Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Grimon, 17-15011 (May 13, 2019)

Grimon appealed convictions for possessing 15 or more unauthorized access devices and aggravated identity theft. On appeal, she argued "that the factual proffer supporting her guilty plea was insufficient to establish that the unauthorized access devices she possessed affected interstate commerce and, therefore, the district court lacked subject matter jurisdiction." The Eleventh Circuit affirmed.

The Court's opinion discusses the distinctions between subject matter jurisdiction – Congressional authorization for a court to hear a given type of case – and jurisdictional elements – i.e., elements "of the offense requiring the government to prove that the defendant's offense had some nexus with interstate or foreign commerce." Jurisdictional elements "are not 'jurisdictional' in the sense of bearing on whether or not the district court has subject matter jurisdiction or authority to adjudicate the case. . . . Rather, the interstate commerce element is 'jurisdictional' only in the sense that it relates to the power of Congress to regulate the forbidden conduct." Thus, "[w]hether th[e] indictment sufficiently alleged, or Grimon's subsequent factual proffer sufficiently demonstrated, an interstate nexus is merely a non-jurisdictional challenge to the sufficient of the evidence as to that element of the offense and has no bearing on the district court's power to adjudicate her case or subject matter jurisdiction."

The Court distinguished the interstate commerce clause jurisdiction at issue in this case from a prior case addressing jurisdiction under the Maritime Drug Law Enforcement Act, under which it was a crime to "conspire to distribute a controlled substance while on board 'a vessel subject to the jurisdiction of the United States.'" The jurisdictional component of that offense did implicate true subject matter jurisdiction. That conclusion had been based on statutory construction of the Maritime Act.

Thus, regardless of whether the proffer demonstrated the interstate commerce nexus or not, the district court had subject matter jurisdiction over the case.

Thompson v. State, 18-10488 (May 17, 2019)

The Eleventh Circuit affirmed the denial of an authorized successive motion under 28 U.S.C. s. 2255. Thompson argued that his two firearm convictions under 18 U.S.C. s. 924(c) were invalid in light of Johnson v. United States, 135 S.Ct. 2551 (2015) and Sessions v. Dimaya, 138 S.Ct. 1204 (2018). The Eleventh Circuit concluded that Thompson's two predicate second-degree murder convictions qualified as crimes of violence "under both s. 924(c)'s residual and elements clauses."

The claim based on the alleged vagueness of the residual clause was foreclosed by the Eleventh Circuit's en banc decision in Ovalles v. United States, 889 F. 3d 1259 (11th Cir. 2018), which concluded that the Supreme Court's Johnson decision did not apply to the residual clause of s. 924(c).

As to the elements clause, the Eleventh Circuit previously held that Florida convictions for both second-degree murder and attempted first-degree murder qualified as violent felonies under the elements clause of the Armed Career Criminals Act. Those decisions compelled the same conclusion as to federal second-degree murder, which the Court described as being "not materially different from Florida's second-degree murder offense."

The offense of second-degree murder under 18 U.S.C. s. 1111(a) requires proof that the victim was killed, and the death was caused with malice aforethought. The statute, "by its plain terms, criminalizes the actual killing of another person," and "the level of force used must necessarily be capable of causing physical pain or injury."

Supreme Court of Florida

Long v. State, SC19-726 (May 17, 2019)

Long appealed the denial of a Rule 3.851 motion and the Supreme Court affirmed the lower court's order.

Long argued that "scientific advances in the assessment, quantification, and consequences of brain injury and brain damage since his 1989 sentencing constituted newly discovered evidence entitling him to a new penalty phase" and that the trial court erred by not granting an evidentiary hearing on the claim. The claim failed for two reasons. First, Long waited more than 30 years before bringing the claim even

though he had been aware of his traumatic brain injury and temporal lobe epilepsy diagnoses since the 1989 penalty phase. Additionally, the claims would have been known at the time of the filing of his three prior postconviction motions. Even though this field of research is constantly advancing, Long could have filed the motion years prior to the signing of the death warrant.

Additionally, the proffered evidence was not such as to have probably affected the outcome of the penalty phase. Long already presented evidence about the traumatic brain injury and temporal lobe epilepsy, and the sentencing court had already found statutory mental health mitigators regarding Long's capacity to appreciate the criminality of his conduct or conform his actions to the law, and being under the influence of extreme mental or emotional disturbance.

