Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Taylor and United States v. Smith, 17-14915 and 18-11852 (Aug. 29, 2019)

The Eleventh Circuit joined ten other circuits in holding that an "NIT warrant," a warrant "purporting to authorize a nationwide, remote-access computer search," in a child pornography case, did not require suppression of evidence under the Fourth Amendment. The warrant in this case was issued by a magistrate in Virginia.

The Court first held that the "magistrate judge's actions exceeded not only Rule 41(b) but also her statutorily proscribed authority under the Federal Magistrates Act, 28 U.S.C. s. 636(a), and that "the warrant was void *ab initio*, rendering any search purporting to rely on it warrantless and thus presumptively unlawful under the Fourth Amendment."

As to the remedy, "because the exclusionary rule is concerned solely with deterring culpable police misconduct – and not at all with regulating magistrate judges' actions – void and voidable warrants should be treated no differently; accordingly, an officer's reasonable reliance on the former, like the latter, can provide the basis for applying the good-faith exception." And, in this particular case, "the officers' warrant application here adequately disclosed the nature of the technology at issue and the scope of the intended search, that the officers reasonably relied on the magistrate judge's determination that the search was permissible, and, accordingly, that the good-faith exception applies in this case."

The case involves the "dark web," and efforts of the government to ferret out the hidden identities of visitors to a particular site. To do that, the "FBI sought to deploy government-created malware – specifically, a computer code called the Network Investigative Technique (" NIT") – that would transmit user information back to the FBI."

Rule 41(b), Fed.R.Crim.P. sets forth the circumstances under which a magistrate judge may issue a warrant both within and without that judge's district.

Rule 41(b)(4) authorizes "tracking device" warrants, and was the only provision of the rule at issue in this case. The first problem in this case was that the government did not seek the issuance of the warrant under Rule 41(b)(4). Regardless, the Court held that "the NIT is not a 'tracking device' within the meaning of . . . Rule 41(b)."

Next, while Rule 41(b) was essentially a "venue" limitation, "the statute *behind* the rule – [28 U.S.C. s. 636] – imposes clear jurisdictional limits on a magistrate judge's power." Thus, the judge "transgressed the limits of her jurisdiction." That led to the warrant being void "at issuance," with the resulting search violating the Fourth Amendment.

The Court, as noted at the outset, then engaged in the analysis by which it concluded that the exclusionary rule did not apply; that the good-faith exception was applicable; and that under the facts of the case, such good-faith existed.

One judge concurred that the warrant was unconstitutional, but dissented as to the application of the exclusionary rule.

United States v. Baptiste, 16-17175, 16-17595 (Aug. 28, 2019)

Baptiste appealed multiple convictions related to a money-laundering scheme. The Court first held that it did not need to decide whether evidence adduced by the government was inadmissible hearsay because any error was harmless. The Court then went on to hold that that same hearsay testimony could be considered by the district court when imposing a sentencing enhancement for obstructing justice on the basis of the "reliable hearsay" doctrine, even without deciding the admissibility of that same evidence at trial. "under the reliable-hearsay doctrine, so long as certain preconditions are met, a sentencing court can rely on evidence that would be off-limits in the guilt phase."

After Francesse Chery testified as a defense witness, the government presented her brother, Anael Chery, "who testified (among other things) that Francesse had told him that, in exchange for her (false) testimony supporting Baptiste's narrative, Baptiste would give her a Mercedes." The admissibility of that testimony at trial turned on the statement-against-interest exception to the prohibition against hearsay evidence; the Eleventh Circuit did not reach that question, based on its finding that any error was harmless.

The "reliable hearsay" doctrine "is rooted in s. 6A1.3 of the Sentencing Guidelines, which states that a court 'may consider relevant information without

regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.'"

First District Court of Appeal

Serrano v. State, 1D17-3669 (Aug. 30, 2019)

Serrano was sentenced to life for offenses committed while he was a juvenile – first-degree murder; home invasion robbery; and conspiracy to commit home invasion robbery. The most recent imposition of sentence was in 2017, a resentencing, pursuant to the 2014 juvenile sentencing statutes.

Serrano was not entitled to a jury for the resentencing. The First District previously rejected that claim in Copeland v. State, 240 So. 3d 58 (Fla. 1st DCA 2018).

