Case Law Update
April 29, 2019
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First District Court of Appeal

Davis v. State, 1D17-0165 (April 25, 2019) (on hearing en banc)

The First District, in an en banc decision, receded from prior case law, and addressed the ability of a trial court to consider a defendant's lack of remorse: "We hold that a trial judge does not violate a defendant's due process rights by merely considering the defendant's lack of remorse or refusal to accept responsibility. We hold that lack of remorse and refusal to accept responsibility can be valid sentencing considerations when sentencing within the statutory range, and we recede from our cases that suggest otherwise."

At sentencing, the defendant continued to assert his innocence. The judge stated: "you still fail to take any responsibility for your actions." The judge imposed a sentence that was the statutory maximum and also referenced other sentencing factors.

The Court's opinion looked a case law from federal courts and state courts outside Florida and found that lack of remorse was often deemed a valid sentencing factor. "A defendant's remorse or willingness to accept responsibility comprises part of the whole picture. These factors speak to a defendant's character and to the defendant's potential for rehabilitation." "For these reasons, we can no longer embrace the blanket, judge-made rule that when it comes to sentencing, '[a] lack of remorse or a failure to accept responsibility may not be considered.'" A defendant would still be able to challenge a sentence on the basis of vindictiveness.

The Court certified a question of great public importance to the Florida Supreme Court:

> WHEN, IF EVER, MUST AN APPELLATE COURT REVERSE A SENTENCE BASED ON THE TRIAL COURT'S CONSIDERATION OF "REMORSE," "FAILURE TO TAKE RESPONSIBILITY," OR THE LIKE?

There are multiple additional opinions concurring in part and dissenting in part.

Milton v. State, 1D17-900 (April 22, 2019)

The trial court appointed an expert to determine competency. That expert found the defendant to be marginally competent. At a change of plea and sentencing hearing, the court found the defendant competent and imposed sentence. The failure to enter a written order to the same effect required reversal, with leave to make a nunc pro tunc determination regarding competency.

Tolbert v. State, 1D17-3240 (April 22, 2019)

The defendant was ordered to pay restitution for a vehicle he destroyed in the amount of the balance due on the loan taken out by the vehicle's owner. The First District reversed, as the proper measurement for restitution was the fair market value of the vehicle at the time of the crime.

Wells v. State, 1D17-4309 (April 22, 2019)

An order disposing of some, but not all, claims in a Rule 3.850 motion is not a final order and is therefore not appealable.

Fernanders v. State, 1D17-4459 (April 22, 2019)

In an appeal from convictions for home invasion robbery, kidnapping, and other offenses, the First District rejected the defendant's argument that the trial court erred in denying a motion to sever the trials of Fernanders and his codefendant, Edwards.

On the morning of the trial, Edwards sought severance based on a claim of antagonistic defenses. He argued that Fernanders planned to testify that Edwards coerced Fernanders to commit the offenses, and that that would prejudice Edwards. Fernanders, in turn, adopted the motion and argued that if the trials were separate, Edwards might testify at Fernanders' trial as to the coercion. Edwards planned on a general denial of the allegations.

Edwards' defense was not antagonistic to Fernanders in any way. As to Fernanders' desire to try to get testimony from Edwards regarding coercion at a separate trial, "[e]ven if that may have happened, Fernanders has provided no

authority stating that a trial court must work together with co-defendants to give one or more of the tactical advantages."

Levin v. State, 1D17-5129 (April 22, 2019)

The denial of a Rule 3.850 motion was reversed as to two claims. In the two claims, which were summarily denied, Levin alleged that counsel was ineffective for failing to investigate competency before Levin entered a plea. It was alleged that a competency evaluation was done after the entry of the plea and prior to sentencing; that the expert found severe delusional psychosis and recommended withdrawal of the plea; and that counsel rejected that advice and proceeded to sentencing.

Thompson v. State, 1D18-403 (April 22, 2019)

In an appeal from the summary denial of a Rule 3.850 motion, the First District addressed several claims of ineffective assistance of counsel.

Counsel could not be deemed ineffective for failing to seek the dismissal of charges based on an alleged lack of probable cause, as "'an indictment or information may not be dismissed by a trial court on the ground that the police unlawfully arrested the defendant based on no probable cause.'"

A claim that counsel was ineffective for failing to object that the prosecution struck every African-American member of the venire was properly denied. Such a claim is viable only when there is an allegation that the resulting jury was not impartial, and, even after Thompson was granted leave to amend the Rule 3.850 motion, he still failed to set forth such an allegation.

Two claims that counsel was ineffective for failing to raise Giglio objections based on the alleged use of perjured testimony were properly denied. "Thompson alleged that the detective gave false testimony regarding S.G.'s identification of Thompson at a photo-line up. But he failed to allege that the detective deliberately lied, that the prosecutor knew the detective lied, or that defense counsel had reason to believe the detective lied."