An "as-applied" challenge to the lethal injection protocol under the Eighth Amendment was rejected. This claim was based on Long's traumatic brain injury and temporal lobe epilepsy. The trial court conducted an evidentiary hearing and found credible the testimony of an expert for the State, negating Long's claim that there was a "substantial and imminent risk that is sure or very likely to cause serious illness and needless suffering." The expert's testimony is summarized in quotes from the trial court's order on this issue. Additionally, Long failed to establish the existence of a known and available alternative method of execution "that entails a significantly less severe risk of pain."

The Court also briefly addressed and rejected challenges to the use of the "three-drug protocol" and the use of etomidate. The Court also briefly addressed and rejected an Eighth Amendment challenge based on Long being on death row for 30 years. Finally, the Court addressed and rejected several claims related to post-warrant public records requests to the medical examiner, FDLE and DOC.

First District Court of Appeal

Sherman v. State, 1D18-4464 (May 16, 2019)

On remand from the Florida Supreme Court, the First District briefly addressed dual convictions for solicitation and traveling to meet a minor after solicitation, and, based on Lee v. State, 258 So. 3d 1297 (Fla. 2018), directed the trial court to reverse the lesser conviction. Based on Lee, the determination of whether the multiple convictions are based upon the same conduct for double jeopardy purposes considers only the charging document.

Stephens v. State, 1D17-850 (May 16, 2019)

Stephens appealed convictions for grand theft and burglary. The First District refused to entertain a claim of ineffective assistance of trial counsel for failing to move for judgment of acquittal based on the alleged insufficiency of the evidence of value of the stolen property. Even if the evidence were insufficient, "there would not be indisputable prejudice unless it was clear the State could not have cured any insufficiency by reopening the case and presenting additional evidence."

There was no abuse of discretion in giving the jury an instruction on principals. There was "evidence that Stephens acted in concern with another in committing the burglary. A witness saw two men by the house, one coming from behind the home, the other watching the witness." The Court identified further pieces of evidence to support the instruction as well.

The evidence was sufficient as to the burglary, notwithstanding Stephens' hypothesis of innocence that the driver of the car picked him up after the burglary. The car in which the police found Stephens was close to the burglarized premises. Stephens fled as the officers approached and "very little time passed between the burglars' departing the home and the officers' apprehending Stephens." This sufficed to negate the hypothesis of innocence.

Simmons v. State, 1D18-191 (May 16, 2019)

Simmons was 15 at the time of the rape he committed in 1967. He entered a guilty plea and received a sentence of life with parole eligibility. He was subsequently released on parole, reincarcerated after a revocation, released again, and revoked a second time. In 2016, pursuant to Graham v. Florida and Atwell v. State, Simmons challenged his original life sentence. The State, in the trial court conceded that Atwell entitled him to resentencing, and the trial court ordered resentencing under the 2014 juvenile sentencing statutes.

Prior to the resentencing hearing, the First District held that a sentence with the possibility of parole was not the equivalent of one without the possibility of parole when the offender had, in fact, been released on parole. As a result, the trial court rescinded its order granting post-conviction relief and ordering a resentencing. Simmons appealed from that order.

"Because the order granting resentencing became final when neither party moved for rehearing or appealed the order, the trial court had no authority to enter a

second order rescinding the original order. This Court has twice held that an order on a motion for postconviction relief is final and appealable even when resentencing has not occurred." The State contended that the trial court, pursuant to Rule 3.192, had the inherent authority to reconsider a ruling while the court had jurisdiction of the case. The First District disagreed; other language in Rule 3.192 expressly precludes application of that rule to proceedings under Rule 3.800(a), and Simmons' motion for resentencing was filed under Rule 3.800(a).

The order granting the Rule 3.800(a) motion was reinstated and the trial court was directed to resentencing Simmons to a lawful sentence.

Moss v. State, 1D17-3328 (May 13, 2019)

Moss appealed a conviction for attempted first-degree murder. The jury found that he actually possessed a firearm during the offense. Moss argued that reclassification of the offense to a life felony was improper because the use of the firearm was an essential element of the offense. The Court disagreed, as the use of a firearm is not an essential element of the offense and attempted first-degree murder does not require that the act be committed with a firearm or in any other specific way.

