Case Law Update
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Supreme Court of the United States

Mont v. United States, 17-8995 (June 3, 109)

The issue before the Court was "whether a convicted criminal's period of supervised release is tolled – in effect, paused – during his pretrial detention for a new criminal offense." "Given the text and statutory context of [18 U.S.C.] s. 3624(e), we conclude that if the court's later imposed sentence credits the period of pretrial detention as time served for the new offense, then the pretrial detention also tolls the supervised-release period."

Mont was sentenced to 120 months imprisonment, later reduced to 84 months, followed by five years of supervised release. He was released from prison on March 6, 2012, and the supervised release was "slated to end on March 6, 2017." There were numerous problems during the supervised release. Mont was charged with state court drug offenses in March 2015; he tested positive for cocaine and oxycodone in October 2015. His supervised-release violations were reported in January 2016. He was arrested again on new state charges on June 1, 2016 and he entered state court guilty pleas in October 2016, with sentencing set for December 2016. He was sentenced in state court on March 21, 2017 to six years imprisonment. The federal district court scheduled a supervised-release hearing for June 28, 2017.

Two days before that hearing, "Mont challenged the jurisdiction of the District Court based on the fact that his supervised release had initially been set to expire on March 6, 2017." Both the federal district court and Sixth Circuit Court of Appeals concluded that jurisdiction existed, but based their conclusions on different rationales. The district court relied on 18 U.S.C. s. 3583(i), "which preserves, for a 'reasonably necessary' period of time, the court's power to adjudicate violations and revoke a term of supervised release after the term has expired 'if, before its expiration, a warrant or summons has been issued on the basis of an allegations of such a violation.'" The summons for the supervised-release hearing had been issued on November 1, 2016, and jurisdiction therefore existed. The Sixth Circuit found that the supervised-release period was tolled "while he was held in pretrial detention in state custody under s. 3624(e)," which provides, in relevant part, that a "term of supervised release does not run during any period in which a person is *imprisoned*

in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.'" The "Sixth Circuit explained that when a defendant is convicted of the offense for which he was held in pretrial detention for longer than 30 days and "'his pretrial detention is credited as time served toward his sentence, then the pretrial detention is 'in connection with' a conviction and tolls the period of supervised release under s. 3624.'"" Thus, the instant case resulted in a tolling from June 2016 – March 2017, and there was "ample time left on his supervised-release term when the warrant issued on March 30, 2017."

"The Courts of Appeals disagree on whether s. 3624(e) tolls supervised release for periods of pretrial detention lasting longer than 30 days when that incarceration is later credited as time served on a conviction." The Supreme Court held "that pretrial detention later credited as time served for a new conviction is 'imprison[ment] in connection with a conviction' and tolls the supervised-release term under s. 3624(e). This is so even if the court must make the tolling calculation after learning whether the time will be credited."

Supreme Court of Florida

In re: Standard Jury Instructions in Criminal Cases – Report 2018-13, SC18-2020 (June 6, 2019)

The Supreme Court authorized for publication and use amendments to standard instructions 3.6(a) (insanity), 3.6(e)(1) and (e)2 (involuntary intoxication negating specific intent or resulting in insanity), and 3.6(j) (entrapment). New instructions were approved: 3.14 (scoresheet findings), and 7.7(c) (assisted self-murder).

The significant changes are the following:

Instruction 3.6(a) "is updated to ensure that the jurors understand that the insanity defense applies to lesser-included crimes."

Instructions 3.6(e)(1) and (e)(2) "are revised to reflect that intent is an essential element of not only the crime charged but also an appropriate lesser-included offense and that the defenses of involuntary intoxication negating specific intent and involuntary intoxication resulting in insanity may also apply to a lesser-included offense."

Instruction 3.6(j) adds language "to reflect that the defense of entrapment applies to applicable lesser-included offenses as well as the offense charged, and a definition for 'inducement' is added. . . ."

Instruction 3.14 is added to enable those findings of fact that increase the minimum sentence and which must be made by the jury.

Instruction 7.7(c) provides a new instruction for the offense of assisting self-murder under section 782.08, Florida Statutes (2018).