King v. State, 1D18-1227 (April 22, 2019)

The First District reversed a revocation of probation, finding that the evidence was insufficient.

"Evidence that a probationer walked away from a monitoring device for a brief period of time is not competent, substantial evidence of a substantial and willful violation." On one occasion, King moved away from the device for five minutes. He told his probation officer that he left the device on the charger in the homeless shelter where he resided when he walked to the cafeteria in the facility.

The evidence also showed that King failed to complete sex offender treatment because the program required an upfront payment of $90, which he could not afford; he tried making a payment of $40, which was all he had at the time. The inability to pay the $800 arrearages for the monitoring device was also not established as a reason for revocation due to the inability to pay.

Delon v. State, 1D18-3648 (April 22, 2019)

The summary denial of a Rule 3.850 motion alleging ineffective assistance of counsel was reversed. Delon alleged that counsel was ineffective for failing to investigate his ineligibility for PRR sentencing, as his prior conviction resulted in a sentence of jail time, not prison time. The Florida Supreme Court recently held, in State v. Lewars, 259 So. 3d 793 (Fla. 2018), that a PRR sentence may not be based upon prior release from jail; only from prison. Even without the benefit of Lewars, defense counsel was expected to have been able to raise and develop such an argument.

Boyd v. State, 1D18-3773 (April 22, 2019)

A condition of probation requiring a defendant "to maintain either full-time employment or full-time education" is "invalid as a matter of law unless in provides a 'good faith effort' exception."

Second District Court of Appeal

Elder v. State, 2D13-3440, 2D17-551 (April 26, 2019)

In a prior opinion, the Second District reversed a conviction and sentence from a plea because the trial court had failed to conduct a necessary competency hearing. The Second District concluded, based on the record, that it was not possible to make a nunc pro tunc determination of competency and reversed and remanded for further proceedings. Upon remand, the trial court did not comply with that mandate, and eventually entered an order retrospectively finding Elder competent and reinstated the original judgment and sentence.

In the current opinion on appeal from the "reinstated" judgment and sentence, the Second District emphasized the limited scope of its prior mandate, which did not authorize the nunc pro tunc determination. The trial court's authority on remand had been solely to determine "current" competency for either a new plea or for a trial. The reinstated judgment and sentence were therefore reversed, and on remand, the trial court was directed to proceed as if the original plea "had never been entered into, ab initio."

Feaster v. State, 2D17-3612 (April 26, 2019)

Feaster appealed from a conviction, after a jury trial, for aggravated battery. Prior to trial, the court had denied his motion to dismiss based on the Stand Your Ground Law. The trial court had applied the pre-2017 burden of proof, which rested on the defendant. As the Second District has previously held that the 2017 statutory amendment, placing the burden of proof on the State applies retroactively, the case was reversed and remanded for the trial court to conduct a new immunity hearing with the new burden of proof. If the defendant is entitled to immunity, the trial court will then enter an order of dismissal with prejudice. If he is not entitled to immunity, the trial court will reinstate the conviction. The Second District, as in other cases, certified conflict with the Third and Fourth Districts on the question of retroactive application of the 2017 statutory amendment.

Horton v. State, 2D17-2852 (April 24, 2019)

This case involves the same issue of retroactive application of the statutory amendment of the burden of proof in the Stand Your Ground law as in Feaster, discussed above. In addition to granting the same relief, the Second District noted, as it has in other opinions on this issue, that the fact that the jury convicted the defendant after the pretrial hearing resulted in a denial of the motion to dismiss was irrelevant.

Champagne v. State, 2D17-3072 (April 24, 2019)

The Second District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence, but certified a question of great public importance to the Florida Supreme Court.

Champagne was convicted of armed robbery and false imprisonment. On the CPC scoresheet, his total points were 348.2 and the lowest possible sentence was

240 months. He was sentenced to 20 years on the false imprisonment, a third-degree felony. Armed robbery was a first-degree felony punishable by life; false imprisonment, a third-degree felony, which carries a maximum sentence of five years.

The CPC, however, requires that the lowest possible sentence be imposed if the lowest possible sentence exceeds that statutory maximum sentence provided in section 775.082. Champagne argued that that provision is implicated only when the lowest possible sentence exceeds the statutory maximum for the primary offense on the scoresheet, which, in this case, was armed robbery; the false imprisonment had been scored as an "additional offense" on the scoresheet.

