Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Cooks, 18-10080 (April 3, 2019)

The Eleventh Circuit upheld the denial of a motion to suppress physical evidence. Officers had an arrest warrant for Cooks. When they approached his residence, a four-hour standoff ensued, with two known hostages inside. Officers were able to make contact with one of the individuals inside, and that person advised officers that Cooks was doing something in a hole in the floor. Officers also heard what they believed to be drilling sounds.

When the officers entered, several hours after the standoff ended, they observed a hole in the floor, covered by a wood plank, screwed down from the outside. They pried it up and discovered a firearms arsenal under it.

The Eleventh Circuit concluded that the warrantless search of the crawlspace containing the firearms was justified under the exigent circumstances exception to the requirement of a search warrant. The officers had probable cause to believe that there were additional hostages. The Court analyzed and treated this as the "emergency-aid" aspect of the exigent circumstances doctrine, which focuses on the existence of probable cause to believe that others are in danger.

The Court acknowledged that some of the evidence cut both ways on this issue, as there was a question as to why officers would believe that additional individuals would be in that crawlspace with the firearms that were found. The sound of the drilling, coupled with the officers' belief in the possibility that there could be other hostages was granted a very high degree of deference. The drilling connoted hiding of either something or someone.

One judge dissented.

United States v. Moss, 17-10473 (Apr. 4, 2019)

The Eleventh Circuit held that a conviction for aggravated assault under Georgia state law did not qualify as a predicate for the sentencing enhancement for

a violent felony under the ACCA. The elements of the Georgia state offense could be satisfied by the mens rea of recklessness.

United States v. Vereen, 17-11147 (Apr. 5, 2019)

Vereen challenged a conviction and sentence for possession of a firearm by a convicted felon. His primary argument on appeal was that the district court erred by failing "to give a jury instruction on what Vereen terms the innocent transitory possession ('ITP') defense, through which he sought to argue that his faultless and brief possession of a firearm did not constitute 'possession' under s. 922(g)(1). He adds that the failure of our Court to clarify whether the ITP defense is available in firearms offenses has created constitutional ambiguity." The Eleventh Circuit rejected both arguments.

Vereen testified that he was delivering mail at a condominium apartment complex; that when he opened the mailboxes, he observed a firearm and removed it, with the intention of reporting it to the police. Vereen was observed by several officers. A search of Vereen's residence yielded another gun and a box of ammunition.

The Eleventh Circuit reviewed the language of s. 922(g)(1) and found nothing in it to support the argument that an ITP defense was available under that statute. There was no "innocent" or "transitory" exception. The felon in possession offense requires only that the conduct be "knowing" and is a general intent crime. Therefore, it does not require an intent to violate the statute and the motive behind the act of possession is irrelevant. While most federal appellate courts have come to the same conclusion, the D.C. Circuit reached a contrary conclusion. It was also noted that the Eleventh Circuit and other courts have concluded that the defense of necessity or justification is a recognized defense, but Vereen did not seek an instruction under the elements of those defenses. At a factual level, the Court noted that Vereen simply could have left the firearm in the mailbox and contacted law enforcement. And, the firearm was not promptly turned over by him to officers; rather, they observed him with it and seized it upon his arrest.

The claim that the absence of such a defense renders "unlawful possession" constitutionally vague was reviewed for plain error in the absence of such argument in the district court. The Eleventh Circuit rejected this with brief analysis: "He has pointed to no precedent, and independent research has revealed none, from this Court or the Supreme Court holding that a court's failure to affirmatively determine

whether a defense is available for a crime renders the underlying criminal statute constitutionally vague."

First District Court of Appeal

Lowry v. State, 1D17-2942 (Apr. 5, 2019)

The trial court erred by continuing involuntary commitment because it was without authority to find Lowry not guilty by reason of insanity without a waiver of jury trial under Rule 3.260, Fla.R.Crim.P. At most, there was a stipulation by counsel that the defendant was not guilty by reason of insanity. The plea was therefore a nullity or void ab initio. A petition for writ of certiorari was therefore granted.

Smith v. State, 1D18-1661 (Apr. 5, 2019)

Smith was charged with capital sexual battery and waived the right to a jury trial.

