Case Law Update
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Supreme Court of the United States

Quarles v. United States, 17-778 (June 10, 2019)

Quarles pled guilty to being a felon in possession of a firearm and had three prior convictions "that appeared to qualify as violent felonies under the Armed Career Criminal Act, 18 U.S.C. s. 924(e)." One of those convictions was a Michigan state court conviction for third-degree home invasion robbery. Section 924(e) defines "violent felony" as including burglary. In Taylor v. United Stats, 495 U.S. 575 (1990), the Supreme Court previously addressed the generic statutory term "burglary" as including, inter alia, "remaining in a building or structure, with intent to commit a crime." Taylor had also noted that state statutes vary significantly in their definitions of burglary and therefore focused on the scope of generic remaining-in burglary.

In this case, the Court addressed the narrow question of "whether remaining-in burglary (i) occurs only if a person has the intent to commit a crime *at the exact moment* when he or she *first* unlawfully remains in a building or structure, or (ii) more broadly, occurs when a person forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure." The Court concluded, for purposes of section 924(e), that "remaining-in burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure."

In support of this conclusion, the Court noted that "the possibility of a violent confrontation does not depend on the exact moment when the burglar forms the intent to commit a crime while unlawfully present in a building or structure. . . . The dangers of remaining-in burglary are not tied to the esoteric question of precisely when the defendant forms the intent to commit a crime."

Supreme Court of Florida

Shine v. State, SC18-688 (June 13, 2019)

The Supreme Court reviewed a conflict "on the issue of whether a defendant is entitled to a de novo sentencing proceeding after an appellate court determines that the trial court's initial downward departure sentence was not supported by legally sufficient findings." The Court held "that the proper remedy upon reversal of a sentence due to the invalidity of a downward departure resentencing is de novo."

When the State appealed the downward departure sentence, the Third District determined that the departure was invalid and "reversed and remanded for 'resentencing within the sentencing guidelines.'"

In Jackson v. State, 64 So. 3d 90 (Fla. 2011), the Supreme Court previously addressed the issue of "'whether an appellate court that reverses the imposition of a downward departure sentence must remand for resentencing within the CPC, or whether it may remand for resentencing outside of the CPC." The Court, in that case, held that "'on remand for resentencing a trial court is permitted to impose a downward departure when the trial court finds a valid basis for departure as prescribed under the [CPC]."

The State, in Shine, argued that Jackson did "not govern the remedy for an erroneous downward departure in all circumstances, relying on the trial court's failure to provide written reasons for departure in that case as a distinguishing factor." The Court, in Shine, rejected the State's effort to distinguish or limit Jackson. The Court reiterated its holding that "on remand for resentencing due to the substantive invalidity of a downward departure, the trial court is permitted to impose a downward departure as long as the departure 'comports with the principles and criteria' of the CPC."

Eleventh Circuit Court of Appeals

United States v. Cooper, 17-11548 (June 10, 2019)

Cooper was convicted for wire fraud, using a facility in interstate and foreign commerce to promote and unlawful activity, attempting to import and importing an alien for an immoral purpose, and attempted sex trafficking and sex trafficking. Cooper challenged the sufficiency of the evidence, the admissibility of some of the evidence, and the accuracy of the jury instructions.

The Court provided a brief summary of the scheme that led to the charges and convictions:

> The indictment alleged a scheme to use a government-sponsored program to lure young women students from Kazakhstan to Florida by promising them clerical work in an office. Instead, the students arrived to learn that they had to perform sexual acts for the defendant's paying customers. The government's challenge was that the students had returned to Kazakhstan and refused to testify, requiring the government to use other sources of proof. The defense challenge was that the evidence amply proved guilt.

The job descriptions and offers related to "answering phones, doing clerical work, organizing retreats, and making appointments for massage, private yoga, et cetera." Some ads posted by Cooper for his business stated that "travel students" would "give 'erotic full body massages'", "exotic body rubs," and "tantric treatments."

A sting operation was set up and an undercover detective met two of the foreign students and "was told the cost of having sex with them, and paid." A raid then resulted in the seizure of materials including Cooper's phone, with "client-contact information and texts directing clients to Cooper's apartments." There was also a visitor log showing 50 visitors over a two-month period. One of the two students the undercover detective met cooperated in a monitored call to the phone number listed in ads.

Cooper still continued operating the sex business and over one year later an undercover agent contacted Cooper by phone and talked about "providing 'full service' and 'sensually erotic massages.'" A second sting operation resulted in the detention of an "employee after she met and negotiated prices with an undercover agent who had made an appointment" based upon the business's advertisement. This employee "handed over text messages discussing sexual services, sent to and received from the [phone number used in ads]." Cooper was arrested several years later, in 2016, and "electronic devices and a notebook seized during the arrest included information about his prostitution business."