Eleventh Circuit Court of Appeals

Pitch v. United States, 17-15016 (June 4, 2019) (link to list of en banc issues)

The Eleventh Circuit granted rehearing en banc. The en banc issues relate to the secrecy of grand jury proceedings and the existence of exceptions beyond those listed in Rule 6(e):

> (1) This Court, in *In re Petition to Inspect and Copy Grand Jury Materials (Hastings)*, 735 F. 2d 1261 (11th Cir. 1984), recognized that courts have inherent power to go beyond the exceptions listed in Federal Rule of Criminal Procedure 6(e) to disclose grand jury records. Should we overturn our holding from *Hastings* and conclude that courts have no power to go beyond the exceptions listed in Rule 6(e)?
> (2) If courts have inherent power to go beyond the exceptions listed in Rule 6(e), may courts use this inherent power to recognized an exception to grand jury secrecy for matters of historical significance?
> (3) If courts have the inherent power to disclose grand jury records for matters of historical significance, what test should they apply when deciding whether to grant such disclosure.
> (4) Whether the district court's disclosure of the grand jury records in their entirety was an abuse of discretion given (a) the purposes of grand jury secrecy and (b) the government's failure to request any redactions.

First District Court of Appeal

Milliron v. State, 1D16-3889 (June 7, 2019)

After the denial of a motion to suppress evidence obtained pursuant to a traffic stop, the defendant entered a negotiated plea and reserved the right "to appeal the dispositive motion to suppress." The trial court accepted that reservation. The First District held that the appeal was "unauthorized because the order denying the motion to suppress is not dispositive as to two of appellant's convictions – battery on a law enforcement officer and resisting arrest with violence." The other convictions were for possession of methamphetamine, possession of a firearm by a convicted felon and possession of paraphernalia.

Florida law "prohibits the defendant from using violence to resist [an] arrest, even if the arrest was illegal." Thus, even without the evidence seized during the traffic stop, the State would be able to proceed with the prosecution for resisting with violence. Similarly, there is no right to commit a battery on a law enforcement officer even if an arrest is illegal.

The Second and Fifth Districts have permitted appeals where the suppression was dispositive as to some convictions but not others, and reversed those for which the suppression order was dispositive, while affirming the remaining convictions. The First District disagreed with that "piecemeal approach," because it "contradicts the purpose of the limitation that a defendant is only permitted to appeal dispositive rulings after entering a plea."

Byrd v. State, 1D17-1529 (June 7, 2019)

Byrd was charged with two drug offenses and one count of possession of paraphernalia. He was diagnosed with a substance abuse problem and had no prior convictions. He moved to "transfer his case to a pre-trial treatment-based program, but the trial judge denied relief." That decision, under s. 397.334(2), Fla. Stat., is discretionary.

The Court first noted that Byrd was eligible, notwithstanding a trafficking charge which was a first-degree felony, because of the statutory language of eligibility which includes "any other felony offenses that is not a forcible felony as defined in s. 776.08."

The trial court expressed concerns based on the Second Judicial Circuit's administrative order which limited eligibility to those charged with "a second or third degree purchase/possession offense under Chapter 893. . . ." The administrative order was in conflict with relevant statutory provisions. However, notwithstanding statutory eligibility, the denial of the transfer motion was not an abuse of discretion. The motion was not filed until shortly prior to the trial, three years after the filing of the charges, and the trial judge expressed dismay over the delay.

Weakley v. State, 1D17-2727 (June 7, 2019)

Weakley challenged the denial of a suppression motion after entering a plea and reserving the right to appeal. The First District affirmed and found that reasonable suspicion existed to stop Weakley.

The Court set forth the following as the relevant facts:

> A nighttime 911 call from a small, five-mobile-home area at the end of a dirt road reported a suspicious person on a motorcycle walking around a foreclosed home nearby. The caller believed the person might be committing a burglary, but, in the dark of the night, could not provide any additional details and then refused to disclose his or her identity. Two officers responded within minutes, driving down the empty road to the group of mobile homes. Before they got there, Jerry Weakley approached heading in the opposite direction on a motorcycle before aggressively accelerating and veering into the shoulder of the road in an attempt to flee past the offices. Based on the motorcyclist's behavior and the nature of the report, the officers stopped Weakley, discovered the motorcycle to be stolen, and found various articles of contraband.

In finding reasonable suspicion, the Court observed:

> A caller reported an unknown individual on a motorcycle walking around an abandoned home one night and believed a burglary might be occurring. Officers quickly responded to the very secluded area down a dirt road in the

> dark and found a motorcycle approaching. Rather than calmly stop or pull to the side of the road so the officers could pass, Weakley aggressively veered to pass the officers and flee.

