Case Law Update
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First District Court of Appeal

Burnsed v. Florida Commission on Offender Review, 1D17-5063 (Aug. 9, 2019) (on motion for rehearing)

The First District rejected the argument that a condition of conditional release denying sex offenders access to the internet was an unconstitutional denial of the First Amendment right to free speech. The recent decision of the United States Supreme Court, in Packingham v. North Carolina, 137 S. Ct. 1730 (2017), was not to the contrary. That decision applied to offenders who finished serving their sentences, and the statutory prohibition at issue in that case was one which constituted a felony. The statutory felony in Packingham made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." That law was invalid, as it "prevented sex offenders from engaging in the legitimate exercise of their First Amendment rights, and the government had not met its burden to show that a law was necessary or legitimate to serve its purpose."

The Parole Commission has "discretionary authority to impose any conditions of conditional release that it deemed warranted."

Livingston v. State, 1D18-0895 (Aug. 9, 2019)

The trial court erred in summarily denying a claim in a Rule 3.850 motion that "counsel was ineffective for misadvising him concerning the maximum penalty he faced and for failing to call his codefendant as a witness."

An officer testified at trial that during a traffic stop, where the car was driven by the defendant's brother, the officer saw the defendant, a passenger, lean towards the glove compartment immediately after the stop. The officer found a firearm in the glove compartment and the defendant and his brother were both charged with offenses related to firearm possession. In the 3.850 motion, he alleged that if his brother had been called to testify, he would have said that the defendant had no knowledge of he firearm.

The trial court denied this claim based on its conclusion that the codefendant/brother would not have testified in a manner that incriminated himself. However, there was nothing in the record indicating that the codefendant ever asserted his Fifth Amendment right.

Although the First District believed further proceedings were required because the record did not conclusively refute the claim, the Court had concerns: "It is simply too easy for a convicted defendant to make vague and very possibly speculative allegations concerning how a codefendant would testify. Requiring a defendant to amend his sworn allegations to specify how he knows the codefendant would have testified in a certain manner places very little additional burden on the defendant." The Court certified the following question to the Supreme Court as one of great public importance:

> DOES A CRIMINAL DEFENDANT HAVE TO ALLEGE A BASIS FOR KNOWING AN UNCALLED WITNESS WOULD TESTIFY FAVORABLY IN ORDER TO PRESENT A LEGALLY SUFFICIENT CLAIM INA RULE 3.850 MOTION?

Maxwell v. Secretary, Florida Department of Corrections, 1D18-3695 (Aug. 9, 2019)

A petition for writ of habeas corpus "may not be used to collaterally attack a judgment and sentence. . . . Habeas corpus is not a vehicle for obtaining review of issues which were raised, could have been raised, or should have been raised on direct appeal or in post-conviction proceedings."

Cannie v. State, 1D18-4239 (Aug. 9, 2019)

Cannie filed a Rule 3.801 motion seeking additional jail credit. The trial court dismissed the motion, finding it lacked jurisdiction due to the then-pending appeal on a Rule 3.800 motion, as well as other pending appeals.

The trial court erred. "'[A]n appeal of a postconviction relief matter will not deprive trial courts of jurisdiction *so long as the issues raised in the two cases are unrelated*.'"

Baity v. State, 1D18-4268 (Aug. 9, 2019)

On appeal from convictions for attempted first-degree murder, aggravated stalking, and burglary, the First District affirmed and held that the admission of a voicemail into evidence was correctly found to constitute an admissible excited utterance. The voicemail was a message left by the defendant's mother, for the defendant's wife, the victim.

The defendant's mother first testified that she received a call from the defendant in which he said that he might beat the victim. Shortly afterwards, the mother left the voicemail for the victim, saying that the victim had to talk to her; that she, the mother, was "saving your life," and that she should not go into the house.

While there was testimony that the mother had been concerned that the defendant would violate an injunction by having contact with the victim, the mother's demeanor on the voicemail was described as "being scared," and that was why the victim called the mother back.