The Second District disagreed, finding that the language in question applied to each individual conviction, and certified the following question:

> IS THE LOWEST PERMISSIBLE SENTENCE AS DEFINED BY AND APPLIED IN SECTION 921.0024(2), FLORIDA STATUTES (2017), AN INDIVIDUAL MINIMUM SENTENCE AND NOT A COLLECTIVE MINIMUM SENTENCE WHERE THERE ARE MULTIPLE CONVICTIONS SUBJECT TO SENTENCING ON A SINGLE SCORESHEET?

Hiraldo v. State, 2D18-1678 (April 24, 2019)

Hiraldo entered an open plea to charges of burglary and grand theft. The Second District reversed the sentence because the trial court "erred in determining that she failed to establish a legal basis to impose a downward departure sentence based on her need for specialized treatment for a mental disorder." Hiraldo claimed she needed the treatment for bipolar disorder.

The trial court agreed with the State's "argument that Hiraldo's bipolar disorder had a substance abuse component and was therefore not 'a mental disorder that is unrelated to substance abuse or addiction,'" which is the statutory language applicable to the reason for the downward departure. The Second District reviewed the testimony from the sentencing hearing and found that "Hiraldo's counselor made it clear that Hiraldo was being treated for two disorders: bipolar disorder and substance abuse disorder. And Hiraldo's treatment for the two disorders was different in that she was taking medication only for the bipolar disorder. The goals of the treatments were also different: Hiraldo's improvements for her bipolar

disorder were measured by her ability to regulate her emotions, and her improvements for her substance abuse disorder were measured by her ability to stay clean."

As Hiraldo presented evidence that satisfied the statutory requirements for the downward departure reason, the trial court was required to consider it on remand.

Crandall v. State, 2D18-2721 (April 24, 2019)

A written sentence erred by including both prior jail and prison credits as a single award without delineating the amount of jail credit.

Third District Court of Appeal

Quinones v. State, 3D17-1769 (April 24, 2019)

The Third District affirmed convictions for dealing in stolen property and providing false verification of ownership to a pawnbroker.

The Court found that the evidence was sufficient. Items of jewelry were stolen during a move to a new residence. Less than ten days later, two of the items, inscribed with the victim's "given name, surname, and nickname," were used by Quinones as collateral for a loan at a pawnshop. The evidence demonstrated more than mere unexplained possession. "Specifically, witness testimony established that both jewelry items were stored together and engraved with personalized markings. These factors, combined with Quinones's possession of both items, jointly, in close proximity to the time of the deprivation of ownership, and his demonstrated effort to dispose of the items through a second-hand market in which goods tend to be undervalued, were sufficient to allow the trier of fact to infer that Quinones knew or should have known the jewelry was stolen."

Martin v. State, 3D17-1848 (April 24, 2019)

Convictions for domestic battery by strangulation and two counts of simple battery did not result in a double jeopardy violation. The record established "two separate, distinct acts of strangulation at two different times and in two different locations."

T.M. v. State, 3D18-894 (April 24, 2019)

In a trial for throwing a deadly missile and criminal mischief, the court did not err in excluding evidence of an audio recording of the victim's 911 calls under the excited utterance hearsay exception. The recording was excluded "because it was presented at trial on a disc containing three recordings of three separate calls with different content in each. The victim had previously listened to a digital recording of the particular call he had made to the 911 operator but had not listened to the contents of the disc offered for admission by the defense. The victim was not asked to testify that the version on the disc was the same recording he had heard previously. After realizing the victim's uncertainty about the contents of the disc, defense counsel indicated that he had 'another way to go about doing this.' The subsequent questioning was directed to the victim's eyewitness account, thus abandoning authentication of the audio recording itself as a prerequisite to its admission into evidence."

D.D. v. State, 3D18-1307 (April 24, 2019)

On appeal from an order revoking probation, the Third District reversed and remanded for entry of an order consistent with the trial court's oral pronouncements. The oral pronouncement referenced violations for failing to submit to a random drug test, failing to comply with curfew, failing to attend school and failing to follow school rules. The written order merely stated that D.D. violated the terms of the probation program through a "non law violation."

The Third District rejected an argument that the violations were based solely on hearsay. Non-hearsay testimony included witness observations of D.D. and statements made by D.D. to his case manager at the school he attends.

Torres v. State, 3D19-0402 (April 24, 2019)

A petition alleging ineffective assistance of appellate counsel was dismissed as untimely. The petition was filed more than eight years after the finality of the judgment and sentence (based on the mandate from the direct appeal). Depending upon the allegations in such a petition, the time for filing it is within either two or four years from the finality of the conviction and sentence on direct review.

