Case Law Update
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Supreme Court of Florida

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-14, SC18-2030 (April 11, 2019)

The Supreme Court approved for publication and use amended jury instructions: 3.3(d) (possession of firearm or other devices causing death or great bodily harm); 8.5(a) (domestic battery by strangulation); 16.5 (neglect of a child); 21.14 (false information to a law enforcement officer investigating a missing person under 16); and 29.24 (human trafficking).

The significant changes include:

Definitions of great bodily harm were revised for the above instructions to include language set forth in Wheeler v. State, 203 So. 3d 1007, 1009 (Fla. 4th DCA 2016), if applicable.

Instruction 3.3(d) cites section 790.001(6), Florida Statutes (2018), and includes a definition of firearm.

The definition of "bona fide" as "genuine" was added to instruction 29.24.

First District Court of Appeal

State v. Smith, 1D17-2911 (April 11, 2019)

The First District reversed an order granting a Rule 3.850 motion.

Smith was convicted of armed robbery. He testified on his own behalf at trial. Defense counsel asked him, "Where were you that night, if you know." The State objected based on the absence of a notice of alibi. Defense counsel explained that she did not expect the defendant to provide an alibi; only an assertion that he did not know, but that he would normally have been at his grandmother's. Counsel ended up withdrawing the question.

At an evidentiary hearing on two claims of ineffective assistance of counsel, counsel explained that she withdrew the question because she believed the alibi defense was weak, and that she had interjected it to some extent through the question itself. And, she was afraid the defendant would volunteer damaging information, as he tended to speak too much. On the related issue of the failure to call the defendant's grandmother, counsel explained again that the alibi was weak. The trial court granted relief based on the withdrawal of the question.

The appellate court found that counsel's explanation as to the withdrawal of the question was a valid strategic decision and did not constitute a deficiency on the part of counsel. On the issue of prejudice from the withdrawal of the question, the First District concluded that the anticipated answer from the defendant was not such as to probably have affected the outcome of the trial. It would have been a self-serving statement, especially without testimony from the grandmother. It was also viewed as weak testimony, especially when compared to the remaining evidence adduced by the State.

Gaymon v. State, 1D17-3335 (April 11, 2019)

Gaymon scored less than 22 points on the Criminal Punishment Code scoresheet and was therefore entitled to a nonstate prison sanction absent findings by the court that he was a danger to the public. The trial court made such findings. However, pursuant to Brown v. State, 260 So. 3d 147 (Fla. 2018), section 775.082(10), Florida Statutes, was unconstitutional as applied, as the findings could be made only by a jury.

Brown left open the issue of the proper remedy on remand to the trial court – either mandating the nonstate prison sanction or providing the State with the opportunity of proving dangerousness in front of a newly empaneled jury. The First District, relying on its own prior decision, Booker v. State, 244 So. 3d 1151, 1169 (Fla. 1st DCA 2018), held that the trial court should impose the sentence under the predecessor version of section 775.082(10), which did not provide for a nonstate prison sanction when points were fewer than 22. The First District, in Booker, certified a question of great public importance, which remains pending in the Florida Supreme Court.

Cheeks v. State, 1D17-2994 (April 9, 2019)

A discretionary fine under section 775.083, Florida Statutes, and a surcharge pursuant to section 938.04, Florida Statutes, were stricken because the trial court did not orally pronounce them at the time of sentencing.

Powell v. State, 1D17-3615 (April 9, 2019)

Powell appealed convictions for first-degree murder and attempted first-degree murder.

Hearsay testimony from a codefendant regarding the events leading up to the incidents – "that a BOLO . . . had been issued for Powell, a warrant had been issued for Powell's arrest and that Powell 'beat [his wife] up'" – did not constitute fundamental error where there was no objection. The comments were deemed to be isolated, passing comments.

Testimony from two deputy sheriffs as to out-of-court statements by the surviving victim were also not fundamental error. The actual statements are not quoted in the opinion. The Court notes that the comments did not constitute improper bolstering in a simple swearing match between witnesses, that the surviving victim testified in court herself, and that there were other witnesses to Powell's acts.

Young v. State, 1D17-5245 (April 9, 2019)

The First District affirmed multiple convictions and rejected Young's argument that statements obtained from him were in violation of his Miranda rights.

