Case Law Update
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Supreme Court of Florida

Dailey v. State, SC18-557 (Oct. 3, 2019)

Dailey, sentenced to death, appealed the denial of a second successive Rule 3.851 motion, and the Supreme Court affirmed the lower court's order. The trial court granted an evidentiary hearing on claims of newly discovered evidence, and the Supreme Court affirmed the lower court's findings as to those claims, as well as Brady and Giglio claims.

A co-perpetrator of the murder signed an affidavit admitting his own responsibility and denying the presence of Dailey at the murder. At the evidentiary hearing, this co-perpetrator admitted signing the affidavit, but testified that the affidavit's contents were not true. He then invoked the Fifth Amendment when questioned about specific allegations in the affidavit, even when ordered to answer the questions. The Supreme Court rejected the argument that the affidavit itself was admissible as a non-hearsay declaration against interest. Dailey had already been convicted of the crime to which he confessed and did "not expose himself to any additional criminal liability" for the murder. And, "given that Pearcy claimed the affidavit was false and refused to testify about any of its substantive assertions, we agree with the circuit court's determination 'that Pearcy's affidavit is hearsay of an exceptionally unreliable nature and does not qualify as a statement against interest.'"

Nor was the affidavit admissible when considering relevant factors under Chambers v. Mississippi, 410 U.S. 284 (1973). Although there was some evidence corroborating Pearcy's affidavit, other factors under Chambers weighed heavily against admissibility. The affidavit was made 30 years after the crime occurred. It was not unquestionably against Pearcy's interest. Questions about the truthfulness arose when Pearcy testified that its contents were false. And, Pearcy's invocation of the Fifth Amendment rendered him unavailable for cross-examination.

The trial court did not err in rejecting a newly discovered evidence claim based on testimony of three former inmates who were once incarcerated with Dailey and who testified "that detectives came to the county jail, called [Dailey] into an interview room where newspaper articles about [the] murder were in plain view, and

asked him if he had any information about the crime." The claim was untimely or otherwise procedurally barred. In a 1999 motion, Dailey alleged that trial counsel was ineffective for not utilizing testimony from these three witnesses. This testimony was therefore known to him by that time and a successive rule 3.851 motion must be "filed within one year of the date upon which the claim became discoverable." There is no basis for a claim in state court that counsel was ineffective for not pursuing a postconviction claim.

A newly discovered evidence claim based on information in a 1985 police report was deemed untimely because Dailey failed to explain why it "could not have been previously discovered by use of reasonable diligence."

A Giglio claim based on a witness's alleged false trial testimony about his prior criminal history failed because the "testimony about his criminal history was not material. Dailey suggests that the jury would be less likely to believe Skalnik's testimony about Dailey if it knew of the lewd and lascivious conduct charge. But Skalnik's credibility was already compromised because the jury was aware that he had committed multiple crimes."

Eleventh Circuit Court of Appeals

United States v. Rothstein, 18-11796 (Sept. 30, 2019)

The government moved to withdraw a prior motion made under Rule 35, Fed.R.Crim.P.. That rule allows the government to recommend a sentence reduction based on "substantial assistance in investigating or prosecuting another person." The trial court granted the government's withdrawal of that motion, and Rothstein appealed.

Rothstein was sentenced to 50 years in prison. The motion had alleged that Rothstein's cooperation was not yet complete and would not be completed within one year of the initial sentencing. It further alleged that it was being filed in an abundance of caution to preserve the district court's jurisdiction under Rule 35(b)(1). The motion expressly reserved the right to withdraw the motion based upon Rothstein's noncompliance with the terms of the plea agreement, the failure to testify truthfully or the false implication of any person or entity.

On appeal, Rothstein argued that once the motion was filed, the government's discretion ended once it filed the Rule 35 motion. The Eleventh Circuit agreed with

other circuits that have concluded that the government's "sole discretion" to file a Rul3 35(b) motion includes the discretion to file a motion to withdraw it.