Hayes v. State, 1D17-3466 (May 13, 2019)

Hayes was found guilty by a jury of six counts of lewd or lascivious battery on a person older than 12 but younger than 16, with special findings of penetration as to each count. On appeal, he challenged the trial court's refusal to impose a downward departure sentence and also argued that the adult-on-minor sex offense multiplier was erroneously applied.

The trial court rejected the requested downward departure by stating, "I'm not convinced from the testimony that I've heard that . . . the victim was a willing participant." There was conflicting evidence as to this and the trial court therefore had authority to rely on evidence that the victim was not a willing participant.

With respect to the sentencing multiplier, the Court rejected Hayes' argument that the legislature intended it to apply only to less serious crimes. The statutory language clearly indicated that it applied to sexual batteries and any other felony offenses.

The multiplier, however, contained a limiting clause: "If applying the multiplier results in the lowest permissible sentence exceeding the statutory maximum sentence for the primary offense under chapter 775, the court may not apply the multiplier and must sentence the defendant to the statutory maximum." Hayes therefore argued that the 90-year sentence with the multiplier exceeded the 15-year statutory maximum for his primary offense, which was a second-degree felony, and that the court had to limit the sentence to 15 years.

The First District interpreted "the limiting clause to provide that when the total result on the scoresheet, with the multiplier applied, exceeds the statutory maximum sentence for the primary offense, the sentencing court must not apply the multiplier and must impose the maximum sentence *for the defendant's primary offense*, here Count One. The court must then look to the subtotal sentencing points with all secondary offenses included, but *without* the multiplier, to determine the lowest permissible aggregate sentence."

In this case, there were 739.2 subtotal sentencing points, without the multiplier, and Hayes should have been sentenced to at least 44.45 years, the lowest permissible sentence without the multiplier, on counts 1-6, and to 15 years on his primary offense, count one. The sentence was reversed and remanded to impose a sentence of 15 years on count one and a total aggregate sentence of no less than 44.45 years in prison, absent a downward-departure.

Thorne v. State, 1D17-4242 (May 13, 2019)

The First District affirmed convictions and sentences for two sex offenses. Thorne challenged the exclusion of anticipated evidence of the victims' prior sexual relationships under the rape shield law. The evidence at issue related to the victim having "initially identified three other assailants" and not naming Thorne until a later interview.

The rape shield law applies only to consensual sexual activity with a person other than the accused. As the proffered evidence pertained to the victim's allegations of nonconsensual conduct by other men the rape shield law did not bar its admission. The Court then examined it for relevancy. The theory of defense "was that the victim fabricated her allegations against him after he stopped giving her gifts" and Thorne argued that the accusations against three other men without accusing him supported that theory. The Court found that the proffered evidence was admissible but that its exclusion was harmless.

The harmless error analysis emphasized three Williams rule witnesses who bolstered the victim's credibility; a controlled call; and testimony of evidence tampering. And, Thorne was "allowed to establish that the victim did *not* accuse him during the November interview, although we recognize that the error allowed the victim to testify she was 'afraid' to report Appellant, when one of the perpetrators that she did name had beaten her."

The erroneous inclusion of penetration points on the sentencing scoresheet was harmless where the "court stated it would have imposed the maximum sentence regardless of the lowest permissible sentence. . . ."

Lindsay v. State, 1D18-122 (May 13, 2019)

The First District affirmed a conviction for second-degree murder and found that the trial court did not abuse its discretion in denying a motion for continuance.

Shortly before trial, defense counsel moved for a continuance to enable testing of a watch found on the victim's body for fingerprints, which might support the defense if someone else's were found. The court denied the motion but permitted the testing if it could be done. Counsel represented that he had sufficient time to do it, but forgot to take care of it. There was no good cause for the continuance and the defendant could not demonstrate prejudice as the record did not demonstrate whether the testing had, in fact, taken place.

The defense had also based its request on the need to obtain additional bank records. There was no demonstration on appeal as to how they would have helped the defense. Additionally, a records custodian did testify about certain transactions near the time of the victim's death.