Numerous unpreserved Confrontation Clause claims were presented and the Court rejected them for multiple reasons, including that they did not involve

"testimonial" statements under Crawford v. Washington. One of these claims was that a Special Agent was permitted to testify that one of the nontestifying victims "had identified Cooper's voice during a monitored phone call." The district court, however, had multiple means of identifying the voice, including the person referring to himself by his first name and the subject matter of the discussion. The identity of the person on the call was thus authenticated absent the challenged testimony. And, the victim's statements on the call were not hearsay as they were not offered to prove the truth of the matter asserted, 'but to give context to the admissible statements," i.e., the admissions of Cooper.

Cooper challenged the use of a book found during a search which included contact information and descriptions of women as inadmissible evidence of prior bad acts. The Eleventh Circuit disagreed, as the exhibit was "relevant to issues other than Cooper's character, including his intent to continue to operate his se business, knowing the type of business it was. The government had to prove that Cooper's actions were part of 'a continuous course of conduct.'"

Evidence of sex trafficking and attempted sex trafficking by fraud was found to be sufficient. The victims were recruited to travel to the United States based on representations that they would be dong clerical and office work at the defendant's yoga studio. Facebook correspondence showed that the victims "were surprised to learn that they were required to do sex work and supported the government's theory that they were not voluntarily providing sexual 'happy ending' massages or other sexual services."

A requested defense instruction that "there was no prohibition on participant performing massages or being employed in the adult entertainment industry" was properly rejected because it "misstate[d] the [federal] regulations by equating an illegal prostitution job with any and all jobs in the adult-entertainment business," among other reasons.

The inclusion of a jury instruction referring to "'unlawful activity'" as including "any business enterprise involving prostitution and related acts in violation of the laws of the State in which they were committed," did not enable the jury to convict Cooper for acts that did not violate the law. "Related acts" was "clearly limited to illegal acts associated with prostitution."

There was no abuse of discretion "in refusing to give Cooper's requested missing-witness instruction" because the record did "not show that the witnesses

were 'peculiarly within the power of' the government." The government itself had tried, but failed to get the students to testify.

United States v. Fox, 18-10723 (June 13, 2019)

Fox appealed a 360-month sentence for one count of sexually exploiting a minor through the production of child pornography. He argued that the court "improperly calculated his guideline range by applying a five-level upward enhancement to his base offense level," and that the sentence was "substantively unreasonable because the District Court failed to properly consider his age."

The five-level enhancement of USSG s. 4B1.5(b)(1) is based on "a pattern of activity involving prohibited sexual conduct." The Eleventh Circuit agreed with other Circuits that the enhancer could apply to repeated prohibited conduct with the same minor; it did not require multiple victims.

Fox further argued that the enhancement required "two unrelated instances of prohibited sexual conduct." The Court disagreed. The Court also rejected his contention that the enhancement "does not allow for the conduct underlying a conviction to be used to enhance a defendant's sentence." An Application Note to the guidelines section expressly addressed that issue and is quoted in the opinion.

Finally, the Court rejected the argument that the sentence was excessively harsh and unreasonable because "of the low probability that he will survive his term of imprisonment." The district court did consider Fox's age – 60 – at the sentencing hearing, but "ultimately determined the nature of Fox's offense outweighed any age-related concerns."

First District Court of Appeal

Hicks v. State, 1D17-1830 (June 12, 2019)

At a Stand-Your-Ground immunity hearing in 2015, the court heard conflicting evidence and both sides agreed that Hicks bore the burden of proof. The trial court denied the motion. Hicks then pled to a charge of aggravated battery with a deadly weapon, reduced from attempted murder. He then appealed, in 2017, before the legislative amendment to the burden of proof in the SYG statute.

Hicks argued that the amended burden of proof applied retroactively. The First District has previously so held, while disagreeing with decisions of the Third

and Fourth Districts. However, "regardless of the statute's applicability . . ., we must affirm because the sole issue Hicks now raises on appeal – which party had the burden – is not dispositive of his case." It was not dispositive because "Hicks does not ask us to hold that the trial court should have granted immunity; he asks only that we remand for 'a new immunity hearing under the current evidentiary standard.'"

One judge dissented, in part due to the Court having decided the dispositiveness issue without the benefit of briefing, but also due to the State's stipulation in the lower court to dispositiveness. The majority disagreed as to the stipulation, finding it to be a stipulation to the effect that if the appellate court concluded the defendant was entitled to immunity it would be dispositive. The dissent also found that issues of immunity should be authorized as interlocutory appeals.