Serrano also argued that the sentence constituted cruel and unusual punishment as the court "weighed the wishes of the victim's family and friends in deciding whether to sentence" him to life. He based this claim on Booth v. Maryland, 482 U.S. 496 (1987), which held "that the Eighth Amendment prohibits testimony by a victim's family on the appropriate sentence in a capital sentencing proceeding." Even when raised in capital cases, Booth errors do not constitute fundamental error and cannot be raised on appeal absent an objection in the trial court. Regardless, the First District found that the trial court did not impose sentence based on the desires of the victim's family members. While the judge did refer to the victim's family members, when "read in context, the court was acknowledging that the *impact* of the murder on the victim's family is relevant, while expressly informing the family that the court is the final decisionmaker." Additionally, Booth did not apply to juvenile resentencing proceedings under Miller v. Alabama. The rationale for application of Booth to a sentencing proceeding before a jury in a death penalty case did not carry over to a juvenile sentencing hearing before a judge for two reasons – "death is different"; and the potential effect on a jury differs from the potential effect on a judge.

The Court reviewed and rejected several other claims, all unpreserved, under the fundamental error standard: 1) while the trial court referenced prior charges for which Serrano was not convicted, he further stated that he did not "know what to make of that," suggesting "equivocation and nothing more"; 2) remarks by the resentencing judge did not suggest that the judge improperly deferred to the original

sentencing judge; 3) the court did not err by failing to give youth alone great weight as a mitigating circumstance – the judge discussed the evidence and found that the lack of maturity was not particularly compelling, as Serrano had engaged in significant planning in advance and did not act impetuously.

Barnes v. State, 1D18-0041 (Aug. 30, 2019)

The trial court lacked jurisdiction to rescind an order granting resentencing once it became final.

Snodgrass v. State, 1D18-4581 (Aug. 30, 2019)

The trial court erred in denying a Rule 3.850 motion as untimely. The case was remanded for an evidentiary hearing as to the timeliness of the original motion. The trial court relied on the court's case docket and did not take into consideration the prisoner mailbox rule.

The original motion was not received by the clerk of the circuit court and it appeared to have a stamp indicating that it was tendered to corrections officials on May 4, 2016. The trial court's review of the document, however, raised an issue of a stamp date having been whited out. These issues would be addressed at the evidentiary hearing.

McLendon v. State, 1D17-3107 (Aug. 30, 2019)

The Court granted a habeas corpus petition, relief to which the State agreed, because continued detention was illegal. A 2015 sentence "illegally exceeded the five-year statutory maximum for the crimes, and because of the credit for time served in prison and jail 'on this case,' plus 126 days' gain time earned, Petitioner had served all time validly sentenced and was not legally on probation when he committed the new law offense of battery on an elderly person." Additionally, the latter charge was dismissed, and there was no remaining "independent crime for which to sentence him" as far as the facts before the Court revealed.

Hester v. State, 1D19-565 (Aug. 29, 2019)

A Rule 3.853 motion for DNA testing was properly denied as it lacked the required specificity to show "'how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence.'" Appellant "stated that 'there could have been a presence or non-presence of bodily

fluids on the sheets or underwear,' but did not assert whether these fluids belonged to him or some other party."

Third District Court of Appeal

State v. Brena, 3D19-976 (Aug. 28, 2019)

The Third District granted a certiorari petition and quashed an order directing the Florida Department of Law Enforcement to remove Brena's statutory requirement to register as a sexual offender.

Brena was convicted of armed kidnapping of a minor in 1994 and, after several probation violations, was released from supervision in 2006 and was statutorily required to register with FDLE under section 943.0435, Florida Statutes. Prior to 2006, he was "deleted as an offender from the database in error and was not notified of his registration requirements." That error was discovered in 2018, and FDLE then notified Brena of the requirement to register. The trial court granted a motion to remove the registration requirement based on laches due to FDLE's error.

The trial court motion could not be treated as a rule 3.800 or 3.850 motion, as the registration requirement was not punishment and was not part of the sentence. Regardless, "the trial court did not have the authority to blatantly disregard a statutory mandate and supplant its judgment by labeling it equitable relief."

State v. Hernandez, 3D19-977 (Aug. 28, 2019)

In a case involving facts very similar to those of State v. Brena, above, the Third District granted another certiorari petition, quashing the trial court's order to delete the statutory requirement of registration under the sex offender registration act. The analysis is the same as in Brena.

Fourth District Court of Appeal

Luongo v. State, 4D17-3770 (Aug. 28, 2019)

Luongo was charged with first-degree murder. While awaiting trial, he was charged with tampering with a witness and solicitation to murder that witness. The case on all three charges proceeded in one trial. Upon conviction for all of the offenses, Luongo argued that the court erred in denying the motion to sever the murder charge from the other charges. The Fourth District disagreed and affirmed.