A video of the child interview was properly admitted into evidence under section 90.802(23), Florida Statutes. Sufficient indicia of reliability for the admission of child hearsay were found, "including the manner in which the interview was conducted, the child's behavior during the interview, the child's description of the acts, and other appropriate factors."

An objection to a jail-call audio as hearsay was properly denied. The call was between the defendant and the infant victim's mother. In the call, the mother told the defendant that he needed to get help. He responded: "'you gonna help me get the help that I need?'" Regardless of whether this qualified as an admission that he committed the abuse, it was still admissible as a statement of a party opponent.

Stamitoles v. State, 1D18-2345 (Apr. 5, 2019)

Stamitoles appealed a county court conviction to the circuit court. Upon affirmance, he sought second-tier certiorari review in the First District, which denied the petition, based upon the failure to satisfy the high standard for granting such relief.

The majority opinion did not discuss the legal issues; it only set forth the burdens that had to be satisfied in such certiorari review. A concurring opinion

addressed the legal issue which it found to be a "close" issue. In a case of resisting an officer, the issue raised was the sufficiency of evidence that the arresting officer was engaged in the lawful exercise of a legal duty, where the defendant claimed that no trespass occurred. Going through the evidence, the concurring opinion found that one witness, a credit manager at a car dealership, stated that the defendant had been at a meeting and had been "trespassed" "from the property with deputy present."

Gordon v. State, 1D18-4096 (April 5, 2019)

The First District affirmed the denial of a Rule 3.800(a) motion in which the defendant argued that the sentence exceeded the statutory maximum because the time previously spent on supervision should have been credited. "After supervision is revoked and a prison sentence is imposed, a defendant is not entitled to credit for the time spent on supervision for the same offense. . . . An exception exists when a new term of supervision is imposed after a defendant violates a term of his supervision. In that case, an award of credit is required when necessary to ensure that the total term of supervision does not exceed the statutory maximum. . . . However, when a defendant's supervision is revoked, and he is sentenced to prison with no supervision to follow, this exception does not apply. . . . This is true even if a new prison term combined with the previous supervisory sentence results in a total that exceeds the statutory maximum"

Kimmons v. State, 1D16-0204 (April 5, 2019)

The trial court revoked probation on behalf of new law offenses that were not charged in the affidavit of violation of probation. The State had filed an amended information in the related new criminal case, charging lesser included offenses of the charges listed in the affidavit of violation of probation. As probation can be revoked on the basis of lesser included offenses as new law violations, the error was not fundamental in the absence of any objection. The revocation was affirmed but remanded for a corrected order of revocation.

Lee v. State, 1D17-1469 (April 3, 2019)

Lee appealed a conviction for aggravated stalking. The First District affirmed and found no abuse of discretion in admitting into evidence the victim's 911 call and three jail calls Lee made to the victim.

The 911 call was admitted into evidence by the trial court under the excited utterance hearsay exception. Lee argued that it did not qualify as an excited

utterance because it occurred several hours after the texted death threat. The trial court emphasized and the First District agreed that the texted threat did not exist in isolation. It was accompanied by the confrontation that Lee was insisting upon. The victim was desperate about getting help from officers prior to the meeting that Lee was insisting on. She started following a deputy into traffic and the fear could be heard on her voice in the 911 call.

As to the jail calls, the victim's statements in those calls were not hearsay as they were not offered for the truth of the matter asserted. Rather, they were used for the purpose of proving Lee's responses.

Deloach v. State, 1D17-1944 (April 3, 2019)

The First District affirmed a conviction and sentence for first-degree murder. The Court upheld the denial of a motion to suppress his statements. He argued that he did not waive his rights knowingly, intelligently and voluntarily, based on a head injury, emotional problems and drug use. Although there was evidence as to these, there was also contrary evidence. An officer saw no signs of impairment on the day of the interview. Deloach was attentive and appeared to understand what was being said. There were no signs of slurring, slouching, sleepiness or hyperactivity. Speech was coherent and appropriate. There was no evidence that Deloach was under the influence of drugs.

Deloach argued that the evidence was insufficient because the testimony that he was the actual shooter was questionable. He told police that he drove the vehicle involved in the offense. One witness stated that the shot was fired from the driver's side. Forensic testimony established that the victim was probably shot by two different firearms due to the location of exit wounds. Additionally, it could still have been found that Deloach acted as a principal in is capacity as the driver.