Officers were attempting to stop Young's vehicle for a faulty headlight. Young led the officers on a chase at speeds of up to 100 miles per hour before he was finally stopped when he crashed his vehicle. Young exited the vehicle and walked towards an officer. The officer drew his weapon and ordered Young to the ground while the officer remained behind his vehicle. The officer then asked, without Miranda warnings, whether there was anyone else in the car, and "what happened?"

The First District rejected Young's argument that warnings were required as it was found that this did not constitute custodial interrogation and warnings are required only when one is in custody. At the time of the incident, it was dark and

the officer could not see whether anyone else was in the vehicle. "As such, for officer safety reasons, he drew his weapon as Appellant was approaching him and ordered him to the ground. Under these circumstances, the deputy's actions of drawing his weapon and ordering Appellant to the ground were reasonable and did not transform the lawful investigatory stop into a formal arrest." The questions, which ensued immediately, did not convert the investigatory stop into custodial interrogation.

Weddington v. State, 1D18-501 (April 9, 2019)

On appeal from convictions for sexual battery and other offenses, the First District affirmed and held that comments made by the judge after jury selection did not constitute fundamental error.

During jury selection, the court struck for cause several prospective jurors who indicated upon questioning by the prosecution that they would need more than witness testimony in order to convict. After they were stricken, the judge addressed the remaining jurors and, in comments that were directed towards the previously stricken jurors, gave a long-winded speech about the court's displeasure with those who are not willing to follow the law. This included statements about those who demand more from the State than the law requires. The judge's speech is quoted in full in the First District's opinion. It included a hypothetical in which the judge presented a scenario in which the judge went and hit a juror on the head with a gavel and queried whether that victim would then want a jury that held the State to a standard higher than that required under the law.

The judge's comments did not present "fairness problems." The hypothetical was in no way related to the facts of the case before the jury. The judge did not express his views as to the evidence in the case. The judge's comments were not deemed to be "prosecutor-friendly," but "simply emphasized the importance of jury service and the rule of law, including the presumption of innocence and the State's burden of proof."

The First District did impress upon the trial court that the better practice would have been to make such comments directly to the excused jurors; not in the presence of those who were trying the case.

Second District Court of Appeal

Sams v. State, 2D16-2117 (April 12, 2019)

Sams appealed convictions for attempted second-degree murder and other offenses. He argued that fundamental error occurred because "the jury instruction for attempted manslaughter did not exclude justifiable and excusable homicide from the definition of attempted manslaughter. He also argues it was fundamental error to omit the introduction to the homicide instruction that defines justifiable and excusable homicide."

Sams argued, in the alternative, that his acts were in the heat of passion and in self-defense. During the charge conference, there was no discussion of the introduction to the homicide instruction. Defense counsel presented a request for the introductory language to the instruction for attempted first-degree murder. Counsel made the same request for attempted second-degree murder, but not for attempted manslaughter. Counsel agreed to the justifiable use of force instruction being read at the end of all of the homicide instructions.

The omissions in question generally constitute fundamental error. One exception is where counsel affirmatively requests the erroneous instruction. Here, while counsel was active in formulating the instructions and affirmatively requested some of the language, counsel did not affirmatively agree to the exclusion of the required exceptions for justifiable and excusable homicide. The Second District therefore found the omissions to constitute fundamental error. The Court also certified to the Supreme Court a question of great public importance:

> IS IT FUNDAMENTAL ERROR TO CONVICT A DEFENDANT UNDER AN ALTERED OR INCOMPLETE LESSER INCLUDED CHARGE WHERE COUNSEL AFFIRMATIVELY AGREES TO THE INSTRUCTION, BUT THE RECORD DOES NOT SHOW THAT COUNSEL WAS AWARE OF THE ALTERATION OR OMISSION AND AFFIRMATIVELY AGREED TO IT AND IS IT ALSO NECESSARY FOR THE RECORD TO DEMONSTRATE THAT COUNSEL WAS AWARE THAT THE INSTRUCTION, AS ALTERED, WAS ERRONEOUS?

Rivera v. State, 2D17-0496 (April 12, 2019)

Rivera asserted a stand your ground defense and at the pretrial hearing on the motion to dismiss, the trial court imposed the burden of proof on the defendant. The Second District has previously held, in Martin v. State, that the 2017 statutory amendment placing the burden on the State at the immunity hearing applied retroactively. This case proceeded to trial and Rivera was convicted. The State argued that the error in failing to apply the new burden of proof at the immunity hearing was harmless because the same evidence was adduced at trial and the jury convicted Rivera. The Second District held that its prior decision in Martin precluded such a harmless error argument. Martin is currently pending review in the Florida Supreme Court.

