Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Moss, 17-10473 (July 15, 2019)

The Court vacated the prior panel opinion and granted rehearing en banc. For the en banc rehearing, the Court directed the parties to address the following issue:

> In light of the Supreme Court's decision in Voisine v. United States, 136 S.Ct. 2272 (2016), does a conviction predicated on a mens rea of recklessness have "as an element the use, attempted use, or threatened use of physical force against the person of another" such that it qualifies as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. s. 924(e)(2)(B)(i)? And to what extent does that analysis affect United States v. Palomino Garcia, 606 F. 3d 1317 (11th Cir. 2010)?

First District Court of Appeal

Gunn v. State, 1D17-5062 (July 16, 2019)

The First District reversed and remanded for resentencing before a different judge, finding that the sentencing judge "erred by having a predetermined, pretrial intention to sentence Mr. Gunn consecutively." This was based on the judge's comment in a written order denying a motion to correct sentence:

> Given the fact that Defendant committed the robbery in this case while on probation, it was always the intent of this Court that Defendant serve his prison sentence in this case consecutively to his VOP prison sentences. This Court's intent was known to the parties, including Defendant personally, prior to the trial in this case. Because this Court imposed the sentence that it intended to impose, Defendant's claim is without merit.

Green v. State, 1D18-1281 (July 16, 2019)

A habeas corpus petition is generally not authorized for collateral postconviction relief and may not be used in an attempt to circumvent the time-bar that would apply had the claim been asserted in a motion under Rule 3.850.

Smith v. State, 1D18-3907 (July 16, 2019)

"A Brady claim is cognizable in a postconviction motion," as is counsel's alleged "failure to seek suppression" of evidence. Smith alleged that he would not have pled guilty but for these two alleged claims and as record attachments to the lower court's order summarily denying the claims did not conclusively refute them, Smith was entitled to an evidentiary hearing.

Ratley v. State, 1D18-4184 (July 16, 2019)

"'Once a trial judge recuses himself from a given case, any subsequent orders he enters in that case are void and have no effect.'" The judge erred by ruling on a Rule 3.853 motion after having previously disqualified himself from the case.

Washington v. State, 1D17-1978 (July 15, 2019)

Prior to trial, Washington had an evidentiary hearing on his stand your ground immunity motion. The trial court denied it on the basis of the then-existing burden of proof which was on the defendant. After conviction at a jury trial, on direct appeal the First District applied its prior decisions, holding that the 2017 statutory amendment to the burden of proof, placing it on the State, applied retroactively. The Court again certified conflict with decisions of the Third and Fourth Districts.

As this case had proceeded to trial and resulted in a guilty verdict, the remedy was a reversal of the conviction and a remand for a new immunity hearing. If the trial court then finds that Washington is entitled to immunity, it must dismiss the case with prejudice. If the court concludes that he is not entitled to immunity, it will then reinstate the conviction.

Second District Court of Appeal

Ratliff v. State, 2D16-5322 (July 19, 2019)

Pursuant to Franklin v. State, 258 So. 3d 1239 (Fla. 2018) and State v. Michel, 257 So. 3d 3 (Fla. 208), and on remand from the Florida Supreme Court, Ratliff's life sentences with parole eligibility for first-degree murder and attempted first-degree murder, committed when he was a juvenile, were not unconstitutional.

Anthony v. State, 2D18-1987 (July 19, 2019)

Anthony filed a mandamus petition against the Public Defender's Office, seeking a "copy of a report from the Department of Justice (DOJ) for the purpose of including this report in his motion for postconviction relief as newly discovered evidence under Florida Rule of Criminal Procedure 3.850." The trial court dismissed the petition as facially insufficient because Anthony did not acknowledge his obligation to pay for copying costs. The Second District reversed and remanded for further proceedings.

Mandamus is an appropriate remedy for a defendant to compel a public defender to produce records from the defendant's own case after a prior request for the records has been denied. "A defendant, when represented by a public defender, is entitled to free copies of his or her own records or property, including copies of all trial and hearing transcripts, motions, State discovery presented to defense counsel, and any other documents that were otherwise prepared at public expense. . . . On the other hand, a defendant is not entitled to free copies of documents in the possession of a public defender if the documents were not obtained at public expense." There is no requirement that "the petitioner affirmative acknowledge an obligation to pay for copying costs in order to state a valid claim for mandamus relief." Whether the DOJ report at issue falls under the category of free copies or not is to be determined after the Public Defender responds to the writ petition.