The Court was also influenced by the State's assertion in the trial court that out-of-state witnesses were already traveling to Florida for the trial, as were relatives of the victim.

Stamm v. State, 1D18-1009 (May 13, 2019)

A habeas corpus petitioner's extradition to Ohio rendered his habeas petition moot and the appeal was therefore dismissed.

Watkins v. State, 1D18-3649 (May 13, 2019)

A habeas corpus petition alleging ineffective assistance of appellate counsel was dismissed as it was filed beyond the two-year deadline. A claim for a manifest injustice exception was rejected. The argument that Watkins wanted to assert – ineffective assistance of trial counsel for failing to advise Watkins of an entrapment defense – was a claim that could not have even been raised on direct appeal by appellate counsel.

Second District Court of Appeal

Jacobs v. State, 2D17-2437 (May 17, 2019)

Jacobs appealed convictions for one count of aggravated stalking and two counts of violation of a stalking injunction. The Second District held that the two convictions for violating the stalking injunction did not result in a double jeopardy violation.

The case presented an issue of whether the acts charged were distinct acts within a single criminal episode. Section 784.0487(4)(a) included, as grounds for finding a violation of a stalking injunction, (1) "going to, or being within 500 feet of, the petitioner's . . . place of employment," and (2) "telephoning, contacting, or otherwise communicating with the petitioner."

"Pursuant to the 'distinct acts' test, a single criminal impulse may be punished only once 'no matter how long the action may continue,' while separate, successive impulses may be punished separately 'even though all unite in swelling a common stream of action.' . . . In determining whether acts are 'distinct,' courts consider 'factors such as whether there was (1) a temporal break between the acts, (2) intervening acts, (3) a change in location between the acts; and/or (4) a new criminal intent formed.'"

Here, the acts of going within 500 feet of the place of employment and telephoning or contacting were "distinctively different." One judge dissented, concluding that only one statutory violation existed as there was just a "single criminal impulse to violate the injunction." The dissent emphasized the lack of a temporal break, while the majority concluded that "even violations that occur simultaneously can be punished separately without violating the double jeopardy prohibition if each commission is of a separate character and type."

N.G.S. v. State, 2D17-4650 (May 17, 2019)

N.G.S. was found to have been a delinquent in possession of a firearm and a delinquent carrying a concealed weapon. The Second District reversed because the trial court "erred in admitting his confession that the gun belonged to him without independent evidence of the corpus delicti of either delinquent act."

At 10:00 p.m., a detective saw N.G.S. sitting in a car with three other young men. The detective approached because he knew N.G.S. was on probation, with an 8:00 p.m. curfew. N.G.S. opened the door and kept saying, "I'm sorry." The detective smelled marijuana in the car. As the detective was about to take N.G.S. from the back seat, "he noticed 'just the edge' of a pistol grip – which he also described as 'just the very back of the backstrap' of a gun – sticking out underneath the seat in front of N.G.S." The detective then found a handgun under the seat in front of N.G.S. The detective questioned N.G.S. and N.G.S. confessed to having gotten the gun and bringing it into the car that night.

For the concealed weapon offense, the corpus delicti "would at least include some evidence, separate from N.G.S.'s admission, that someone covered by the statute (i.e., a delinquent with the requisite prior delinquency finding) carried something that met the definition of a concealed weapon. The State's evidence in this case, however, showed that the only potentially-unlawful item Detective Dodson recovered during his interaction with N.G.S. was a gun. Because a gun cannot be a 'concealed weapon' under chapter 790, it follows that the State's evidence does not establish the corpus delicti for delinquent carrying a concealed weapon."

As to the possession charge, "the body of the crime is 'that a firearm was possessed by an individual who is prohibited by the statute from possessing it' as relevant here, an individual under twenty-four who has been found to have committed a delinquent act that would be a felony if committed by an adult." N.G.S. was the only individual in the car shown to have been covered by section 790.23(1)(b), and the State therefore had to show that he himself possessed a firearm.

The evidence in this case did not demonstrate either actual or constructive possession. The most that the State established was that the gun was found in N.G.S.'s vicinity, but that argument was "meritless because there were three other people in the car right before Detective Dodson found the gun, and our court has 'repeatedly held that mere proximity to contraband in a jointly occupied car is not sufficient to sustain a conviction based on constructive possession.'" Actual

possession was not established because a "person actually possesses an item when it is in his hand, on his person, or within his reach and under his control."