One judge dissented, emphasizing the anonymous, bare-bones tip and the only other factor being the "perceived flight of an approaching motorcyclist." The majority opinion of the Court addressed the dissent and stated that the dissent considered the indicia of suspicion factors individually, not as a totality. The majority also addressed the dissent's contention that Weakley's conduct was not really a flight. The majority reiterated the "aggressive" driving that the officers observed.

Jarvis v. State, 1D17-4186 (June 7, 2019)

In McGouirk v. State, 493 So. 2d 1016 (Fla. 1986), the Supreme Curt held that "the imposition of consecutive mandatory minimums arising from the single criminal act of placing [a] bomb was improper." In the instant case, a Rule 3.800(a) motion alleged that the consecutive sentences were from a single criminal episode where a single bomb killed one person and injured two others. The motion, however, was properly denied because it was "not clear from the charging document or the verdict form (both attached to the trial court's order) that there was just a single act. Jarvis has thus not demonstrated entitlement to relief."

Kline v. State, 1D18-1706 (June 7, 2019)

Kline appealed convictions for 10 counts of child pornography. He argued that it was not clear that the trial court applied the correct standard when the court denied a motion for new trial based on the claim that the verdict was contrary to the weight of the evidence.

The trial court denied the motion stating that it was "denied for the reasons stated on the record during trial." Kline did not object or seek clarification. The argument on appeal was deemed unpreserved for appellate review and "the *potential* that the trial court erred does not reach the level of fundamental error."

Earl v. State, 1D18-3828 (June 7, 2019)

In a Rule 3.800(a) motion to correct illegal sentence, Earl argued that "the trial court's failure to impose mandatory minimum sentences rendered his sentence

illegal." He argued that the trial court failed to impose a 10-year mandatory minimum sentence on each of his convictions for armed robbery and kidnapping, as a Prison Releasee Reoffender. He received life sentences for each count.

The First District dismissed the appeal because "the order denying appellant's rule 3.800(a) motion was not adverse to appellant." The Court certified conflict with decisions of the Third and Fifth Districts, which have permitted such claims to be raised in a Rule 3.800(a) motion.

Osborne v. State, 1D17-2765 (June 5, 2019)

After the denial of a motion to suppress evidence seized during a search of his residence, Osborne pled no contest to charges of lewd and lascivious conduct and video voyeurism. On appeal, he challenged the denial of the suppression motion. The First District affirmed the convictions and sentences because Osborne "failed to reserve the right to appeal the trial court's ruling on the motions to suppress, either in the written plea agreement or during his plea colloquy. Further, the State did not stipulate, and the trial court did not determine, that the motions to suppress were dispositive."

Second District Court of Appeal

Nugent v. State, 2D17-3169 (June 7, 2019)

Nugent appealed convictions for trafficking in oxycodone, possession of a controlled substance and possession of drug paraphernalia. The Second District reversed because the State failed to prove constructive possession of any of the contraband. The Court set forth the following evidence from the trial:

> At trial, the State's evidence reflected that on May 31, 2016, the Lee County Sheriff's Office conducted a drug investigation focused on a red Mustang that officers had observed driving back and forth in a residential neighborhood. Detectives followed the Mustang to a convenience store where they observed a passenger exit the Mustang and stand on the store sidewalk. Moments later, Nugent, driving a dark Nissan, arrived and parked in front of the store. The Mustang's passenger entered the Nissan for a few minutes before going into the convenience store. When the passenger exited the store,

> police observed an unidentified object in his hand as he reentered the passenger side of the Nissan.
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> A detective followed the Nissan away from the store and conducted a traffic stop after observing the car fail to completely stop at a stop sign. Nugent handed the officer a rental agreement, which reflected that the car had been rented by Nugent's girlfriend. A few minutes later, a K-9 officer arrived and conducted an exterior sniff of the vehicle. The dog alerted to the driver's door.
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> Both Nugent and the passenger complied with the detective's request to exit the vehicle while two additional detectives conducted a search. During the search, the detectives discovered a white pill bottle labeled oxycodone lying sideways in the bottom of the driver's door pocket beside a half-filled bottle of water. A search of the center console revealed some cash and a man's watch on top of a baggie of white pills. Underneath the watch, cash, and pills was paperwork belonging to Nugent. The detectives also found an envelope addressed to Nugent in the glove compartment. Prior to his arrest, Nugent's girlfriend arrived at the scene and confirmed that she had rented the vehicle.
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> The detectives testified that they never saw Nugent make any furtive movements or reach toward the center console or driver's door pocket. While they believed that the water bottle belonged to Nugent, they admitted that the only evidence connecting it to Nugent was the fact that it was cold and had condensation on it. Although there was no evidence that the passenger purchased the bottle of water at the store, the detectives suspected that he had given the bottle to Nugent.

