Case Law Update
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Supreme Court of Florida

In Re: Amendments to the Florida Evidence Code, SC19-107 (May 23, 2019)

The Florida Supreme Court, pursuant to its rulemaking authority, adopted chapter 2013-107, sections 1 and 2, Laws of Florida (Daubert amendments), and 90.704 (basis of opinion testimony by experts).

The Florida Supreme Court previously "declined to adopt the *Daubert* amendments, to the extent they are procedural, solely 'due to the constitutional concerns raised' by the [Florida Bar's Code and Rules of Evidence] Committee members and commenters who opposed the amendments." In DeLisle v. Crane Co., 258 So. 3d 1219 (Fla. 2018), the Court held that the statutory Daubert amendment as to section 90.702 was procedural in nature, not substantive, that it conflicted with the Supreme Court's previous adoption of the Frye test, and that the Daubert amendment therefore violated the Florida Constitution.

The Court now receded from its prior decision not to adopt the Daubert amendments and to retain the Frye standard. Although the Court now decided to adopt the Daubert amendments, in so doing, the Court did not "decide, in this rules case, the constitutional or other substantive concerns that have been raised about the amendments. Those issues must be left for a proper case or controversy."

The Court therefore adopted, under its rule-making authority, the Daubert amendments to both sections 90.702 and 90.704, effective immediately upon the release of the opinion.

Eleventh Circuit Court of Appeals

Smith v. Commissioner, Alabama Department of Corrections, 17-15043 (May 22, 2019)

Smith appealed the denial of a petition for writ of habeas corpus and was granted a certificate of appealability "on whether he is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002)."

The Eleventh Circuit expanded the COA "to include whether the prosecutor at Smith's state trial struck jurors on the basis of gender, race, and national origin in violation of the Sixth and Fourteenth Amendments. . . ." The Eleventh Circuit affirmed the district court's denial of the habeas petition.

Atkins v. Virginia "held that the execution of individuals with intellectual disabilities violated the Eight Amendment." The Court did not define intellectual disability and state courts then took different approaches, with some establishing a bright line threshold for IQ scores; others did not. Moore v. Texas, 137 S.Ct. 1039 (2017), then "established that states cannot disregard current clinical and medical standards in assessing whether a capital defendant is intellectually disabled. In addition, the Court clarified that under prevailing clinical standards, the focus of the adaptive functioning inquiry should be on an individual's adaptive deficits – not adaptive strengths." The Moore decision was found by the Eleventh Circuit to announce a procedural rule, and, as a procedural rule, it did not meet the requirements for retroactive application under Teague v. Lane, 489 U.S. 288 (1989).

For a new rule to apply retroactively, Teague recognized two exceptions to the general bar against retroactive application: "The first exception is for substantive rules of constitutional law that place an entire category of primary conduct beyond the reach of the criminal law, including 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.' . . . The second exception is for 'watershed rules of criminal procedure' that are necessary to the fundamental fairness of criminal proceedings." As Moore announced a procedural rule, only the second exception had potential applicability, and the Eleventh Circuit found that the exception was inapplicable and Moore did not apply retroactively. While Moore was "an important development," the Court could not "say that Moore altered the bedrock procedural elements essential to the fairness of a criminal proceeding. . . ."

The Court then found that the state courts did not unreasonably apply Atkins. One IQ score was 64; others ranged from 72-75. One expert used a standard error of measurement and provided a range of 68-77. The state court did not credit the testimony regarding the IQ score of 64. As Atkins did not define intellectual disability or direct state on how to define it or provide a range of IQ scores, it could not be said that the state courts' rejection of the score of 64 was an unreasonable application of Atkins. Similarly, while Moore addressed adaptive weaknesses and strengths, as Atkins had not done so, the state courts' emphasis on Smith's adaptive strengths was not an unreasonable application of Atkins.

As to the Batson claim, the prosecutor exercised 14 of 15 peremptory challenges on female venire members. The state appellate court remanded the case to the trial court for the prosecutor to offer explanations. Four of the women "were eliminated because of their religious affiliations. The [state] court noted that three of the four women were Sunday School teachers; the other was a Counselor of Ministry." These women stated that their "religious beliefs would not preclude them from imposing a death sentence." The prosecutor did not ask any follow up questions before striking them. The state trial court accepted the prosecutor's explanation that the potential jurors were "susceptive to mercy arguments." The state appellate court affirmed the finding that the reasons were nondiscriminatory.

Smith argued that the prosecution was inconsistent, because one male venire member was not stricken after he identified himself as a member of his church's board. There was a problems with the state court transcript as to the name of this juror and the Eleventh Circuit assumed that the person referred to as Johnson was a misidentification, as the jury pool did not contain anyone with that name. Smith was therefore "unable to provide the state courts with any additional information about Johnson that might have been used to determine whether there were meaningful differences between him and the female venire members. We do not know Johnson's other answers during voir dire, information about his demeanor, or any other potentially relevant factors, such as his occupation." Accordingly, Smith did not meet his burden as a federal habeas petitioner.