The reference to the voicemail as being "shortly after" the defendant's original call sufficed to establish that the voicemail was made before there was time to contrive or misrepresent. The statement was also found to be one made while under stress or excitement caused by an event based on testimony that the mother sounded scared when leaving the message.

Second District Court of Appeal

In Re: Contempt Adjudication of Weiner, 2D19-1413 (Aug. 7, 2019)

The Second District granted a habeas corpus petition challenging an adjudication for indirect criminal contempt.

During a child custody case, the judge issued an order preventing the parties from publishing information about the case on social media. Ms. Weiner was not a party to the case; she was the current wife of the child's father. As she was not a party, she was not served with the order. On March 21, 2019, the trial court issued an order directing her to show cause on April 2, 2019, why she should not be held in contempt for violating that order. She did not receive the show cause order until the day prior to the scheduled contempt hearing.

The contempt adjudication was quashed because Ms. Weiner was not a party subject to the original order barring publication on social media and because the trial court did not serve her with the order to show cause within a reasonable time to allow preparation of a defense. Finally, "the trial judge should have disqualified herself because the contempt conduct involved disrespect and criticism of the judge."

Third District Court of Appeal

George v. State of Florida, Department of Corrections, 3D18-1335 (Aug. 7, 2019)

The trial court entered a judgment for $273,000 in favor of the Department of Corrections, pursuant to s. 960.292(2), Florida Statutes, which provides for reimbursement of the Department for the cost of incarcerating prisoners while in custody. George challenged the restitution lien, arguing that DOC intended to use it "as a set off against any recovery he might be awarded in the future in the event he prevails in a separate civil lawsuit he filed against the Department for a personal injury he suffered during his incarceration." The Third District affirmed the order, but declined "to reach the issue of whether this lien can be legally used as a set off against any future recovery because that issue is not ripe for determination."

Vilsaint v. State, 3D18-2570 (Aug. 7, 2019)

An order denying a rule 3.800(a) motion to correct illegal sentence was affirmed. The motion challenged the use of a withhold of adjudication in 1993 on the defendant's habitual offender sentence for an offense committed in 2006. While the 1993 version of the habitual offender statute precluded the use of a withheld adjudication as a qualifying predicate conviction under the habitual offender statute, the 2006 version of the statute treated a withheld adjudication as a conviction. The sentencing statute in effect at the time of the commission of the offense for which the defendant is being sentenced controls.

McCray v. State, 3D19-0076 (Aug. 7, 2019)

When the trial court denies a Rule 3.850 motion as facially insufficient it must provide the defendant 60 days to amend the motion.

Fourth District Court of Appeal

Puzio v. State, 4D17-3034 (Aug. 7, 2019) (on rehearing)

Puzio appealed from resentences for two counts of first-degree murder and one count of armed carjacking committed while he was a juvenile. He was charged, convicted and sentenced to life without parole in the mid-1990's. In 2017, after the Supreme Court's decision in Miller v. Alabama, he sought resentencing, which he received.

The sentencing scheme under section 775.082(1)(b), Florida Statutes (2017), distinguishes between individuals who "actually killed, intended to kill, or attempted to kill the victim," and those who did not do so.

On appeal, the Court agreed with the defendant that the trial court erred when imposing the sentence on the basis of the provision based on actually killing, intending to kill or attempting to kill. The "verdict form did not ask the jury to choose between premeditation and felony murder, and it cannot be determined from the verdict form whether the jury found beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill the victims."

Garcia v. State, 4D17-3751 (Aug. 7, 2019)

In an appeal from a conviction for arson, Garcia's sentence was reversed because it "may have been based, at least in part, on an impermissible sentencing factor."

The Florida Supreme Court previously held, in Norvil v. State, 191 So. 3d 406, 407 (Fla. 2016), that "a trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense." In this case, the prosecutor's sentencing recommendation "relied heavily upon the evidence of appellant's post-arrest misconduct."

Although the trial court did not make any comment indicating that it had considered this impermissible post-arrest conduct, it is the State's burden to show that the trial court did not rely on the impermissible factor. The judge stated that the sentence was based on "all the evidence," and the judge imposed the exact sentence requested by the prosecutor. The resentencing must be before a different judge.