Boston v. United States, 17-13870 (Sept. 30, 2019)

The denial of a successive motion to correct sentence under 28 U.S.C. s. 2255(a) and (h) was affirmed.

Boston was sentenced under the Armed Career Criminal Act, 18 U.S.C. s. 924(e). He had prior convictions for multiple armed robberies, including seven as a principal, which, under Florida law, included aider-and-abettor liability. After Johnson v. United States, 135 S.Ct. 2551 (2015), held that the residual clause of the ACCA was void for vagueness, Boston filed his second motion to correct sentence challenging reliance on the convictions that were based on aider-and-abettor liability theories.

The Eleventh Circuit relied on the holding of In re Colon, 826 F. 3d 1301 (1th Cir. 2016), which held: "Because an aider and abettor is responsible for the acts of the principal as a matter of law, an aider and abettor of a Hobbs Act robbery necessarily commits all the elements of a principal Hobbs Act robber," meaning he "necessarily commits a crime that" satisfies the elements clause of section 924(c)." Thus, "one who commits the Florida crime of principal to armed robbery necessarily commits the Florida crime of armed robbery." The Florida and federal statutes for principal liability differ: Florida's "punishes aiding and abetting an attempted offense, while the federal statute, on its face, does not. That distinction does not matter where, as here, the underlying offense, armed robbery, categorically qualifies as a predicate offense regardless of whether it is attempted or completed. . . . The logic of *Colon* still controls – even if one aids and abets a robbery that is only attempted but not completed, one has still committed the crime of attempted robbery, which is a violent felony under the Act."

United States v. Sheffield, 17-13682 (Oct. 1, 2019)

Sheffield pled guilty to numerous charges related to a fraudulent tax credit scheme. On appeal, he contested the restitution order of more than $3.4 million, which Sheffield was ordered to pay jointly and severally with other co-defendants. The Eleventh Circuit reversed the restitution order.

The scheme involved "thousands of tax returns falsely claiming a $1,000 tax credit. The returns were fraudulent because the taxpayers had not incurred the

$4,000 in educational expenses needed to qualify for the tax credit. Based on the fraudulent returns, the IRS issue a $1,000 refund to each taxpayer. . . ."

Based on the nature of this scheme, "the appropriate restitution amount is definite and easy to calculate." Thus, "the government cannot satisfy its burden of proof by relying on the oft-stated (but not always applicable) principle that restitution can be based on a reasonable estimate of law."

The government had submitted to the district court a spreadsheet, which it acknowledged may have contained some duplicate entries. The district court could not determine which entries were duplicate and ordered Sheffield to provide a list of the duplicate entries. Sheffield was unable to do so, and the district court then granted restitution on the basis of that spreadsheet.

Figuring out the precise amount of the losses should have been an easy mathematical calculation – exactly $1,000 for each false tax credit.

United States v. Sanchez, 18-10711 (Oct. 2, 2019)

Sanchez appealed his sentence under the Armed Career Criminal Act, arguing that he did not have three qualifying prior convictions. The Eleventh Circuit affirmed.

Sanchez challenged convictions for first-degree robbery and attempted second-degree murder form the State of New York. The Eleventh Circuit applied the categorical approach to determine whether these convictions involved "the use, attempted use, or threatened use" of the requisite physical force.

The New York offense of robbery requires proof of "forcibly stealing" property. The state's Court of Appeals has held that this does not include "sudden or stealthy seizure of snatching." Forcibly stealing therefore satisfied the physical force requirement.

The Court further rejected Sanchez's argument "that New York first-degree robbery does not qualify as a violent felony because a defendant can be convicted under s. 160.15 even though he is unaware of his accomplice's commission of one of the aggravating factors. Under s. 160.15, a defendant is not guilty unless he 'forcibly steals,' and intended to forcibly steal, the victim's property." The defendant, under the state statute, must have the requisite intent to forcibly steal.