Fletcher v. State,1D18-1867 (June 12, 2019)

The First District granted a petition for writ of prohibition, finding that Fletcher was entitled to immunity from prosecution under the Stand Your Ground law. Fletcher was charged with aggravated battery with a firearm.

Fletcher had a concealed weapons permit and testified that the shooting constituted justifiable use of force. He and his brother drove to Parker's home because of concern for their sister, who had a "troubled relationship" with Parker. Parker was believed to be violent by Fletcher and known to generally carry a firearm.

Upon arriving, Fletcher called 911 and approached Parker's home. Fletcher observed Parker reach for his waistband. Fletcher brandished his own firearm and warned Parker to stop. When Parker "made an aggressive move towards Fletcher's brother," Fletcher fired a shot which struck Parker's leg.

Parker and his mother testified to the effect that Fletcher's brother had been confrontational and that when Parker saw Fletcher with a firearm, Parker tried to knock it out of his hand. Parker's mother also testified that Fletcher stood behind Parker, holding a gun to his head. The trial court made credibility findings and discredited Parker's and his mother's testimonies.

While the trial court concluded that Fletcher had objectively reasonable fear, the court denied immunity based on "its belief that the evidence showed that Fletcher was trespassing on Parker's property and therefore, not where he had a right to be."

The First District reviewed the evidence of possible trespass. First, it came from the two discredited witnesses. Second, Fletcher's testimony was supported by a 911 recording, to the effect that Fletcher "was away from the property when the altercation began."

Mency v. State, 1D18-1993 (June 12, 2019)

Although the trial court erred, under First District case law, when it did not apply the 2017 amendment to the Stand Your Ground law's burden of proof retroactively, that error was not consequential, because the trial court stated that "regardless of who had the burden, the appellant was not entitled to immunity. This ruling implies that the trial court made a ruling under both standards."

Dixon v. State, 1D18-2055 (June 12, 2019)

A claim of entitlement to jail credit was moot because the defendant had served his sentence and the appeal was dismissed.

Jackson v. State, 1D18-2541 (June 12, 2019)

Jackson pled guilty for offenses he committed in 1989 when he was 17-years old – first-degree murder and sexual battery with great force. Other charges were nolle prossed and he was sentenced to life for the murder followed by 15 years for the sexual battery. In 2016, he sought relief under Miller v. Alabama. He received a new sentencing hearing, and the trial court reimposed the life sentence for the murder with review after 25 years and made detailed findings under the 2014 juvenile sentencing statutes.

The court made findings that Jackson's actions "reveal something much more than transient immaturity of youth," and that the court was "not convinced that youth, educational limitations, or lack of normal functioning family are at the root cause of the terror, violence, and premeditation exhibited in this case." The court concluded that Jackson was "among the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." As these findings were supported by competent substantial evidence, the sentence was upheld.

Jackson also argued that "because he was eligible for a sentence review hearing at the time of his resentencing hearing, the trial court should have given greater weight to the evidence of his maturity and rehabilitation as demonstrated by his relatively clean disciplinary record and his involvement in self-betterment

activities while prison." The First District disagreed with this argument. The sentence and hearing under review were a resentencing hearing, not the statutory "review" hearing. And, the weight of relevant sentencing factors is for the trial court, not the appellate court.

Reese v. State, 1D18-3108 (June 12, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion, but disagreed with the trial court's rationale for denying several claims.

Reese's motion for rehearing in the trial court clarified that the claim of ineffective assistance for not presenting mitigating evidence referred to sentencing rather than the trial; the trial court did not address the sentencing issue. There was no prejudice as the life sentence as a PRR was statutorily mandated and could not be mitigated.

In another claim, the trial court concluded that counsel was not ineffective for failing to ask the victim about "his pending criminal charges to show that he had a motive to testify that his attacker was a woman (Reese) as the State claimed, and not a man as he originally told the police." The trial court found that the victim's credibility could not be impeached with the pending charges. However, "'when charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest.'" The appellate court found that the claim failed to establish prejudice, as defense counsel extensively cross-examined the victim and elicited other matters such as drug use and discrepancies in the description of the gender of the attacker.

The trial court rejected a claim of ineffective assistance for failing to raise double jeopardy challenges as to convictions for aggravated battery with a firearm and battery by engaging in Blockburger double jeopardy analysis. The correct rationale for this claim was that each count referred to a different victim.

Bell v. State, 1D18-3168 (June 12, 2019)

The First District affirmed the denial of a motion to correct illegal sentence. In 1997, Bell was convicted of armed robbery and sentenced to life as a VCC. In 2004, the VCC sentence was vacated and he was again sentenced to life as an HFO. He now argued that "because the basis for the departure sentence in 1997 was found invalid in 2004, the court could not again depart during resentencing." That argument, based on Shull v. Dugger, 515 So. 2d 748 (Fla. 1987), which held "that a

trial court may not enunciate new reasons for a departure sentence after the reasons given for the original departure sentence have been reversed" had already been rejected by the Supreme Court "as applied to the habitual felony offender statute."