Burns v. State, 1D17-1953 (Apr. 3, 2019)

Burns received 35-year sentences for second-degree murder and other non-homicide offenses committed when he was 14-years old, in 1999. He was not entitled to resentencing under the 2014 juvenile statutes because the 35-year sentence did not constitute a life sentence or a de facto life sentence.

Grimsley v. State, 1D17-2803 (Apr. 3, 2019)

Grimsley appealed a conviction for unlawful sexual activity with a minor after he impregnated her. DNA tests showed a 99.9% chance he was the father, and the victim testified that he had sex with her. He argued on appeal that the prosecutor erred in arguing that he had a burden of proving that he was not the father. The First District disagreed.

On two occasions, in opening and closing argument, the prosecutor referred to Grimsley's statements and noted that he did not deny being the father. It was permissible for the prosecutor to comment on the evidence as to what happened at the interview. The prosecutor, however, did cross the line by arguing that Grimsley could have said more and proclaimed his innocence. The trial court did not err in denying a motion for mistrial given the strength of the other evidence in the case.

Robinson v. State, 1D17-4084 (Apr. 3, 2019)

Robinson appealed a conviction for solicitation to commit first-degree murder. The First District affirmed and found that the evidence was sufficient.

The Court rejected Robinson's argument that he did not express an intent that the crime be carried out; that he deferred a final decision when he spoke to his cellmate. The Court found evidence that Robinson repeatedly said that he intended that his cellmate carry out the murder. He also attempted to obtain the bail money to enable his cellmate to commit the murder. He discussed the method of committing the murder and made statements about his confidence that his cellmate would be successful.

Second District Court of Appeal

Dooley v. State, 2D17-368 (April 3, 2019)

The Second District held that the stand your ground jury instructions constituted fundamental error in this appeal from a manslaughter conviction.

An altercation occurred at park. During the first part, which was a heated verbal altercation, Dooley raised his shirt, displaying the butt of a gun. Dooley then turned and walked away towards his home. The victim, James, then grabbed Dooley and turned him around to continue the argument. There was conflicting testimony

as to what occurred next. Dooley drew his weapon at one point; James tried to grab it; and Dooley fired a shot which struck James in the chest, killing him.

Two portions of the instruction on justifiable use of force were at issue:

> If the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat and had the right to stand his ground and meet force with force. . . .
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> . . .
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> . . . Although as previously explained, if the defendant was not engaged in an unlawful activity and was attacked in any place where he had a right to be, he had no duty to retreat.

The State, in its closing argument, asserted that stand your ground did not apply to Dooley because he had already violated the law by bringing a gun to the park.

The "unlawful activity" language of the instructions was problematic because it failed to distinguish between two statutory provisions: section 776.013(3), for which the limitation may exist, and 776.012(1), as to which the limitation is inapplicable. The offense in this case preceded the 2014 statutory amendments regarding "unlawful activity" and this case was governed by the pre-2014 version of the statutes.

Under section 776.013(3) a person would have to prove that he or she reasonably believed the use of deadly force was necessary to prevent death or great bodily harm or to prevent the commission of a forcible felony. Under section 776.012(1) a person would have to prove that he or she reasonably believed the use of deadly force was necessary to prevent imminent death or great bodily harm or the imminent commission of a forcible felony. The jury instructions in this case did not provide the jury any guidance as to the differences between these two statutory provisions and the appropriate applicability of the "unlawful activity" language.

Buggs v. State, 2D17-4040 (April 3, 2019)

After probation revocation as to two charges, a first-degree felony and a third-degree felony, the trial court imposed a single sentence of 30 years. The trial court denied a Rule 3.800(b) motion pending the direct appeal, and issued an order relying on case law from the 1950's and 1970's which authorized the imposition of such a single sentence when each count was a facet or phase of the same transaction. That case law was no longer valid, as section 775.021(4), Florida Statutes, was amended in 1988 and expressly requires separate sentences for each count, for offenses committed during the course of a single criminal episode. Thus, the new sentence, where combined incarceration plus probation exceeded five years resulted in an illegal sentence as to the third-degree felony, which carried a five-year maximum.