On remand, the trial court may conduct a new immunity hearing under the proper burden of proof. If the court rules in favor of the State, convictions and sentences from the jury trial may be reinstated. The Court certified conflict on the retroactivity issue with decisions of the Third and Fourth Districts.

Livingstone v. State, 2D17-1695 (April 12, 2019)

A violation of one condition of probation was reversed, for possession of ammunition. The condition itself referred to possessing a firearm or weapon. Possession of ammunition, which has a distinct definition in chapter 790, Florida Statutes, does not suffice to establish a violation for possessing a firearm or weapon.

State v. Bethley, 2D18-4143 (April 12, 2019)

The Court granted the State's petition for writ of certiorari which sought review of a trial court order granting a motion in limine to exclude statistical testimony regarding DNA evidence.

"An expert need not be a statistician to testify regarding the statistical significance of a DNA match." "However, the expert must 'demonstrate a sufficient knowledge of the database grounded in the study of authoritative sources.'" The State's expert satisfied that standard. The factual details regarding the expert's experience, background and education are not provided in the opinion.

Wright v. State, 2D18-1164 (April 10, 2019)

The Second District reversed a conviction for unlawful use of a two-way communications device under section 934.215, Florida Statutes (2017), because it constituted a double jeopardy violation where the defendant was also convicted of using a computer device to seduce, solicit, lure or entice a child under section 847.0135(3)(a), Florida Statutes. The two convictions were pursuant to an open plea to the court.

While a guilty plea generally waives such a double jeopardy claim, an exception exists when the following three elements exist: "(a) the plea is a general plea as distinguished from a plea bargain; (b) the double jeopardy violation is apparent from the record; and (c) there is nothing in the record to indicate a waiver of the double jeopardy violation."

The State argued that this was not an open plea, but a plea bargain, because the colloquy referenced one charge being nolle prossed. The Court disagreed. There was no agreement as to any sentence, and, when the court inquired of the parties as to whether there was a plea agreement, both parties responded that there was not. The State's decision to nolle prosse one charge did not transform the open plea into a plea agreement.

The chapter 934 charge for the use of the communications device is subsumed within the seducing/soliciting charge where, as here, the two charges derived from a single criminal episode.

Third District Court of Appeal

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

On motion for clarification, the Third District found that one conviction resulted in a double jeopardy violation.

Baker was convicted, after a jury trial, on charges of prohibiting the use of a computer service to solicit the parent of a child to consent to the child engaging in an unlawful sexual activity; and traveling to meet the child for an unlawful sexual activity facilitated by the parent after the consent.

Emails were exchanged by Baker and the undercover officer on both March 2nd and 3rd, and after the final exchange Baker traveled to meet the child for the

purpose of the unlawful sexual activity. Although the record established two separate instances of solicitation on the two days, the reviewing court's inquiry is limited to the charging document. "While the Second Amended Information charging Baker with both offenses states two separate dates – the March 2nd as the date of the solicitation offense and the 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."

To avoid a double jeopardy problem, "the charging document must be clear, on its face, that the conduct constituting solicitation for one offense is separate and distinct from the conduct constituting solicitation under the other offense."

Mitchell v. State, 3D17-2718 (April 10, 2019)

In an appeal from a conviction for animal cruelty, Mitchell argued that the court erred in limiting his right to cross-examine a witness. The Third District disagreed and affirmed.

Mitchell "sought to cross-examine the State's only eyewitness as to his prior arrest for aggravated assault upon a neighbor. The defense proffered that the arrest for aggravated assault occurred after the eyewitness assaulted his neighbor and the eyewitness accused his neighbor of abusing an animal. However, when the police arrived, the police determined that the accusation of animal abuse was unfounded and arrested the eyewitness for aggravated assault." Although Mitchell was not permitted to cross-examine the witness about the aggravated assault, the jury did learn that the neighbor had previously accused someone of abusing an animal and that the accusation was false.

Section 90.610(1), Florida Statutes, limits impeachment of witnesses to questioning as to the existence of a prior felony conviction or a crime involving dishonesty or a false statement. There was no statutory basis for the type of impeachment Mitchell sought to engage in. And, due to the other evidence regarding the neighbor that did come in, any error was harmless.