Ledsome v. State, 1D18-3859 (June 12, 2019)

One of the grounds for revocation of probation was reversed due to insufficient evidence. Ledsome "was given until the 31st of [May] . . . to report, but other evidence adduced at the hearing on the affidavit of probation established Ledsome was arrested on the 31st. Thus, the violation for failure to report on May 1st is not established in the record. . . ."

Third District Court of Appeal

Williams v. State, 3D18-1188 (June 12, 2019)

The failure to give the standard jury instruction 3.7 (reasonable doubt; burden of proof) constitutes fundamental error.

Thourtman v. Junior, 3D18-2433 (June 12, 2019)

The Third District, disagreeing with decisions from the Fourth District Court of Appeal, held that Article I, section 14 of the Florida Constitution does not prohibit "a trial court from detaining a defendant beyond first appearance for a reasonable time pending an Arthur bond hearing unless the trial court makes a preliminary finding of 'proof evident, presumption great.'"

Thourtman argued that although the trial court at first appearance found the existence of probable cause for an offense punishable by life, the court failed to make a further preliminary finding of proof evident, presumption great, and that he was therefore entitled to the setting of bail. The Third District held that for "the same reasons that it is not constitutionally required or practical to conduct a full Arthur hearing at first appearance, it is not constitutionally required or practical to hold a 'preliminary' Arthur hearing at first appearance. Nothing in Article I, section 14 prohibits a trial judge at first appearance, upon finding probable cause that the defendant committed a crime punishable by capital punishment or life imprisonment, to defer ruling on a bond and to detain the defendant for a reasonable time necessary to conduct an Arthur bond hearing. The Court certified conflict with the decisions of Gray v. State, 257 So. 3d 477 (Fla. 4th DCA 2018) and Ysaza v. State, 222 So. 3d 3 (Fla. 4th DCA 2018).

One judge dissented. Review of the decision is currently pending in the Florida Supreme Court.

Cadet v. State, 3D19-178 (June 12, 2019)

In a Rule 3.800 motion to correct sentence, Cadet argued that his revocation of probation was improper because the trial court erred when it placed him on administrative probation. Although it is correct that administrative probation – i.e., non-reporting probation – can be imposed only by the Department of Corrections, the Third District affirmed the denial of the motion. "Otherwise defective sentences" have been upheld "when they were voluntarily accepted by the defendant as a part of a mutually advantageous agreement with the State."

Fourth District Court of Appeal

Simeone v. State, 4D18-3470 (June 12, 2019)

The Fourth District denied a petition for writ of mandamus or certiorari seeking to compel Simeone's admission into veterans' court.

The Fourth District denied the petition and, based on its reading of the "plain language" of section 948.08(7), Florida Statutes, held that "a defendant who satisfies section 948.08(7)'s criteria is 'eligible' for, but not entitled to, admission into veterans' court." The statute provides that a veteran, as defined in section 1.01, Florida Statutes, "who suffers from a military service-related mental illness, traumatic brain injury, substance abuse disorder, or psychological problem, is eligible for voluntary admission into a pretrial veterans' treatment intervention program approved by the chief judge of the circuit, upon motion of either party or the court's own motion, except" for enumerated circumstances based on prior entry into or offer of such a program. Furthermore, the "court shall dismiss the charges upon a finding that the defendant has successfully completed the pretrial intervention program."

The Fourth District first concluded that certiorari, not mandamus, was the proper means for reviewing the motion for transfer to veterans' court. Then the Court found that the denial was not a departure from the essential requirements of law. Focusing primarily on the term "eligible," the Court found that the "statute merely provides the criteria which the defendant must satisfy to be 'qualified to

participate or be chosen' for veterans' court, but does not require his automatic admission into veterans' court, if qualified."

The Court did express concerns about the administrative order of the 15th judicial circuit, which stated that "[f]inal determination for the admission of a defendant to [veterans' court] will be made by the [veterans' court] Judge based on recommendations from,, and as appropriate with the concurrence of, the Assistant State Attorney, Assistant Public Defender, VA, and Probation." The concern was that nonconcurrence by the State Attorney could constitute a limitation on the trial court's statutory discretion. The Court did not rule on the validity of that language as there was nothing in the record in this case indicating "that any such deferral or abdication of the veterans' court judge's discretion has occurred. . . . We trust that the veterans' court judge and the state will continue to be cognizant of our observations going forward."