Joinder of the offenses was proper because they "were causally related . . . as the witness at issue was cooperating with police in the murder investigation." The murder charge "induced the solicitation and tampering charges." And, the "State argued that commission of solicitation and tampering was done in an attempt to prevent a key witness from testifying to avoid a murder conviction." The solicitation and tampering charges could also be construed "as demonstrating Appellant's consciousness of guilt" for the murder.

J.R. v. State, 4D19-1538 (Aug. 28, 2019)

A prohibition petition was granted "because the circuit court lost jurisdiction over the petitioner, who turned 20 years old on May 13, 2019." "Petitioner was sentenced without the comprehensive evaluation required by section 985.185(1), Florida Statutes (2018). Once his sentence was reversed, he was no longer 'committed to the department' within the meaning of section 985.0301(5). Therefore, the circuit court was bound by section 985.0301(5)(a), which states that the court retains jurisdiction 'until the child reaches 19 years of age.'"

Fifth District Court of Appeal

Gresham v. State, 5D18-124 (Aug. 30, 2019)

After a conviction for first-degree murder and grand theft, the case was remanded to the trial court for a retroactive competency evaluation, where the trial court failed to hold a required hearing prior to trial or enter an order determining competency after defense counsel filed a suggestion of incompetency.

Cote v. State, 5D18-1562, et al. (Aug. 30, 2019)

The trial court erred in finding a probation violation was willful where the only evidence was hearsay. The alleged violation was based on discharge from a required rehabilitation program for fighting with another patient. The only witness at the VOP hearing was the probation officer, who did not witness the altercation or even speak to anyone involved in the fight; her testimony was only that she was notified of the discharge and that it was based on the fight.

McCloud v. State, 5D18-2476 (Aug. 30, 2019)

There was no error in not appointing post-conviction counsel when the record supported the summary denial of the motion.

Greene v. State, 5D18-2484 (Aug. 30, 2019) (on rehearing)

An order striking pro se pleadings as nullities because counsel represented Greene when Greene filed the pleadings was reversed and remanded for further proceedings, because it was unclear from the record "what the scope of counsel's representation was below and whether it encompassed the Rule 3.800(a)" motion which had previously been denied.

Watkins v. State, 5D18-3302 (Aug. 30, 2019)

The Fifth District reversed a conviction for kidnapping as a double jeopardy violation. Watkins was convicted for kidnapping and other offenses in Flagler County after having been previously convicted of kidnapping and other offenses in Volusia County. The Court found that Watkins's "actions constituted a single episode of kidnapping."

> Confining a person against his or her will constitutes kidnapping. Although Watkins moved M.M. to multiple locations, there was never a temporal break in Watkins' confinement of M.M.; the kidnapping began at James Ormond Park in Volusia County when Watkins threatened to kill M.M. if she exited the vehicle, and did not cease until Watkins left M.M. naked, injured, and unconscious in a field off Old King's Road in Flagler County. . . .
>
> Whether or not Watkins was sincere in telling M.M. that he would take her back when they left High Bridge Road, Watkins continually confined M.M. The State's assertion that M.M. "voluntarily" reentered Watkins's car ignores the reality of her situation; Watkins's actions rendered M.M. stranded in a secluded, rural area with no way to return to safety. . . .

Additionally, Watkins's actions "were not predicated on distinct acts." Although he moved the victim "to different locations, there was no temporal break

during M.M.'s confinement. Additionally, the record does not reflect any intervening acts during the confinement, and Watkins's statement that he intended to take M.M. back when they left the third location is undermined by his subsequent actions of driving around 'aimlessly.'"

Chappell v. State, 5D19-567 (Aug. 30, 2019) (on rehearing)

The "two-year limit for filing a motion pursuant to Florida Rule of Criminal Procedure 3.850 does not begin to run until direct review proceedings have concluded." In this case, that point in time was not reached until "the thirty-day deadline expired for filing a direct appeal of his resentencing in this case."

Cuyler v. State, 5D19-1231 (Aug. 30, 2019)

When a Rule 3.850 motion is denied as insufficient, a defendant is "entitled to receive an opportunity to amend [if] it is not 'apparent that the defect cannot be corrected.'"

Novo v. State, 5D19-2290 (Aug. 28, 2019)
Robinson v. State, 5D19-2372 (Aug. 23, 2019)

The denial of a motion to disqualify a judge is reviewed on appeal through a petition for writ of prohibition. In both of these cases, the "judge failed to limit his inquiry to a determination of the sufficiency of the motion to disqualify," and that requires disqualification.