Price v. State, 4D18-1293 (Aug. 7, 2019)

Price appealed a conviction and sentence for felony possession of marijuana. The Fourth District affirmed the conviction, and upheld the denial of a motion to suppress, but reversed and remanded for resentencing before a different judge because the court improperly relied on a new arrest for marijuana possession occurring the week prior to the sentencing.

The marijuana was found during a search of a vehicle incident to the execution of a search warrant on the property where the car was parked. Price was not listed as an owner of the property or a target of the search. The residence was suspected of being headquarters of several drug dealers. The warrant covered the search of the residence and any "persons, vehicles and/or outbuildings found on the curtilage thereof." It also authorized officers to "enter and search the said residence, curtilage, outbuildings, and conveyances." Price's car, in which a backpack with the marijuana was found, was "parked at the end of the driveway closest to the street."

The trial court ruled that the area where the car was parked was curtilage. Based on the grammatical construction of the warrant, through its use of commas, the Fourth District construed the "qualifying language 'located on said curtilage' to refer to persons and not conveyances. With regard to physical structures, we view the warrant to authorize the search of the 'residence,' 'curtilage,' 'outbuildings,' and 'conveyances' located on a parcel of real property with a specific address." As the warrant broadly covered conveyances on the property with that address, the issue of whether the driveway was curtilage was not relevant.

During the sentencing hearing, defense counsel was the first person to reference "'new misdemeanor charges . . . last week.'" It was clear to the Fourth District that the court already knew that the arrest was for marijuana and the judge referenced the new arrest twice when discussing the reasons for imposing the sentence, "all in the context of marijuana use and 'how is this going to stop.'"

State v. Kigar, 4D19-0600 (Aug. 7, 2019)

Kigar was charged with over 100 counts of patient brokering under s. 817.505(1)(a), Florida Statutes. The State filed a motion in limine to prohibit the assertion of a defense based on "advice of counsel." The trial court denied the motion and the State sought certiorari review in the Fourth District. The Court granted the petition.

"'[A]dvice of counsel' is not a defense to the general intent crime of patient brokering." The focus of the Florida statute is on financial arrangements to induce the referral of patients to or from a heal care provider or facility. The statute includes a "safe harbor" provision, under which the statute does not apply to enumerated practices including any "discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder." The federal statute proscribes "knowingly and willfully" offering or paying remuneration to induce such referrals; none of the enumerated exceptions were applicable to this case.

The focus of this case was on whether the federal statutory element of "knowingly and willfully" was incorporated by reference in the state statute. The Fourth District, disagreeing with the trial court, concluded that it was not. The Florida statute's safe harbor provision incorporated the enumerated exceptions of the federal statute, but did not adopt the federal statute in its entirety. The "knowingly and willfully" language of the federal statute does not appear in the state statute.

The Court discussed the trial court's reliance on Harden v. State, 938 So. 2d 480 (Fla. 2006), which found a different Florida statute unconstitutional because it did not include a "willfulness" requirement. That case referred to the same federal statutes including the "knowingly and willfully" requirement. However, the statute at issue in Harden did not contain safe harbor exemptions. And, Harden did not address or consider the significance of a subsequent Congressional enactment which provided that under the federal statute at issue, "a person need not have actual knowledge of this section or specific intent to commit a violation of this section."

Finally, the Fourth District concluded that even if the "knowingly and willfully" mens rea was read into the Florida statute, it did not equate to specific intent. Section 817.505 "is a general intent crime." As it is a general intent crime, "advice of counsel" cannot be asserted as a defense.

Fifth District Court of Appeal

Ray v. State, 5D18-1277 (Aug. 9, 2019)

Ray was convicted of first-degree murder, aggravated child abuse and child neglect. The victim was her two-year old daughter. The State's theory was that the child died "from intentionally inflicted head injuries." The defense was that the child fell in the kitchen after a bath, while the other children were being bathed.

Ray filed a 3.850 motion, alleging that trial counsel were ineffective for failing to present multiple experts to take issue with the conclusions of the medical examiner. The Fifth District affirmed.