State v. Socarras, 3D18-783 (April 10, 2019)

The trial court suppressed three post-Miranda statements by the defendant pursuant to Garrity v. New Jersey, 385 U.S. 493 (1967), finding that they were improperly compelled. On appeal by the State, the Third District reversed in part

and affirmed in part. The statements at issue were made as part of an internal affairs investigation by the Miami-Dade Police Department.

Garrity addressed one "exception to the general rule that the privilege [against self-incrimination] is not self-executing, namely where statements are the product of an impermissible condition imposed on the privilege." Garrity itself involved the threat of discharge to secure self-incriminatory testimony from an employee.

In this case, the trial court found that between the second and third statements, an interrogating officer "informed Socarras, 'we have to make this look like an isolated incident if you want to try to maintain your position in narcotics.' As such, the statement was 'obtained under threat of removal from office,' violating Socarras's 'Fourteenth Amendment [protection] against coerced statements,' and the trial court properly found the third statement could not be 'use[d] in subsequent criminal proceedings.'"

As to the first two statements, the Court's analysis focused on whether a mere subjective belief on the part of the person being interrogated that discharge consequences ensued if questions were not answered was sufficient to trigger Garrity. The Third District looked to the totality of the circumstances to determine whether the defendant's belief that the statements were being obtained by threat of job loss was objectively reasonable. As to the first two statements, there were no threats. Although Socarras testified as to his subjective belief, he was given his Miranda warnings and explicitly waived his rights.

Fourth District Court of Appeal

Machin v. State, 4D17-2787 (April 10, 2019) (on motion for rehearing en banc)

The Fourth District granted the State's motion for rehearing en banc and addressed the narrow issue of the proper remedy to follow when the appellate court concludes that a trial court failed to conduct a required competency hearing. The three-judge panel in the prior opinion had reversed the conviction and sentence, with leave to conduct a competency hearing on remand, if possible, and, if the defendant was deemed competent and the time of the prior trial or plea, to then reinstate the conviction and sentence; otherwise, a new trial would be held once competency was restored.

The Fourth District now spelled out the procedures to follow on remand. Within 60 days of a temporary remand from the appellate court, the trial court must

conduct a hearing to determine whether a nunc pro tunc competency hearing is possible. If it is not possible, the trial court will then vacate the conviction and sentence. The appellate court will then dismiss the appeal as moot. If the trial court concludes that the defendant is currently competent, a new trial or plea colloquy will be held. If the defendant is not currently competent, the trial court will comply with Rules 3.212 through 3.215 regarding restoration of competency.

If the nunc pro tunc competency hearing determining competency at the time of the prior trial or plea is possible, several alternatives exist. If competent, the trial court will make appropriate findings and the appeal from which there had been a temporary remand will then continue. If the trial court finds the defendant was not competent at the time of the plea or trial, the trial court will vacate the judgment and sentence and the pending appeal will be dismissed as moot. If the trial court finds that the defendant was incompetent at the time of the trial or plea and remains incompetent now, the trial court will vacate the judgment and sentence and proceed in accordance with Rules 3.212 through 3.215.

Gallo v. State, 4D18-1236 (April 10, 2019) (on motion for rehearing)

The Fourth District affirmed convictions and sentences and addressed several sentencing arguments.

The Court rejected the defendant's argument that the trial court relied on general deterrence, to the exclusion of all other sentencing factors. The Fourth District rejected that characterization of the sentencing and found that the trial court had relied on and emphasized several other factors: the egregious facts of the case; prevention, focusing on the defendant's use of drugs and incentivizing the defendant not to relapse; protection of the public from those who are dangerous; and general deterrence of others from taking illicit drugs that might turn them into violent psychopaths.

Gallo also argued his sentence was disproportionate when compared to other felons with similar CPC scoresheet scores. The comparison was not valid as it divorced the sentence imposed from the actual facts of this case.

Boggess v. State, 4D18-1943 (April 10, 2019)

In an appeal from a conviction for second-degree murder with a firearm, the Fourth District affirmed and addressed two issues: the prohibition of admission of

prior inconsistent statements; and alleged burden shifting comments by the prosecutor in closing argument.

The State suggested that Boggess, during his trial testimony, engaged in recent fabrication, as he was claiming an accidental shooting, but did not reference such an accident in prior statements noted by the prosecution. One earlier statement, relied upon by the defense, in which Boggess did refer to an accidental shooting, was then admitted into evidence. Other prior statements the defense sought to elicit were properly excluded, however. These statements were found to have been made significantly after the date of the shooting, allowing more time for reflection.