Additionally, the fact that the women stated that their religious beliefs would not preclude them from imposing the death penalty was not dispositive. The prosecutor's reason was "that they would be particularly receptive to Smith's counsel's request for mercy at the penalty phase of the trial. This is an acceptable justification for a peremptory strike."

Long v. Secretary, Department of Corrections, 19-11942 (May 22, 2019)

Long was sentenced to death and, with a pending execution date, filed a section 1983 complaint and an emergency motion for a temporary restraining order, preliminary injunction or stay of execution. The motion for the restraining order or stay was denied and the federal district court found that all claims in the motion were barred by the doctrine of res judicata and that Long could not show a substantial likelihood of success on the merits.

Long appealed and challenged the prison Warden's denial of requests for exceptions to the policy of witnesses at the execution and the State's use of etomidate

in its lethal injection protocol. The Eleventh Circuit did not find any exceptional circumstances for a last-minute stay.

United States v. Babcock, 17-13678 (May 24, 2019)

Babcock was charged with two counts of producing a visual depiction of sexually explicit conduct with a minor. After a motion to suppress evidence seized was denied, he entered a plea and appealed the suppression issue.

The Court found that under the facts of the case, the officers had "probable cause to believe not only that the phone's owner had committed a crime and that the phone contained evidence of that crime, but also that the suspect would likely destroy that evidence before they could procure a warrant." As a result, the order denying suppression was affirmed.

An officer responded to a domestic-disturbance call at a camper parked by Babcock's residence and hear a female yelling, "Stop, stop, stop." The deputy knocked on the door of the camper, Babcock exited and closed the door behind him, and said that no one else was inside. The deputy then heard a female say she was coming out. A teenage girl exited and had blood on her left thigh. Babcock handed the deputy his cell phone to show a video of the girl, wearing only yoga shorts and a camo jacket, sitting on a bed, holding a knife to her throat and saying she wanted to die. Babcock could be heard berating the girl. The deputy returned the phone to Babcock, but asked for it again when backup arrived on the scene.

In an interview, Babcock denied knowing the girl's age and denied being in a relationship with her; he said she showed up unannounced and admitted that he knew her and that she had previously been his neighbor.

The girl, who had a license showing her to be 16, said she and Babcock had gone the night before to a party, where she consumed alcohol and cocaine, among other substances. When the girl started panicking or experiencing effects of an overdose, an ambulance was called and she was taken to the hospital.

Babcock then consented to a search of the camper where blood was discovered on the bedsheets and prescription pills were scattered about. When a detective asked Babcock for his phone again, he refused, but offered to email the video noted above. The detective kept the phone.

Subsequently, at the hospital, the girl made similar statements to a detective and denied the existence of any further relationship with Babcock. When the detective told her that he had Babcock's phone, she admitted a relationship and told the detective that the phone contained sexually explicit images of her. The detective then sought a warrant to search the phone and found nude images of the girl and explicit recordings of her and Babcock together.

The Eleventh Circuit rejected the government's "contention that the officers' two-day detention of Babcock's cell phone was a mere investigatory 'stop' allowable based on reasonable suspicion alone. Rather, we hold that it 'ripened' into a full-blown seizure that required probable cause." The Court's analysis focused on the lengthy duration of the seizure of the phone leading up to the warrant; the substantial nature of the "intrusion into Babcock's possessory interest in his private property," and the detective's lack of diligence – i.e., "holding onto Babcock's phone over the weekend rather than more promptly attempting to secure a warrant, either telephonically in person."

The Court, however, accepted that probable cause existed that an offense had been committed. In addition to facts noted above, the Court emphasized that the girl had been in Babcock's bed and left traces of blood there; and that, at that time, Babcock called her "dumb as f***" and complained that "this is what I deal with right here . . . you gotta do drama and fighting me all over the place." All of the facts gave the officers probable cause that "evidence of a crime would likely be found on Babcock's phone." That was not necessarily probable cause as to child pornography, but some crime.

As probable cause of the likely evidence of a crime being on the phone existed, the exigent-circumstances exception to the requirement of a warrant was applicable. An objective belief that Babcock would delete incriminating information prior to a warrant being obtained existed.

First District Court of Appeal

Gaskey v. State, 1D17-2793 (May 21, 2019)

Gaskey appealed convictions for two counts of first-degree murder and other offenses. The First District upheld the denial of a motion to suppress statements made during a post-arrest interrogation.