As to attempted second-degree murder, the state statute for second-degree murder requires proof of an "intent to cause the death of another person." Thus, "the knowing and intentional causation of death also necessarily involves the use of physical force because it is impossible to cause death without applying force that is capable of causing pain or physical injury. Therefore, New York's second-degree murder statute, which requires the intentional causation of death, categorically requires the use of force." The Court rejected the argument that the statute does not require force because the murder could be committed by poisoning. Prior decisions of the Court have held that the "ACCA's elements clause encompasses both direct and indirect applications of physical force, including the use of poison, to cause pain or physical injury." Similarly, the fact that the murder could be predicated on the intentional withholding of food or medical care for a child, resulting in death, did not mandate a different conclusion. That would still satisfy the use of force under the elements clause of the ACCA.

First District Court of Appeal

Walker v. State, 1D18-372 (Oct. 3, 2019)

The trial court failed to conduct a required competency hearing after an evaluation was requested and an expert was appointed.

Peterson v. State, 1D18-1416 (Oct. 3, 2019)

There was no indication in the record that the trial court reviewed an expert's report or made an independent determination that competency had been restored. The case was reversed for further proceedings.

Manhard v. State, 1D17-5010 (Oct. 1, 2019)

The First District affirmed convictions for leaving the scene of a crash involving death, DUI manslaughter, and driving while a license was canceled, suspended or revoked, causing serious bodily injury or death.

The evidence was sufficient to prove leaving the scene of a crash involving death. The State was required to prove that that the defendant "knew of the crash and knew or should have known there was serious injury." The State was not required "to prove the defendant knew or should have known that a death occurred." Jail phone calls included the defendant's admission that "somebody hit him into me, he rolled up over my car, broke the windshield. I freaked out, kept on driving." The

defendant was observed having driven a car with a damaged windshield and glass on him.

The defendant further argued "that where the victim is involved in a multiple-impact collision, the State must prove the additional element that the driver knew of the *specific* impact that actually resulted in the injury." The First District rejected decisions to that effect as non-binding decisions of other district courts of appeal. But, even if they were applicable, they were distinguishable. In this case, unlike the others, "the State provided evidence that Appellant should have seen the victim, and known the accident involved a person."

The trial court did not err in admitting into evidence a recording from the trooper's vehicle. The defendant argued it included evidence of "bad acts, uncharged collateral crimes, and comments on Appellant's silence." The focus of the appellate argument was on matters that went beyond the pretrial ruling on a motion in limine and absent objection at trial were reviewed for fundamental error. Besides finding a lack of fundamental error, the Court found no abuse of discretion as to the admission of the evidence, even if preserved. The evidence was not relevant solely to proving bad character or propensity. The defendant's "behavior, demeanor, words, and acts are relevant to establish the material fact of impairment at the time of the crash, an element of the crime of DUI Manslaughter. . . . Accordingly, the inclusion of evidence of Appellant's conduct was relevant to show impairment and was inextricably intertwined with the DUI Manslaughter charge."

A conviction for DUI manslaughter sufficed to render proper the inclusion of victim injury points for death. The conviction, in and of itself, satisfies the causation requirement for the imposition of such points.

Lynn v. State, 1D18-3816 (Oct. 1, 2019)

The Court affirmed the denial of multiple claims in a Rule 3.850 motion for which an evidentiary hearing had been granted.

Immediately prior to deliberations, the jury asked if transcripts would be available in the morning. The court answered in the negative and the jury chose to being deliberations the next morning. Counsel was not ineffective for failing to object, as that was a correct response. An instruction to the jury regarding the possibility of a read-back would have been premature.

There was no basis for counsel to have challenged the use of a single booking photograph of the defendant as the basis for identification by all four alleged victims, as all of the witnesses had an independent basis for their identification – they previously purchased drugs from Lynn.

There was no basis for counsel to have objected to the prosecutor's closing argument, where the prosecutor argued that the defendant came to the victims' house days later and said he was sorry he shot their car. This was a fair comment on the evidence, where the "witnesses testified that Lynn said that he did not mean to shoot their car and he offered to pay for the repairs."

