District affirmed and addressed the claim that the defendant was entitled to a new stand your ground hearing based on the 2017 statute amending the burden of proof. Pursuant to the Court's own precedent, the Court concluded that the amendment did not apply retroactively, but stayed issuance of the Court's mandate pending resolution of the case in the Florida Supreme Court in which the issue will likely be resolved.

E.M. v. State, 4D17-3557, et al. (Mar. 27, 2019)

E.M. appealed adjudications of delinquency and contempt. The Court found that the trial court did not err in rejecting DJJ's recommended disposition. The trial court identified five findings DJJ recommendation that did not support the recommendation of non-secure detention, and the Fourth District accepted the trial court's conclusions. The five findings of DJJ which the trial court found to be inconsistent with non-secure detention were: a high risk of reoffending; noncompliance with all services; the age of 13, coupled with continuous rule violations; an incarcerated father and a mother who did not want to deal with the problems; and a failure of the juvenile to follow any one of the trial court's prior sanctions.

The failure of the trial court to enter a written order with findings as to the contempt resulted in a remand with directions to enter such an order.

Johnson v. State, 4D17-3776 (Mar. 27, 2019)

Johnson appealed convictions for multiple sex offenses. The Fourth District addressed and rejected a claim of fundamental error with respect to the jury instructions.

One of the sexual battery charges was for penetration of the anus with the penis; the other for penetration of the mouth. The primary offense instructions for each offense were typed on separate pages. The lesser included offense instructions for each sexual battery – lewd or lascivious battery – were likewise written on separate pages. According to the court reporter's transcription, the judge, when reading the lesser included offense instructions, matched them up incorrectly and read the lesser for count two when instructing on count three and vice versa. There was no objection. The jury found the defendant guilty as charged and the verdict forms on which this was done had interrogatories corresponding to the primary charges. The packet of written instructions provided to the jury also appeared to have an incorrect sequence.

Ultimately, the error was not found to be fundamental, based on the facts of the case and the closing arguments. The formatting of the verdict form was also found to have been of such a nature as to properly assist the jury in matching up the correct lesser offense instruction with the corresponding primary offense instruction.

[Flaherty v. State](), 4D18-2872 (Mar. 27, 2019)

Appellate counsel was ineffective for failing to argue that the trial court erred when it failed to conduct a competency hearing after ordering an evaluation.

[Gincley v. State](), 4D18-3067 (Mar. 27, 2019)

Gincley sought certiorari review of the trial court's determination that he was ineligible for the court's treatment-based drug court program. He also challenged the administrative order that served as the basis for that determination.

The Nineteenth Judicial Circuit added a condition of eligibility that does not exist in the relevant Florida statute, section 948.08(6)(a). That condition was that the defendant must not have been admitted into a previous drug court program. By adding that provision, the administrative order contravened the state statute, and the chief judge of the circuit lacked the authority to do that. The Fourth District therefore quashed the administrative order as well as the lower court's determination that the defendant did not qualify for the drug court program.

Fifth District Court of Appeal

[Cooper v. State](), 5D17-2326 (Mar. 29, 2019)

On remand from the Florida Supreme Court, the Fifth District held that upon revocation of probation for a substantive violation, where the defendant had originally been sentenced as a youthful offender, the trial court could impose any sentence it originally could have imposed, including a mandatory minimum sentence that exceeded the statutory maximum for the second-degree felony for which Cooper had been convicted.

[Gaskins v. State](), 5D18-1089 (Mar. 29, 2019)

On direct appeal from a conviction for grand theft, Gaskins argued that trial counsel was ineffective for failing to move for judgment of acquittal based on insufficient proof of value. Claims of ineffective assistance of counsel may be raised on direct appeal only when they are clear on the face of the record. In this case, the Fifth District found that that was not the case because of the possibility that the State may have been permitted to reopen the case if a motion for judgment of acquittal had been made. The sole testimony of value at trial was the victim's testimony as to what he paid for the stolen items.

Brower v. State, 5D19-87 (Mar. 29, 2019)

The Fifth District granted a petition for writ of certiorari challenging the trial court's denial of the Public Defender's motion to withdraw. "While section 27.5303 permits the trial court to inquire as to the nature of the conflict, the court is not permitted to inquire into privileged and confidential matters. Section 27.5303, Fla. Stat. (2018). Even though the exact nature of the conflict was unknown, the trial court nevertheless departed from the essential requirements of law when it inquired into privileged and confidential matters and denied Petitioner's facially sufficient motion to withdraw."