Davis v. State, 2D18-892 (Apr. 3, 2019)

A $500 fine, imposed pursuant to section 893.13(1)(d)(3) was stricken. That fine applied only to one charged with the sale of a controlled substance within 1,000 feet of a proscribed location; Davis was not so charged. And, even when applicable, contrary to the State's argument in the trial court, the fine is discretionary, not mandatory, and the court was required to orally pronounce statutory authority for it.

Third District Court of Appeal

Diaz v. State, 3D17-464 (Apr. 3, 2019)

Diaz's probation was revoked because he was found in possession of a cigarette made from a synthetic cannabinoid, AB-Chimanaca. The Third District affirmed.

This particular cannabinoid was not added to the list of controlled substances until several months after Diaz was found in possession of it in prison, where he claimed to have received it from another prisoner and that he used it for self-medication. However, the operative statute was not the list of controlled substances in chapter 893; rather, it was the statute for the offense with which Diaz was charged, section 951.22(1), which was not limited to the list of controlled substances in 893.02(4). The controlling provision included catchall language, "or drug of any kind of nature."

The Third District rejected Diaz's related argument that if section 951.22(1) included AB-Chiminaca, then the statute is unconstitutionally vague. A person of

common intelligence would understand that the statutory proscription applied to "any drug," not just those listed in 893.02(4).

Finally, it did not matter that the violation occurred before the probationary term commenced. The Florida Supreme Court had previously rejected such an argument and the Supreme Court cases are cited by the Third District's opinion.

Charlier v. State, 3D17-2327 (Apr. 3, 2019)

The defendant was convicted of second-degree murder. On appeal, he challenged the sufficiency of evidence, arguing that the evidence was entirely circumstantial and that it did not exclude his reasonable hypothesis of innocence, that someone else committed the murder.

The Third District reviewed the evidence and concluded that it was sufficient and did exclude the defendant's hypothesis of innocence. The State showed "a view of the evidence that is distinctly inconsistent with Charlier's view that someone else could have murdered Jasmine after he left the apartment around 6:00 a.m. The jury could instead reasonably conclude the victim was alive when the defendant arrived, and she perished while he was there."

There was evidence of a domestic argument between the defendant and victim, and that she intended to leave their relationship. Surveillance video showed the defendant entering the victim's building around 5:00 a.m., leaving around 5:45 a.m., entering again, by the stairs, a few minutes later, and exiting again, around 6:00 a.m. The video showed him leaving in different shoes than those he wore when entering. The victim failed to respond to phone calls from her mother between 6:17 a.m. and 7:40 a.m. The victim was found, shot in the head and dead, at 10:30 a.m. in an unlocked apartment. Forensic testimony placed the time of death between 5:00 a.m. and 10:30 a.m. The defendant was apprehended, leaving his mother's apartment, the following morning, wearing clothes that were seen when he entered the victim's apartment; they were stained, but had recently been washed. The defendant was left-handed, and the path of the bullet was consistent with having been shot by a left-handed person.

Fourth District Court of Appeal

Viladoine v. State, 4D16-218 (April 3, 2019)

The defendant was convicted on one count of sexual battery on a child under the age of 12, by causing his penis to penetrate or unite with the victim's vagina. The Fourth District reversed because the trial court permitted the State to amend the information during trial to add the charge that the crime was committed with an object.

At trial, the victim testified that the defendant placed a gun inside her vagina. She added that it was a toy gun. The defense moved for judgment of acquittal based on the failure to prove penetration by, or uniting with, the defendant's penis. When the State sought to amend the information by adding language "with an object," the court granted the motion, finding no prejudice, because the defense was an alibi defense. The Fourth District, relying on earlier decisions, held that the amendment changed an essential element of the offense and that such an amendment is per se prejudicial.

Additionally, the amendment altered the way in which the defense would have prepared for trial. The belated amendment prevented the defense from investigating, at the outset, whether the alleged pink toy gun was ever present in the home of the baby sitter, where the offense allegedly occurred.