Geoppo v. State, 1D18-4425 (Oct. 1, 2019)

The First District reiterated its prior holding that Miller v. Alabama, 567 U.S. 460 (2012), does not apply to adult offenders.

Second District Court of Appeal

Brown v. State, 2D18-1892 (Oct. 4, 2019)

The revocation of community control was reversed due to insufficient evidence. The State's evidence "consisted solely of testimony that Brown failed to answer his door when his community officer visited at 6:50 a.m." The officer further stated that she knocked on the door "several times very hard," that no one answered, and that she left a card for Brown, with a note for him to call her immediately, but she never received a call.

Brown "testified that he was home at the time but that he was asleep. He testified that he did not hear his cell phone ring, did not hear anyone knock on the door, and did not find Shaw's card in his door when he left for work later that morning. He testified that his bedroom is at the back of his apartment, about seventy-five feet from the front door," and that he would normally get up to prepare for work between 4:30 and 7:45 a.m.

"Even if the trial court rejected Brown's testimony that he was asleep, the record contains no direct evidence that Brown was not home. . . . Thus, the inference that Brown was absent from his home was simply one of several reasonable inferences that could have been made from the State's evidence, rendering the State's evidence legally insufficient. . . ."

State v. Pharisien, 2D18-4254 (Oct. 4, 2019)

As a result of a confusing prior opinion of the appellate court remanding a case to the trial court for retrial, the trial court entered an order for a new trial on a charge of attempted second-degree murder in addition to the actual murder charge. The State sought certiorari review, arguing that the reversal for new trial was solely as to the murder charge. The Second District granted the petition and acknowledged that the trial court's dilemma in interpreting the Second District's opinion from the prior appeal was induced by the appellate court's "admittedly ambiguous opinion."

C.C.J. v. State, 2D17-5113 (Oct. 2, 2019)

The record before the appellate court did "not contain an executed written consent form verifying [C.C.J.'s] acceptance of representation by the [certified legal] intern. . . . We agree that the law requires a written consent for representation by a certified legal intern." The case was reversed for further proceedings.

McCray v. State, 2D18-1541 (Oct. 2, 2019)

The Court addressed several claims related to sentencing as a Violent Felony Offender of Special Concern. The absence of written findings that the defendant posed a danger to the community did not compel the striking of the designation.

If a trial court has made oral findings, when findings as to danger to the community are required under the statute, the appellate court can simply remand for written findings. Here, "the trial court expressed its frustration with Mr. McCray's repeated violations and his unsuitability for continued supervision." This was found to suffice for a remand to enter the written findings.

Morell v. State, 2D18-3683 (Oct. 2, 2019)

A 20-year sentence for robbery, a second-degree felony, exceeded the 15-year statutory maximum for a sentence. Although Morell qualified for PRR sentencing, that only provided a 15-year mandatory minimum sentence; it did not permit exceeding the 15-year maximum for the second-degree felony.

Leka v. State, 2D18-5095 (Oct. 2, 2019)

The Second District granted a certiorari petition and quashed the order granting the State's request to subpoena Leka's medical records.

At the time of the motion for a subpoena duces tecum, there was no pending criminal action. The State alleged the existence of reasonable founded suspicion that the records were relevant to an ongoing criminal investigation. Leka was notified of the subpoena and objected that the State's notice was legally insufficient. The trial court conducted an evidentiary hearing on the motion. The proceedings and the controlling statutes – sections 395.3025 and 456.057, Florida Statutes - are an effort to balance a patient's privacy rights and the State's legitimate access to the medical information.

"Here, at the hearing in the show cause case, the State did not introduce an accident report or a probable cause affidavit; nor did the State argue the relevancy of the requested medical records to a criminal action. In fact, there is nothing in the record specifying which records the State was seeking. Although the State presented the testimony of Officer Alli, his testimony was largely hearsay and those statements which were not hearsay did little to connect Leka to either the accident Officer Alli had been investigating or to the man Office Alli observed in the hospital."