The comments in closing argument were characterized by the defendant as saying that the defendant could not prove his defense. In one, the prosecutor said, "it's not good enough to say this is an accident." An objection was overruled. In the second: "but they can't just prove an accident. The other elements of that crime also have to fit in order to find that excusable homicide applies." Upon objection by the defense, the court instructed the jury that it was the State's burden to prove the offense beyond a reasonable doubt. In the third comment, the prosecutor summarized part of what the defense was claiming as to how the incident occurred, and then added: "but they can't do it." An objection to this comment was overruled.

The Fourth District found that the "comments, when taken in context, were an explanation of the lack of evidence supporting Boggess's theory of defense." They were permissible attacks on the accidental killing theory, "reminding the jury that just saying the shooting was accident did not amount to a valid defense. All three comments permissibly highlighted the state's position that this shooting was no accident and that the defense's evidence did not support its argument." The use of the word "prove" in the second comment rendered it confusing and inaccurate, but a curative instruction was given and that was deemed sufficient to cure any confusion.

Platt v. State, 4D18-2231 (April 10, 2019)

The sentencing scoresheet erroneously included 3.2 points for prior convictions. Those convictions were more than 15 years old and the State did not provide competent evidence demonstrating Platt's release from confinement or supervision within ten years of the new offense. The sentence itself was affirmed as the scoring error was deemed harmless, where it was otherwise clear that the trial court would have imposed the same sentence regardless of the 3.2 points.

Whitley v. State, 4D18-2619 (April 10, 2019)

After a jury acquittal, the court entered a judgment of not guilty. Whitley then sought to recover various costs, pursuant to section 939.06, Florida Statutes. He appealed as to the denial of costs from pretrial house arrest, which had been paid to the County Sheriff's Office. The trial court's denial of those costs was affirmed because they were not a "'charge of subsistence while [a defendant] is detained in custody' within the meaning of section 939.06." Section 939.06 provides for costs or fees of the court or any ministerial office. And, house arrest did not qualify as detention in custody.

Fifth District Court of Appeal

Berben v. State, 5D17-1428 (April 12, 2019) (corrected opinion)

Berben argued that consecutive sentences of five-years each for 20 counts of possession of child pornography were disproportionate and constituted cruel and unusual punishment. The Fifth District rejected that claim, citing one of its own decisions with similar convictions and sentences.

However, the trial court did err by basing the lengthy sentence on impermissible factors. Although there was no evidence that the defendant had engaged in conduct promoting the distribution of the images and was not charged under the statutory provision pertaining to such distribution, the trial court referenced, as a factual predicate for the sentence, the defendant's act of sharing the images with others. The majority opinion of the Court entertained this issue as one of fundamental error even thought it was not raised in the trial court at sentencing or in a Rule 3.800(b) motion pending direct appeal. One judge dissented regarding the propriety of considering the promotion of sharing of images as a factor.

State v. Schuler, 5D18-3086 (April 12, 2019)

The Fifth District reversed a downward departure sentence. The trial court departed based on the reason that the defendant required "specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." The reason was based on a physical disability to the defendant's left knew, which he testified resulted from his encounter with law enforcement that led to his present charges.

While the defendant testified as to swelling of the knee and the use of a wheelchair when needed, there was no medical diagnosis or opinion regarding the existence of a disability or any testimony as to a course of treatment. The evidence was insufficient to support the departure reason.

Smith v. State, 5D18-3528 (April 12, 2019)

When a Rule 3.801 motion seeking jail credit is denied as legally insufficient, the defendant must be given leave to file an amended motion.

Rish v. State, 5D18-3657 (April 12, 2019)

A claim of ineffective assistance of trial counsel for providing misadvice with respect to a plea offer was found by the Fifth District to be insufficiently pled. "Rish failed to allege a specific act or omission constituting deficient performance in that he did not assert that trial counsel's assessment of the case and assurances regarding his probable sentence constituted unreasonable or unsupported advice."

The claim was further insufficient as it did not allege the requisite prejudice as required under Alcorn v. State, 121 So. 3d 419 (Fla. 2013). "Under Alcorn, 'to show prejudice, the defendant must demonstrate a reasonable probability, defined as a probability sufficient to undermine confidence in the outcome, that (1) he or she would have accepted the offer had counsel advised the defendant correctly, (2) the prosecutor would not have withdrawn the offer, (3) the court would have accepted the offer, and (4) the conviction, or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.'" Leave to amend was granted.