Morrill v. State, 4D18-781 (April 3, 2019)

The trial court erred in awarding $2,200 as restitution for a stolen necklace due to insufficient evidence. The victim estimated the value at $2,200 to $2,400, as he had priced others for replacement. There was no documentation or evidence of the necklace's price; and, although he had a photo of the necklace, it had been given to the police and was never returned. The sources of the victim's online research were not explained. The victim's opinion was deemed to be based entirely on hearsay. There was no testimony as to the condition, depreciation or manner of use. Nor was there evidence of the weight of the necklace or the price of gold at the time of the theft.

The Court noted the recent enactment of the provision of Article I, section 16 of the Florida Constitution, which requires, inter alia, that victims be "provided with assistance collecting restitution." The Court was critical of the State, as it did not "satisfactorily provide this assistance." There was "no evidence that the State

attempted to retrieve a photo of the stolen necklace from the police. . . . Nor did the State provide support for the victim's effort to establish the replacement cost as more than a mere 'guesstimate.'

The case was remanded for a new restitution hearing.

J.R. v. State, 4D18-1719 (April 3, 2019)

J.R. voluntarily absented himself from the adjudicatory hearing after it commenced. As the hearing proceeded after his voluntary absence, the Fourth District rejected his argument that the trial court erred in proceeding while he was absent.

J.R. failed to appear on the morning of the continuation of the hearing. He had been advised of the hearing and his need to appear by the judge. At the time of the subsequent disposition hearing, a complete report could not be done by DJJ due to his continued absence. J.R. was being held in Georgia, without bond, and Georgia would not extradite him. The court proceeded to the disposition hearing without the complete report from DJJ. Although the complete evaluation was obstructed by J.R.'s voluntary absence, the Fourth District remanded for further proceedings. The juvenile rules of procedure expressly authorize the adjudicatory hearing to proceed when a juvenile voluntarily absents himself or herself. A comparable exception does not exist for DJJ's evaluation for the disposition hearing.

Hastie v. State, 4D18-3159 (Apr. 3, 2019) (corrected opinion)

On appeal from the denial of a motion to correct illegal sentence, the violent career criminal designation was removed from grand theft convictions. Grand theft convictions are not enumerated offenses in the VCC statute for designation as a VCC.

Bynes v. State, 4D18-3593 (Apr. 3, 2019)

In an appeal from the denial of a Rule 3.800(a) motion, the Fourth District held that the trial court erred in denying the motion as a successive motion. Although there had been several prior Rule 3.800(a) motions, the prior motions did not assert the same claim as that asserted in the prior motion. There is no limit to the number of Rule 3.800(a) motions that may be filed; the only restriction is when the identical claim has previously been litigated.

However, the Fourth District found that the motion lacked merit and affirmed the trial court's denial. There was nothing in the record to show that the current offenses for which the defendant had been convicted were committed more than five years after his release from incarceration on the prior convictions that served as predicate offenses.

Fifth District Court of Appeal

Ward v. State, 5D17-2441 (April 5, 2019)

In an appeal from convictions for aggravated child abuse, the Fifth District reversed for a new trial because the trial court erred in excluding a defense witness as a sanction for failing to disclose the witness. The witness in question appeared on the State's own witness list and had been deposed.

The State argued, in the trial court, that had it know Ward intended to call this witness, the State would have called the witness in its own case-in-chief. When the defense argued that the State could reopen its case, the State responded that it had made a strategic decision as to how to present its case. The Fifth District concluded that the State failed to demonstrate procedural prejudice and the trial court therefore erred in failing to consider less severe sanctions.

Taylor v. State, 5D18-213 (April 5, 2019)

The Fifth District addressed a double jeopardy argument. Taylor was convicted of one count of possession of materials depicting sexual performance by a child (ten or more images), under section 775.0847(2) and (3)(a); and more than 50 counts of possession of materials depicting sexual performance by a child, under section 827.07(15). Each of these 50+ counts alleged a specific file name.

Section 827.07(15) makes the possession of "each image" a separate offense. Section 775.0847 reclassifies the offense to the next higher degree if more than 10 images are possessed and the content involves one of several enumerated types of images, such as images of a sexual battery of a child, or any sexual performance involving a child under the age of five.

The reclassification statute does not require the State to limit the charges to one offense per ten images, and the State may charge the possession of each image separately. The Fifth District therefore rejected the double jeopardy challenge based on its assessment of legislative intent.