While the officer's testimony made it apparent that the State was seeking records regarding an investigation of an uncharged DUI offense, "because there is no subpoena in the record and no subpoena has been executed, neither Leka nor this court knows which medical records the State is seeking or what their relevancy may be."

The order granting the motion for a subpoena was quashed. On remand, the State was not precluded form seeking the records through a subpoena in a future action.

Third District Court of Appeal

Robinson v. State, 3D18-0916 (Oct. 2, 2019)

A conviction for possession of a firearm by a violent career criminal was affirmed. The Third District rejected the argument that a motion for discharge following a demand for speedy trial was improperly denied.

The State's proffer and documentation in support of a motion to extend the speedy trial time "were adequate to establish that the unavailability of [a] witness was the result of 'unexpected illness' or 'unexpected incapacity.'" The State was

not required to accept a proposed stipulation by the defense as to the substance of the proffered testimony of the witness.

Additionally, the evidence at issue was a DNA report, which the State furnished immediately on receipt, and the defense sought and was granted a continuance for further discovery. That continuance resulted in a waiver of speedy trial rights under the speedy trial rule.

Lubin v. State, 3D18-1461 (Oct. 2, 2019)

A claim regarding the inadmissibility of Williams rule evidence of prior crimes was not preserved for appellate review. Although the trial court held a pretrial hearing on the State's notice of intent to offer the evidence, the court did not issue a definitive ruling. Absent such a definitive ruling, the defendant was required to make a contemporaneous objection when the testimony was adduced at trial.

The Court alternatively found that the admission of the evidence was not an abuse of discretion, but the facts related to the case and the prior offenses are not set forth in the opinion.

Moore v. State, 3D19-1610 (Oct. 2, 3019)

The trial court found a Rule 3.850 motion and provided 60 days in which the defendant could file an amended motion. Rather than do so, the defendant appealed the order. The Third District dismissed based on a lack of jurisdiction, as the order granting leave to amend was a nonfinal order and was not appealable.

Fourth District Court of Appeal

Strachan v. State, 4D18-868 (Oct. 2, 2019)

Convictions for aggravated battery and other offenses were reversed for a new trial, and the Court addressed four issues – instructions regarding a jury-requested audio playback of testimony; limits on voir dire; hearsay; and instructions on the justifiable use of force as to lesser-included offenses.

When the jury requested an audio playback of testimony, the court granted the request but refused to have it done in open court; it was done in the jury room. Rule 3.410(a) provides that "[a]ll testimony read or played back must be done in open

court in the presence of all parties." The State conceded error, and the remedy for such an error was a new trial.

When defense counsel's allotted time for voir dire expired, counsel requested additional time to explore jurors' views regarding credibility of witnesses, the presumption of innocence, the burden of proof, the right to remain silent, and the effects of gory photographs. The judge denied the request stating that the court had already gone over those issues. The Fourth District concluded that this was reversible error as well.

First, the appellate court reviewed voir dire and concluded that defense counsel's prior questioning had been used "very wisely"; it had not been wasted. Second, a judge cannot engage in voir dire questioning and then prevent counsel from exploring those areas on the ground of repetitiveness. Third, although both parties were given the same amount of time, when the prosecution was nearing the end of its original amount of time, the judge asked if the State wanted more time, asking if an additional 10 minutes would be "okay." Defense counsel, however, was forced to ask for additional time, and that request was quickly denied. Fourth, the prosecution noted for the court that the State had appellate concerns with the court's denial of additional time to defense counsel.

Although not reversible error in and of itself, the Fourth District found that the trial court erred in excluding a text message as hearsay. The text in question was sent 48 hours before the incident and read: "b****** usually gut n****** with the deepest pockets, my stupid (unintelligible) tried to fall in love?" The defense argued that it was offered to show the defendant's state of mind at the time of the incident. The judge excluded it, saying, "How is that a threat?" The Fourth District stated that even if the judge did not understand it to be a threat, that was a question for the jury, and it went to the credibility of the self-defense claim.