Additionally, there was no surveillance video evidence, no incriminating statements, no testimony from the passenger, no fingerprint or DNA evidence was adduced and the girlfriend did not testify as to how long and often Nugent used the rental car.

The key point of the Court's analysis was that because "the rental car was in joint possession rather than Nugent's exclusive possession, knowledge and ability to maintain dominion and control could not be inferred from Nugent's mere proximity to the contraband." Therefore, each element had to be proved by independent evidence. There "was no independent proof connecting Nugent to the drugs found in either compartment of the vehicle." "Even if we accept the State's argument that the pill bottle containing oxycodone – which was found inside the driver's side door pocket – was in plain view, this evidence is only sufficient to prove Nugent's knowledge of the pill bottle, not his dominion and control over it." Dominion and control require "'more than the mere ability of the defendant to reach out and touch the item of contraband.'"

Nugent's theory of defense was that "someone else had placed his papers in the console before the contraband was thrown in on top and that he was not aware of the pill bottle in the door when he borrowed the vehicle." This was consistent with other evidence in the case and the State's evidence was not inconsistent with the defense.

Reed v. State, 2D18-2005 (June 7, 2019)

In a Rule 3.800(a) motion, Reed alleged that the "sentence was illegal because the trial court lacked jurisdiction over him due to defects in the information, specifically the omission in the body of the information of his name as the person who committed the crime as well as the omission of the subsection of the statute that he was alleged to have violated."

This was an issue that could have been raised on direct appeal and thus is not cognizable in a rule 3.800(a) motion." The appellate court clarified some language used in the trial court's order. While "a party cannot collaterally attack his or her conviction or sentence based on an alleged technical defect in the information that could have been corrected if a timely objection had been made," "'a claim that a sentence was illegally imposed because the information did not charge the defendant with an element required for his [or her] sentence is cognizable in a rule 3.800(a) motion.' [citation omitted]. Likewise, a defendant may attack his or her conviction where an indictment or information completely fails to allege 'one or more of the essential elements of' a crime because that 'is a defect that can be raised at any time – before trial, after trial, on appeal, or by habeas corpus.'"

Fourth District Court of Appeal

Dippolito v. State, 4D17-2486 (June 5, 2019)

The Court issued a substituted opinion on a motion for rehearing en banc. Dippolito appealed a conviction for soliciting to commit the first-degree murder of her husband.

The trial court did not abuse its discretion in allowing the State "to introduce evidence that [the defendant] told her lover that she had previously tried to poison her husband with antifreeze." Although the trial court had ruled to exclude that testimony in a pretrial hearing, defense counsel opened the door when counsel "elicited testimony from the lover that he didn't believe that appellant actually wanted to kill her husband." The evidence "was necessary to limit the lover's testimony on direct. It also explains why the lover initially approached the police – because he did actually believe appellant was going to kill her husband."

The Fourth District further held that law enforcement's conduct did not amount to objective entrapment as a matter of law. The police participated in the "Cops" TV program. That did not occur until after the arrest of the defendant. In the program, the "police staged a fake crime scene at appellant's home and informed her that her husband had been killed in the manner described by the hit man. Appellant's reaction was videotaped. . . ." At a subsequent interview, the defendant was told that her husband was still alive and she maintained her innocence. The defendant also argued "that the police threatened the lover to gain his cooperation," but the trial court found that there were no threats. "It was the lover who first approached the police with his concern that appellant would kill her husband, not the other way around." On a related issue there was no error in not instructing the jury on objective entrapment. That is a matter for the court as a matter of law and was decided by the court after an evidentiary hearing.

Last, the Fourth District briefly addressed, and found no error, the admission of collateral offense evidence. All of these were deemed necessary "to give a complete or intelligent account of the criminal episode and how it developed over time. The text messages were entered into evidence to show that Dippolito had an ongoing plot, first to have her husband's probation revoked in order to obtain his assets. And later, when she failed to get his probation revoked, she plotted to murder him."