Raysor v. State, 2D18-2610 (July 19, 2019)

The Second District reversed the summary denial of two claims of a Rule 3.850 motion for further proceedings. Raysor alleged that counsel was ineffective for failing to object to three comments by the prosecutor in closing argument. The State responded to the motion asserting that the comments in question relied on inferences that could reasonably be drawn from the comments. The trial court's order denied the claims based on the use of standard instructions informing the jurors

that what the attorneys say is not evidence and that attorneys may make reasonable inferences from the evidence. The court's order did not attach the transcript of the jury instructions. Nor did the attachments to the lower court's order include either recordings or transcripts of Raysor's statements to law enforcement that were referred to in the prosecutor's closing argument.

Even when standard instructions are given, that what attorneys say is not evidence, that does not necessarily cure a prosecutor's statement if the statement relies on facts not in evidence.

Davis v. State, 2D17-4460 (July 17, 2019)

The Court accepted the State's concession "that the circuit court erred in finding that Davis willfully violated probation by changing his residence without first obtaining the consent of his probation officer when, shortly after his release from jail, he learned that he would not be permitted to live at his approved residence and was forced into temporary homelessness."

Westervelt v. State, 2D17-4639 (July 17, 2019)

The defendant entered a guilty plea to eight finance-related offenses. A written plea agreement provided for restitution in excess of $1,100,000 and 10 years in prison plus probation. It also provided that for each $200,000 of restitution paid prior to sentencing, the prison term would be reduced by one year.

In a motion to correct illegal sentence, the defendant argued that a defendant cannot agree to an illegal sentence, and one which conditions payment of restitution on ability to pay is an illegal sentence. The Second District noted the correctness of those principles, but affirmed the denial of the motion. The defendant's motion did not provide a transcript of the plea/sentencing hearing, and the appellate court therefore had "no knowledge of how the conversation among the court, Westervelt, and the parties' attorneys may have proceeded." The lower court's order was therefore affirmed.

Third District Court of Appeal

Aquino v. State, 3D17-1666 (July 17, 2019)

In a direct appeal for a conviction for lewd or lascivious conduct by a person 18 years or over and a victim under 16 years, Aquino argued that trial counsel's

failure to move for judgment of acquittal was fundamental error based on the sufficiency of the evidence and that counsel was further ineffective for failing to object to the State's request for an instruction on the lesser included offense of attempted lewd or lascivious conduct. The Third District affirmed the conviction and sentence.

The jury instructions defined lewd and lascivious to mean "a wicked, lustful, unchaste, licentious or sensual intent on the part of the person doing an act." "Based on this definition, there was sufficient evidence from which a jury could determine that the defendant committed the offense of lewd or lascivious conduct. Based on the victim's testimony, the defendant, a fifty-six-year-old person, grabbed the arm of the fourteen-year-old victim while no one else was present in the area, pulled her onto his lap, and then began to kiss her neck while his hand was on her thigh. While this was occurring, the fourteen-year-old victim felt scared. After she got off of his lap, he called her over, and she sat down next to him, and he made the following comments to her: 'You're a beautiful girl. You're not a baby anymore. You're a grownup.' He also inquired whether she knew that he liked her. . . ."

The claim of ineffective assistance based on the failure to object was not a proper issue for direct appeal as it was not apparent on the face of the record. It was denied without prejudice to raise in a Rule 3.850 motion. It is a claim for which defense counsel may have had a tactical explanation.

A.F. v. State, 3D18-1362 (July 17, 2019)

An adjudication of delinquency was appealed. The only disputed issue was whether A.F. knew the bicycles he was trying to sell were stolen several days earlier. Details from the testimony are not included in the opinion and the Third District affirmed because the trial court explicitly found that A.F.'s testimony was not credibility and because the lower court noted the contradictory nature of A.F.'s testimony.

Fourth District Court of Appeal

Cherfrere v. State, 4D13-4071 (July 17, 2019)

The defendant appealed convictions for multiple offenses, including attempted first-degree murder. The Fourth District affirmed and addressed one issue – whether the jury was properly allowed to "deliberate on two separate acts of

attempted first-degree murder, after [the defendant] was charged with only one count of the offense."

The information alleged that the defendant committed the offense by using a weapon: "a knife and/or a motor vehicle, and in the furtherance of said attempt did repeatedly stab [the wife], and/or did intentionally drive a motor vehicle into the driver's side of a motor vehicle being operated by [the wife] . . . ."

In an argument that was not raised in the trial court, and was therefore reviewed under the fundamental error standard, the defendant argued that the jury should not have been permitted to deliberate on two separate acts – "ramming his truck into the wife's occupied SUV and the act of chasing and repeatedly stabbing the wife."

A jury verdict must be unanimous "to at least one specific act." The manner in which the defendant was charged in this case was not improper. The court disagreed with the defendant's characterization of the allegation as being "two entirely separate incidents." Rather, the allegations set forth acts committed during a single criminal episode. The facts showed an attack on a single victim, in the same neighborhood, within a span of minutes.