Fourth District Court of Appeal

State v. Morris, 4D18-2470 (April 24, 2019)

The State appealed a suppression order and the Fourth District affirmed. The defendant's vehicle was stopped because a "Drive Pink AutoNation license plate frame around the defendant's license plate was 'obscuring matter' over the words 'MyFlorida.com' and 'Sunshine State.'" The Fourth District's opinion includes a photo of the license plate. On the top, a small portion of the upper parts of some of the letters in "MyFlorida.Com" was covered by the frame, but the phrase itself was readable. On the bottom, approximately the lower half of the letters in "Sunshine State" was covered by the frame, but the phrase was still readable.

The Fourth District disagreed with the State's argument that under section 316.605(1), Florida Statutes (2017), "all" of the writing on the license plate had to be clear and free from "obscuring matter." "Here, all the letters and words on the license plate were visible within 100 feet. In fact, the officer who stopped the defendant testified in deposition that 'he didn't have any trouble' reading the word 'Florida.' The trial court specifically found that 'everything that needs to be identified is identifiable,' even with the frame."

Fifth District Court of Appeal

Williams v. State, 5D18-871 (April 26, 2019)

The Fifth District reversed an order summarily denying a Rule 3.850 motion as to two of the multiple claims for further proceedings.

In one of the claims, Williams alleged that counsel told him it was in his best interest not to testify; Williams argued that "it was necessary for him to testify to assert the 'independent act defense,' alleging that he would have told the jury he believed that he and co-defendant were going to confront the victim and 'fist fight him if necessary,' and that he had no idea that the co-defendant had a gun or that he intended 'to do anything more than fight.'" The trial court found that this was inconsistent with what Williams told the investigating detective – that he had never been to the location of the murder and did not know the victim – and that the defendant would have been impeached had he testified as alleged in the 3.850 motion. This created an issue of credibility, and the record attached to the trial court's order did "not conclusively refute that counsel's failure to advise Williams of his absolute right to testify would not have resulted in a different outcome."

In another related claim, Williams asserted that counsel failed to present evidence to support the request for an independent act jury instruction even though it was argued in closing that Williams was unaware that the co-defendant had a rifle. For the same reasons as in the prior claim, the Court reversed for further proceedings.

In the further proceedings, the trial court may attach additional records if they conclusively refute the claims; otherwise, the trial court must conduct an evidentiary hearing on the claims.

Shelko v. State, 5D18-1162 (April 26, 2019)

The trial court committed fundamental error at a sentencing hearing by "considering unsubstantiated allegations of misconduct."

Shelko was convicted of drug charges at a jury trial. At the sentencing hearing, immediately after the verdict, the judge examined the methamphetamine that Shelko possessed and commented on what he "called cartel quality meth," as opposed to "the cheap stuff that's made locally." That, plus the existence of two separate baggies and $1,300 in cash, troubled the judge: "[A]lthough [Shelko] wasn't charged with sale or distribution, it's obvious that when you look at those two different amounts of cartel quality meth that [the money] was a result of ill gotten gains."

There was no "testimony or evidence presented at trial to suggest Shelko was somehow involved in a drug cartel or acquitted the methamphetamine from a distributor for a cartel. In fact, the only evidence at trial was that Shelko acquired this drug 'locally.'"

On remand, the sentencing will be before a different judge.

Mann v. State, 5D19-430 (April 26, 2019)

On direct appeal, the Fifth District remanded for a nunc pro tunc competency hearing. On remand, the trial court conducted the hearing and found that Mann was competent to proceed at the time of trial. Mann did not appeal that order and now sought a belated appeal. The Court denied the petition for belated appeal as Rule 9.140(b) did not authorize any appeals from competency orders. Furthermore, although the order could be reviewed by a petition for writ of certiorari, there is no entitlement to belated certiorari review.

Rodriguez v. State, 5D19-1114 (April 24, 2019)

The Fifth District granted a habeas corpus petition which sought pretrial release.

Rodriguez was arrested for domestic battery. At that time, he was already out on bond on an earlier domestic battery charge. At the first appearance on the new charge, the judge held him without bond and revoked the bond in the earlier case.

While the commission of a new offense while out on bond enables the court to, sua sponte, revoke the bond in the earlier case, that does not suffice to hold a defendant "'without bond as to any charges for which the defendant was not already on a form of pretrial release.'"

Calzetta v. State, 5D19-1065 (April 22, 2019)

The Fifth District granted a habeas corpus petition and directed the lower court "to hold a hearing for the purposes of setting a new bond and reasonable conditions for pretrial release."

Calzetta had posted bond after arrest on trafficking and possession charges, but violated a condition of pretrial release by failing to complete a drug test. The State sought revocation of pretrial release, which the trial court granted, and sent "bond at zero." A motion to set a new bond was denied.

Pursuant to both rule and statute, an application for modification of bail must be heard by a court in person, with the defendant present, at least three hours notice to the state attorney. The motion for a new bond "was improperly denied without a hearing."