Cuciak v, State, 4D18-437 (June 5, 2019)

The Fourth District reversed the denial of a pro se motion to withdraw plea after sentencing because the trial court failed to appoint conflict-free counsel. After a negotiated plea and imposition of sentence, defense counsel moved to withdraw and Cuciak filed his motion to withdraw plea and appoint counsel. Original counsel was permitted to withdraw and, while Cuciak was unrepresented, the court summarily denied a motion to withdraw plea. Pursuant to Rule 3.170(l), the 30-day period after sentencing in which a motion to withdraw plea may be filed is a critical stage of the proceedings during which a defendant is entitled to counsel.

Joseph v. State, 4D18-538 (June 5, 2019)

Joseph appealed convictions for first-degree murder, armed robbery, armed kidnapping, and grand theft of a motor vehicle. The Fourth District affirmed and upheld the denial of a motion to suppress evidence of the victim's possessions, which had been found in Joseph's pockets after his arrest.

The initial stop of Joseph was supported by reasonable suspicion. He "and the codefendant matched the physical description of the suspects provided by a citizen informant, they were apprehended shortly after the crime and near the abandoned house, and they were the only two people outside in the crime scene area." "The fact that his shirt was a different color than was originally reported by the informant was insufficient to dispel suspicion, as he may have merely discarded the other shirt."

It "was reasonable for the officer to draw his weapon and place Joseph in handcuffs because he was suspected to be armed and his co-defendant fled. The drawn weapon and handcuffs did not convert the encounter into an arrest."

After the handcuffing and flight of the co-defendant, Joseph "was tentatively identified by a witness at a show-up." Joseph was then arrested and searched. The detective explained "that department policy was that an individual is in custody when he is going to be taken to headquarters, and then he inventories what is on their person. . . ."

Ramos v. State, 4D18-1035 (June 5, 2019)

Ramos was charged with two counts of sexual battery by "'causing his penis to penetrate or have union with the butt of [the victim].'" There was no challenge

to the information. At trial, the victim, ten years old at the time of the trial, stated that "the inappropriate contact was with her 'butt.'" There were inconsistencies in her descriptions of what occurred. Ramos gave a statement to a detective, and eventually admitted inappropriate contact, but he was inconsistent on what happened.

The jury was instructed as follows: "[The defendant] committed an act upon [the victim] in which the sexual organ of [the defendant] penetrated or had union with the **butt** of [the victim]." There were further definitions of union as contact. There were no objections.

Ramos argued that the use of the word "butt" instead of "anus" constituted fundamental error. The Court agreed. "Significantly, the instructions did not define 'butt' or specify that the defendant's act must involve contact with or penetration of the victim's anus."

State v. Crossley-Robinson, 4D18-1393 (June 5, 2019)

The Fourth District reversed a downward departure sentence because the record did not support it. The defendant entered an open plea to four robberies and one attempted robbery. The victims were four banks and the offenses occurred over a six-month period.

The first reason for the departure was that the offenses "were committed in an unsophisticated manner and were isolated incidents for which the defendant had shown remorse." The offenses were not "isolated incidents" as that phrase is used in s. 921.0026(2)(j), Florida Statutes. With incidents occurring over a six-month period and with four different victims, they could not be considered isolated incidents.

The second reason for departure was that the defendant "cooperated with the state to resolve the current offense or any other offense." The Fourth District concluded that "the defendant's telephonic reporting of a molestation of her child, a crime which she did not witness or participate in, and which predated some of her offenses, was insufficient to establish 'cooperation' with the State under section 921.0026(2)(i)."

D.L.T. v. State, 4D18-2528 (June 5, 2019)

The Fourth District affirmed the disposition of the juvenile case and rejected the claim that the "trial court's explanation for departing from the DJJ's recommendation was inadequate." D.L.T. challenged the trial court's failure "to articulate the potential lengths of stay associated with each level of restrictiveness, as well as the trial court's understanding of the treatment programs and services available at the various levels." The claim was not preserved for appellate review. And, even though a failure to comply with E.A.R. v. State, 4 So. 3d 614 (Fla. 2009), constitutes fundamental error, the failure to either object or raise the claim through a motion under Rule 8.135(b) during the pendency of the direct appeal precludes it being considered on direct appeal.

Fifth District Court of Appeal

Purcell v. State, 5D17-2901 (June 7, 2019)

The trial court erred in denying a pre-sentence motion to withdraw a plea as Purcell established good cause for the motion. The motion alleged that "her attorney failed to inform her of the negative consequences a plea would have in the corresponding dependency case." Purcell pled no contest to two counts of child abuse. "[W]hile failing to inform Purcell of the collateral consequence of the termination of her parental rights may not have rendered her plea involuntary, her ignorance of the consequence does establish good cause."