Conyers v. State, 4D17-3790 (July 7, 2019)

A conviction for trafficking in oxycodone was reversed for a new trial because the court erred in "admitting hearsay testimony from a police officer about highly prejudicial information he received from a non-testifying confidential informant."

The officer testified that the informant provided him with a description of the individual who would b driving a described Ford F-150 pickup truck, who was interested in buying large quantities of prescription pills. The informant gave the officer a phone number of the described man; the officer called the number and spoke to the individual.

The defense argued that this testimony "was hearsay and improperly suggested that appellant had a propensity to purchase large amounts of opiates. The State argued that the statements were not hearsay because they were not offered for the truth of their content but were intended to show the effect on the listener, i.e., the police officer, who then opened an investigation." The Fourth District rejected the State's hearsay argument as "simply wrong." And, even if the statements were not introduced for the truth of the matter asserted, "they were irrelevant, because the

police officer's reason for investigating appellant was immaterial," and "the risk of unfair prejudice outweighed any probative value."

Squire v. State, 4D18-290, 4D18-313 (July 17, 2019)

Squire appealed convictions for attempted first-degree murder and possession of a firearm by a convicted felon. The Fourth District affirmed the convictions, but reversed the firearm conviction because counsel was ineffective on the face of the record for failing to move for judgment of acquittal "on the issue of whether appellant's discharge of a firearm caused great bodily harm to the victim." This finding was required for the imposition of a mandatory minimum sentence under the 10-20-Life statute.

"The evidence at trial showed that appellant and is brother fired multiple shots at the victim. . . . The victim was shot twice in each leg." One bullet was surgically removed. A revolver, a 40-caliber semiautomatic pistol, and a 22-caliber semiautomatic pistol were found in the home where the two brothers lived. The surgically-removed bullet was found, by an expert, to have been fired by the revolver. A shell casing from the scene was fired by the 40-caliber pistol. The brother's DNA was linked to the revolver. The defendant's DNA was not linked to any of the firearm found in the home.

Although there was sufficient evidence to show that the defendant personally possessed a firearm, the evidence was insufficient to demonstrate that he discharged a firearm causing great bodily harm to the victim. Evidence in support of that required finding under the 10-20-Life statute could not be in the form of vicarious liability under a principal theory.

On remand, the 25-year mandatory minimum for the attempted murder will be reversed and the 20-year mandatory minimum, based on discharge of a firearm, will be substituted.

Cordero-Callahan v. State, 4D18-2285 (July 17, 2019)

A written order of probation included a special condition that the defendant must pay costs "in equal monthly payments." As this was not orally pronounced at the sentencing hearing, it was error to include it in the written order of probation.

Carrasco v. State, 4D19-1025 (July 17, 2019)

The trial court erred in prohibiting the defendant from filing further pro se post-conviction motions without allowing the defendant to respond before consideration of sanctions by the court.

Marino v. State, 4D19-1283 (July 17, 2019)

"The trial court ordered an incompetent criminal defendant detained in jail without ordering competency restoration treatment and without making any findings that would permit pretrial detention." The Fourth District previously granted a petition for writ of habeas corpus, and this opinion clarified "when and how a court may order competency restoration treatment in jail."

The defendant was found incompetent to proceed to trial. After multiple hearings, with no placement being found for the defendant, he was released on standard pretrial release supervision. After a failure to appear for a placement hearing, he was arrested again. During subsequent proceedings, the State agreed to conditional release – the defendant had been referred to a program at that time but refused to sign the required paperwork. The court did not want to release the defendant, who was homeless, to the street corner listed as his address. The court therefore order the defendant to remain in custody with no bond.

Under Rule 3.212, Fla.R.Crim.P., upon finding the defendant incompetent to proceed, "the court may order (1) treatment in the community as a condition of release; or (2) 'treatment to be administered at the custodial facility or may order the defendant transferred to another facility for treatment or may commit the defendant.'" "When a court orders treatment in a custodial facility, it must ensure 'that treatment appropriate for the defendant's condition is available' at the facility. . . . The court must also put in place procedures for periodic review like those required when a defendant is involuntarily committed. . . . Every effort should be made to avoid an incompetent defendant languishing in jail without adequate treatment and without an adequate mechanism to monitor the defendant's condition." "Treatment in a custodial facility, however, may be ordered only where the constitutional and statutory criteria for pretrial detention are met."

The required findings to permit pretrial detention were not made in this case. And, the trial court erred by ordering "pretrial detention without ordering that defendant receive competency restoration treatment while incarcerated or confirming that appropriate treatment was available at the facility."

Finally, when "a court opts to conditionally release a defendant in lieu of commitment, the statute [s. 916.17] allows the court to modify release conditions or order commitment upon a violation of release conditions."