Third District Court of Appeal

State v. Calix, 3D16-2784 (May 15, 2019)

Applying the Florida Supreme Court's 2018 decisions in State v. Michel and Franklin v. State, the Third District reversed an order of the trial court granting post-conviction relief, where a juvenile offender had originally been sentenced to life in prison with the possibility of parole after 25 years.

State v. Ellis, 3D17-2478 (May 15, 2019)

The Third District affirmed an order of the trial court granting a Rule 3.850 motion after an evidentiary hearing. The motion alleged that trial counsel was ineffective "for failing to file a pretrial motion to dismiss based upon pre-arrest delay" and for conducting a deficient pretrial investigation.

Ellis was charged with aggravated battery on a pregnant victim, domestic battery by strangulation and kidnapping. He was convicted of lesser included offenses of two counts of misdemeanor battery and one count of false imprisonment. The only evidence at trial was the victim's version of events.

The alleged incidents occurred May 13, 2011. The alleged victim made a report to law enforcement two days later; Ellis was arrested one year later. There were "numerous material inconsistencies and differing accounts of the alleged criminal incidents" between the victim's report and later testimony.

The victim alleged that the defendant compelled her to withdraw funds at a bank. The offenses for which the defendant was convicted allegedly occurred at a motel. The claim of ineffectiveness was based on the failure to investigate surveillance video that may have corroborated or disproven the alleged victim's account; the failure to seek dismissal based on prearrest delay; and the failure to investigate the motel's check-in records.

In this case, the potentially relevant surveillance videos were destroyed by the bank and a nearby store 90 and 30 days, respectively, after the date of the alleged incident. The State provided no explanation for the delay in filing the information. And, the motel manager testified at the evidentiary hearing, and the motel records

would have shown that neither Ellis nor the victim were at the motel on the date of the alleged criminal acts. These lapses further impeded counsel's ability to impeach the credibility of the alleged victim.

Fourth District Court of Appeal

Dieujuste v. State, 4D17-3842, et al. (May 15, 2019)

The Fourth District reversed a conviction for cocaine possession and a probation revocation based on that conviction. A suppression motion should have been granted as there was no reasonable suspicion to stop Dieujuste.

An officer responded to an anonymous call providing a physical description of an individual, along with a description of his clothing, saying that the individual was standing next to a convertible black Camaro in front of a liquor store, dealing drugs out of the car. The car was described as being "filled with drugs."

When the officer arrived, the vehicle described was there, and the defendant was standing at the passenger side of the car; two others were in the car. When the defendant saw the officer, in uniform, the defendant "walked quickly back to the vehicle door, bent down, and was pulling on the center console." The officer pulled his gun on the defendant, ordered him to stand up and asked him what he put under the console. The defendant responded, "nothing." The officer could hear the "crinkle" of a plastic bag and saw a "tiny corner of the bag."

The officer then placed the defendant in handcuffs. The officer also said he smelled marijuana while he was speaking to the defendant. The officer searched the passenger compartment of the vehicle and found crack cocaine hidden under the center console area.

The Fourth District first found that the trial court correctly concluded that the anonymous tip did not justify the stop of the defendant. The defendant did not match the description of the individual selling drugs and an anonymous tip requires corroboration to establish reliability. The trial court found that the observations of the defendant returning to the vehicle, bending down and doing something in the vehicle sufficed to establish reasonable suspicion and fear for safety of the officer. The Fourth District disagreed: "Here, there were no facts, even taken together with the anonymous tip information, from which it could be inferred that the suspect was dangerous and may gain control of a weapon. The tip did not mention weapons at all, and the officer did not observe anything but appellant bending down into the

vehicle. What he heard was the crinkle of plastic, which in no way suggests the sound of a gun." Additionally, it was found that the officer's smelling of the marijuana occurred after the stop.

Breland v. State, 4D18-537 (May 15, 2019)

Breland was convicted of "one count of leaving the scene of an accident for each of the three cars that he hit while fleeing from the police." These multiple convictions did not result in a double jeopardy violation "because appellant's actions resulted in three separate crashes, seconds apart, at different locations in and near a parking lot. Each crash was a distinct criminal act, so no double jeopardy protection was triggered."