The trial court also failed to instruct the jury that the justifiable use of deadly and non-deadly force instructions applied to lesser-included offenses in addition to the crime charged. There was no objection and this did not qualify as fundamental error or as ineffective assistance of counsel on the face of the record. However, as the case was being remanded for retrial, the Fourth District addressed the issue and found that it was an error, as the defense, when asserted, and when resulting in the giving of the instruction as to the greater offense, must be given with respect to all lesser-included offenses as to which a claim of self-defense applies.

Fox v. State, 4D18-1374 (Oct. 2, 2019)

The Court addressed a sentencing issue – whether Norvil v. State, 191 So. 3d 406 (Fla. 2016), barred the trial court from considering a collateral crime which the defendant "committed before the instant crimes, but for which the defendant was not convicted until *after* he committed the instant crimes." The Fourth District held that Norvil was inapplicable where the collateral crime was committed before the instant crimes and the conviction for the collateral crime was prior to the sentencing for the instant crimes.

The Court's opinion includes an in-depth discussion of Norvil, a review of the relevant language in the Criminal Punishment Code, and a consideration of recent decisions from the First District Court of Appeal.

Fifth District Court of Appeal

Vitiello v. State, 5D17-3834 (Oct. 4, 2019)

The Court affirmed convictions for boating under the influence and held that the trial court did not err in admitting testimony of an expert for the State who used "retrograde extrapolation" to estimate that the defendant's "blood alcohol content ('BAC') exceeded the legal limit at the time of the crash."

"Retrograde extrapolation applies a mathematical calculation 'to estimate a person's blood alcohol level at a particular point in time by working backward from the time the blood [sample] was taken." Although the trial occurred at a time when the Frye test was applicable, during the pendency of the appeal, the Florida Supreme Court adopted the Daubert standard and the law in effect at the time of the appeal was applicable.

After detailing the elements of Daubert analysis, the Court observed that "[w]hile this test may seem exacting, rejection of expert testimony under Daubert 'is the exception rather than the rule.'" Cross-examination, the presentation of contrary evidence, and instructions on the burden of proof are the "appropriate safeguards" where the testimony meets the "standards set forth by the rules of evidence."

The primary argued of the defense was that the expert "lacked the facts necessary to conclude [the defendant's] blood alcohol level was declining at the time of the accident, such as when she had her last drink or what and when she had eaten prior to the crash." The Fourth District surveyed decisions from other state court

jurisdictions and noted disagreement as to whether the lack of this information went to the weight of the testimony or its admissibility. The Fourth District sided with the decisions that found that it went to the weight of the testimony, and that the evidence was therefore properly admitted. The Court found support for this conclusion from the Florida Supreme Court's decision in Miller v. State, 597 So. 2d 767 (Fla. 1991), where the Supreme Court held "that the delay between the arrest or crash and the blood test goes to the weight of the evidence, not its admissibility."

Moradi v. State, 5D18-3713 (Oct. 4, 2019)

Appellate counsel was not ineffective on direct appeal for failing to argue that the 2017 statutory amendment to the Stand Your Ground burden of proof applied retroactively.

The statutory amendment went into effect during the pendency of the direct appeal. That appeal resulted in an affirmance of the conviction, with the mandate being issued on December 5, 2017. The first appellate court decision to hold that the statutory amendment applied retroactively was issued on May 4, 2018, in a case from the Second District. The Fifth District concurred with that conclusion in September 2018.

"[A]ppellate counsel is not required to anticipate changes in the law." An appellate counsel's failure to present argument based on a new, favorable decision from another district court can constitute ineffective assistance. "However, [t]he ineffectiveness of appellate counsel cannot be based upon the failure of counsel to assert a theory of law which was not at the time of the appeal fully articulated or established in the law.'" "Here, the theory that the amended Stand Your Ground statute should apply retroactively had not been mentioned even once by any Florida appellate court during the pendency of Moradi's appeal, much less 'fully articulated' or 'established in the law.'"