Gaskey argued that after waiving his Miranda rights, he invoked the right to counsel during the interrogation. The Court concluded that Gaskey did not make an unequivocal or an unambiguous assertion of the right to counsel, and the investigator was therefore not required to cease questioning Gaskey.

The officer was asking Gaskey questions about his girlfriend, Carroll, who had been arrested along with him. Gaskey became exasperated, and started talking about Carroll. He told the officer" "I just want to know what's wrong with [Carroll]. So, tell me what she's figured out, and after that, go ahead and f****g sign off that I need a lawyer or whatever if I'm being arrested. . . ." The Court held that this was not an unequivocal invocation of the right to counsel. Rather, it appeared "that Gaskey's primary motivation was to get information about Carroll. Indeed, Gaskey's entire conversation with Raley centered on Gaskey's repeated requests to find out why Carroll was crying and later what she 'figured out.'" Additionally, Gaskey's statement "was entirely conditional." Any alleged assertion of his right to counsel or to end questioning "was dependent on receiving information about Carroll."

The Court also rejected an argument that another officer, Lt. Harrison, misstated the law regarding first-degree murder during questioning. The lieutenant was describing the differences between first-degree murder, second-degree murder and manslaughter. "Harrison simply responded to Gaskey's statement with the accurate observation that his mindset during the commission of the crime is important to determining the punishment he faced." While the officer's explanations may have been "somewhat inapt to experienced criminal practitioners," there was nothing that constituted a misstatement of law.

Vito v. State, 1D17-3076 (May 21, 2019)

The First District affirmed the denial of a motion to withdraw a plea, rejecting the argument that "the trial court failed to make on-the-record determinations of certain required factors regarding his entry of the plea."

Vito argued "that the trial court failed to determine on the record that he understood the rights waived by (and potential consequences of) entering a guilty plea." The trial court, "without doubt . . . did not review each factor enumerated in Rule 3.172(c) in its colloquy with Vito." The "sole contention . . . was that he was misadvised as to the sentence he would receive, but at the hearing he conceded that counseled did not promise any specific sentence and that he understood the full range of sentences that could be imposed." At one point in the colloquy, Vito said that he

did not "understand the principle of it, you know, the important part of it," and the State "reminded him that he swore that he understood the rights he was waiving. Based on the foregoing, it was held that the claim was not preserved for review.

Alternatively, the Court found that Vito failed to demonstrate the requisite prejudice for withdrawal of a plea under Rule 3.172(j).

Mallet v. State, 1D17-4627 (May 21, 2019)

The First District affirmed the denial of a Rule 3.850 motion, for which an evidentiary hearing was held. Mallet argued that he would not have entered an open plea if he had known that counsel failed to reserve the right to appeal a prior order denying a motion to dismiss two of the counts. He pled to 117 counts of possessing images depicting sexual conduct by a child and two counts of possession with intent to promote such images.

At the evidentiary hearing, defense counsel admitted that he did not reserve the right to appeal because of his own misunderstanding of the preservation process. He had also told Mallet that there were no valid defenses to the charges against him, including the two possession-with-intent charges as to which the motion to dismiss was denied.

Mallet failed to establish prejudice. It was his burden to demonstrate that he would have proceeded to trial, but for counsel's ineffectiveness. He had no viable defenses. The State possessed extensive evidence of guilt. He was advised that he was giving up his right to appeal anything other than the sentence. He was facing a maximum sentence of 615 years and was sentenced to a term of 40 years plus probation. Even if the two intent to promote counts had been dismissed, he was still facing 585 years in prison.

Second District Court of Appeal

Underwood v. State, 2D17-4525 (May 24, 2019)

After a notice of appeal was filed from a conviction and sentence, the trial court lacked jurisdiction to consider and deny a motion for mitigation and reduction of sentence.

Third District Court of Appeal

Lopez v. State, 3D18-2623 (May 22, 2019)

The lower court erred by denying a facially insufficient motion for correction of jail credit under Rule 3.801 without giving Lopez leave to amend the motion.

Forte v. State, 3D19-368 (May 22, 2019)

Upon revocation of probation, the trial court imposed consecutive sentences for offenses under three different trial court case numbers. Forte argued that "by giving credit for all time served for offenses not charged in the same information, these sentences should run concurrently, not consecutively. The Court rejected that argument, as section 921.16(1), Florida Statutes, provides that sentences run concurrently unless the court specifically imposes them consecutively, as was the case here.

Fourth District Court of Appeal

Aragon v. State, 4D17-2010 (May 22, 2019)

Aragon appealed convictions for sexually assaulting three six-year-old girls. On appeal, he challenged the trial court's denial of his request "for a permissive lesser-included simple battery instruction on the three lewd or lascivious molestation counts." The Fourth District found no error and affirmed.

The State argued that "the trial court could not allow the simple battery instruction as a lesser-included offense because the information did not plead a lack of consent and the facts of the case did not support simple battery."