Mitchell v. State, 4D18-855 (May 15, 2019)

The trial court's consideration of one ground for violation of probation was in error because it had been the basis of a prior modification or probation. The violation in question – based on a positive drug test for marijuana – had previously been used to modify probation by adding a requirement that the defendant obtain a substance abuse evaluation and abide by any treatment recommendations. "This was an enhancement of her original sentence, as it added additional terms of probation, the violation of which could subject her to revocation of probation and imposition of an increased sentence. Since her probationary sentence had already been enhanced for the same violation of this condition, a second enhancement or punishment based upon the same violation would impose multiple punishments for the same offense."

The Fourth District distinguished an earlier case in which in had found no double jeopardy violation. In that case, the violation was dismissed because an officer failed to appear for the VOP hearing; a second violation was then filed based on the same alleged violation.

T.L.B. v. State, 4D18-1907 (May 15, 2019)

An adjudication of delinquency for possession of marijuana was reversed because there was no reasonable suspicion to support a search by a school resource officer.

The officer had seen T.L.B. in videos of a gang and exhibiting "gestures associated with gang membership at school in the past." One video of gang

members, from nine months earlier, contained lyrics causing the officer to be concerned about weapons being brought to school. Another student, C.H. was in some photos as a gang member. There were gang altercations at school, but none involved weapons, although some of the photos showed members carrying firearms, but not T.L.B. or C.H. Five months earlier, T.L.B. had been involved in a fight with rival gang members.

On the day of the incident leading to the search, T.L.B. was involved in a verbal altercation with rival gang members. A school nurse saw C.H. using a bathroom in the nurse's office, and five minutes later, T.L.B. entered the same bathroom, which he was permitted to use due to medical issues. Although C.H. and T.L.B. were known to be friends and in the same "group," the nurse had a gut feeling that something was not right. She contacted the school resource officer, who directed her to search the bathroom, but she found nothing unusual.

"The officer then brought appellant in and began to search his backpack." The officer was concerned about something happening in the "bus loop" as school was about to let out. He was looking for weapons, although the nurse did not mention any and he never observed T.L.B. with one. He also searched T.L.B.'s pockets and shoes and found a small amount of marijuana in the shoes. The officer was proceeding solely on a hunch, and absent reasonable suspicion, the marijuana should have been suppressed.

Helms v. State, 4D17-3811 (May 15, 2019)

The Fourth District reversed a conviction for robbery with a firearm. The trial court erred "in allowing the investigating detective to testify that appellant's girlfriend advised the detective of his cell phone number, as this was improper hearsay." And, his sentence as a PRR was reversed "as he was neither committed to nor released from the Department of Corrections within three years of the robbery."

The investigating detective testified that the defendant's girlfriend gave her Helms' phone number, which the detective then used to obtain a search warrant for phone records linked to that number. The girlfriend, when testifying, did not remember the phone number or giving it to the detective. Cell phone records were then used to place Helms' phone in the vicinity of the robbery.

The trial court permitted the detective's testimony about the girlfriend providing the phone number to come in as a prior inconsistent statement. If prior

inconsistent statements are made under oath, they may be admissible as substantive evidence if the declarant is subject to cross-examination about the statement. Here, the statement, if made, was not under oath at a prior proceeding, and was not admissible as substantive evidence. It was substantive because it was used as the basis for presenting the cell phone records.

The court concluded that the error in admitting the testimony was not harmless. One judge dissented as to the harmless error analysis. Both the Court's opinion and the dissent include substantial factual details for their analyses.

Bruce v. State, 417-3740 (May 15, 2019)

Bruce appealed convictions for burglary and grand theft. As to both grand thefts, the State failed to prove the value of the stolen items exceeded $100.

One victim "identified photographs of a 'gold bracelet' and testified that her daughter, who purchased it, told her that the value 'was close to $300.'" There was no testimony as to value of costume jewelry items. Another victim identified photos of stolen items and testified as to purchase prices of man, but there was no evidence as to fair market value.

Apart from the absence of testimony of fair market value, the testimony about the gold bracelet's value being close to $300 was wrongfully admitted over defense counsel's hearsay exception.