Trial counsels' performance was not deficient for two reasons. "First, the decision to go with a straightforward causation defense, as opposed to a scientific 'battle of the experts,' was a reasonable strategy." Ray's trial counsel had consulted with an expert and that expert had minimized the significance of multiple bruises on the child's body, stating that they could have been incurred several days prior and that bruises do not always involve trauma. While that expert did say that the number of bruises was not consistent with a single fall, he did say that they could have been incurred at different times and were consistent with other medical conditions.

The second reason for the Court's conclusion as that challenging the medical examiner "could have opened the door to some of the most damning testimony imaginable. Although not well developed in the record, during the investigation of this case, another one of Ray's children 'describe[d] a period of time where Violet Ray was slamming [the victim's] head into the back of a sink.' Counsel cannot be faulted or second-guessed for avoiding the possibility of this testimony being put before the jury."

One judge dissented.

Rios v. State, 5D18-1737 (Aug. 9, 2019)

The Fifth District reversed convictions for first-degree murder and armed burglary because the delayed administration of Miranda warnings rendered the defendant's "subsequent waiver and incriminating statements made to law enforcement involuntary."

While investigating another homicide, Rios was found hiding in a closet. She was asked to come to the police station for questioning, and was taken, without handcuffs, in an unmarked police car. At the station, she was isolated in an interview room on the "secured second floor." She remained there for over 11 hours, during which time she was interviewed intermittently three times.

During the second of these interviews, Rios made incriminating statements. That statement ended at about 8:30 p.m. Detectives returned for the third interview, at 12:25 a.m., and the Miranda warnings were administered at the outset. The

defendant again made incriminating statements, but they went far beyond those of the second interview.

The second interview was custodial in nature. The defendant had consented to go to the police station after the police found her during the course of a search of another residence. The defendant knew that the residence being searched contained stolen paraphernalia "and a gun that had been used to commit crimes," and that the police were questioning her codefendants. She was placed on the secured second floor, subjected to video surveillance, required to use an escort in the building, and was the subject of delays in response to her requests to use the restroom. The defendant was a runaway, but her inability to leave was not due solely to her status as a runaway. She was told that she could not leave until her father arrived, but officers sent her father away when he arrived, thus preventing her from leaving.

In addition to the interrogation being custodial, although some of the earlier questions may not have qualified as interrogation, eventually, and prior to incriminating responses, they did. Detectives asked questions such as whether she pulled the trigger.

The Court further evaluated the effect of the delayed warnings and concluded that the detectives "used improper and deliberate tactics in delaying administration" of the warnings. There was no purpose other than "to exhaust Appellant into admitting her involvement in the crime."

Monts v. State, 5D18-3763 (Aug. 9, 2019)

The Fifth District affirmed a conviction for felony battery.

There was no error in admitting an email the defendant sent his girlfriend while in jail; nor was there an error in admitting a videotape of a meeting of the defendant and his girlfriend at the jail. The email told the defendant's girlfriend "that he was sorry for letting her down," and the defendant further requested of his girlfriend "that she act as if he was with her." In the video recording, Monts told his girlfriend that he told "the lady I was home with you at the time . . . so if she calls you, be sure – I guess she'll get in contact with you." Both of these pieces of evidence "could reasonably be interpreted as Monts attempting to fabricate an alibi by having his girlfriend testify that she was with Monts at the time of the battery."

The trial court did err in limiting cross-examination of the victim by precluding Monts "from inquiring about the deferred prosecution agreement that [the

victim] entered into with the State that was still in effect at the time of Monts's trial. This agreement, which is part of our record, showed that the victim had been charged with battery in an unrelated matter, but that the State agreed to defer prosecution against her on this charge for a period of twelve months, provided that the victim fully abided by the agreement's terms and conditions." "Monts should have been able to bring out the circumstances of the victim's deferred prosecution agreement with the State so that the jury could evaluate her possible motive or self-interest with respect to her testimony." Based upon a review of the entire record, however, this error was deemed harmless.