The Court set forth the elements of lewd or lascivious molestation and quoted the information and observed that the information did not "allege that the charged offense was committed against the victims' will." One of the requirements for a lesser-included offense instruction is that the charging document allege the elements of the lesser offense while charging the greater. As that had not occurred, there was no entitlement to the lesser-included offense instruction.

The Court rejected Aragon's argument that the "against the will" element of simple battery was implicitly charged because victims under the age of twelve lack the capacity to consent. The Court disagreed, because "the presumption of a lack of

consent based on the victim's age cannot be implicitly alleged when consent is not an essential element of the charged offense."

State v. Hansen, 4D18-261 (May 22, 2019)

Hansen was charged with one count of false report of a bomb threat and one count of misuse of 911 or 911 system. He entered an open plea of no contest, moved for a downward departure sentence, and sought a withhold of adjudication as to the false report charge. The trial court imposed a downward departure based on the need for specialized treatment for a mental disorder unrelated to substance abuse, addiction, or for a physical disability. The trial court also withheld adjudication for the offense of false reporting.

Section 790.163(1), Florida Statutes, which defines the crime of making a false report of a bomb threat, provides: "Notwithstanding any other law, adjudication of guilt or imposition of sentence for a violation of this section may not be suspended deferred or withheld. However, the state attorney may move the sentencing court to reduce or suspend the sentence of any person who is conviction of a violation of this section and who provides substantial assistance. . . ."

The Court engaged in statutory construction, emphasizing the meaning of "notwithstanding any other law," and concluded that that phrase reflected "the mandatory nature of the prohibition against withholding adjudication in connection with imposing a sentence for a false report for a bomb." The Court disagreed with Hansen's argument that "the statutory authority to suspend a sentence for the crime includes the authority to withhold adjudication of guilt." The adjudication of guilt relates to the judgment of conviction, not the sentence.

Fifth District Court of Appeal

Amaro v. State, 5D17-2744 (May 24, 2019)

Amaro appealed the denial of a Rule 3.850 motion. One of the claims addressed by the court on appeal was that counsel was "ineffective for failing to file a pretrial motion in limine requesting a Daubert hearing to either exclude or limit the State's introduction of expert testimony on tool-mark identification." At the time of trial, the statutory amendment to the evidence code adopting the Daubert test had been in effect for about 10 months. The Supreme Court, in 2018, refused to adopt the statutory amendment as a rule of court procedure. In May, 2019, days prior to

the opinion of this Court, the Florida Supreme Court did adopt the Daubert legislation, although that is not noted in the Fifth District's opinion.

Although Amaro received an evidentiary hearing on the 3.850 motion, he presented no expert testimony on this. In the appellate court, he sought to rely on articles found through a Google search. His inclusion of, and reliance on, such matters in his brief was improper. Turning to case law, the Court noted that tool-mark identification evidence was not new or novel and had previously been accepted by state and federal courts, under both the Daubert and Frye standards.

In another claim, Amaro argued that counsel was ineffective for failing to request a cautionary instruction "regarding unasked juror questions and to object to the trial court's noncompliance with" Rule 3.371. The Fifth District first held that this claim was not preserved for appellate review because Amaro failed "to cite to the record or transcript to identify the questions at issue." The Court noted that the transcript was over 1,300 pages. Nevertheless, the Court addressed "the merits of the claim for the benefit of future litigants." The trial court did fail to comply with the requirement that upon indication of a juror's desire to ask a question, "the jury must be advised that if a question submitted by a juror is not allowed for any reason, the juror must not discuss it with the other jurors and must not hold it against either party."

Trial counsel, at the postconviction evidentiary hearing, admitted he was not familiar with the rule. The Fifth District rejected the trial court's conclusion that the failure to request the instruction or object to its absence was a reasonable trial strategy. Nevertheless, Amaro failed to establish prejudice. His Rule 3.850 motion asked the trial court to "presume prejudice." The Fifth District rejected that argument, noting that to "decide otherwise would effectively find that the failure to instruct the jury pursuant to Rule 3.371(b)(5) constitutes per se reversible error."

Beauchamp v. State, 5D18-3381 (May 24, 2019)

A petition alleging ineffective assistance of appellate counsel was granted and the Court vacated the sentence and remanded for resentencing before a different judge.

At the sentencing hearing several witnesses spoke of the defendant's remorse. The defendant also testified, and referred to the incident, which included an aggravated battery on a law enforcement officer as an "accident." The judge then stated that "continuing to lie is not going to help. I'm trying to make up my mind

what sort of sentence to give you. Your insistence on trying to diminish your culpability is not helping your situation. You would be much better off in my eyes and certainly everyone else's if you would just tell the truth."

The sentence was reversed due to the trial court's erroneous consideration of lack of remorse.