

Case Law Update
September 16, 2019
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

[United States v. Gillis](#), 16-16482 (Sept. 13, 2019)

Gillis appealed convictions for “(1) attempting to knowingly induce or entice a minor to engage in sexual activity, . . . (2) solicitation of another to commit the crime of federal kidnapping . . ., and (3) knowingly transmitting a communication containing a threat to kidnap.”

The evidence on the enticement of a minor charge was sufficient:

. . . At trial, the evidence showed that Gillis engaged in a two-week online conversation with a person he believed to be the parent of a minor daughter, during which he discussed in detail plans to meet and engage in sexual activity with the daughter. Though Gillis is correct that Agent Hyre initiated discussion of the fictional minor, Gillis’s responses as the conversation progressed demonstrated his sexual interest in the daughter and intent to induce the daughter, through her father, to engage in sexual activity.

Furthermore, Gillis cancelled the first meeting because he was “nervous” and feared he was being set up, not because he was no longer interested in engaging in sexual activity with the minor daughter. Indeed, Gillis’s subsequent comments to Agent Hyre in planning the second meeting show he remained interested in engaging in sexual activity with the daughter and anticipated doing so after first meeting the father. And Gillis took a substantial step toward consummating that plan when he drove nearly an hour from his home to Lake Mary for that meeting.

As to the expert witnesses, Daubert hearings were held prior to the exclusion of the proffered testimony. “Gillis submits that the excluded expert testimony would have placed in context his online communications and shown he was engaging in fantasy role play and had no intent to do these crimes.” He was arguing that even if the evidence did not satisfy standards for admissibility, its exclusion “deprived him of his constitutional right to present a defense.” The Eleventh Circuit first addressed admissibility under the rules of evidence and Daubert.

As to one expert, who would have opined “that Gillis was not sexually attracted to prepubescent girls,” the exclusion was not an error as such testimony “would do more than ‘leave [an] inference for the jury to draw,’ and instead veered into the impermissible territory of offering an opinion on Gillis’s mental state.” There was no compelling reason for an exception to the expert witness rules of admissibility.

The conviction for solicitation of another to commit federal kidnapping required proof that the defendant solicited another person to “engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force. . . .” The actual conduct in the case clearly involved such physical force, as the solicitation included “hooding, blindfolding, and snagging the victim M.O., putting her in a van, and then using her as a sex slave.” Gillis argued, however, that the actual conduct was irrelevant, and that the solicitation statute required a determination of the element of force based on the “categorical approach.”

The Court’s analysis hinged largely on the significance of its own prior decision in United States v. McGuire, 706 F. 3d 1333 (11th Cir. 2013). However, McGuire involved 18 U.S.C. s. 924(c), and this case involved the solicitation statute, 18 U.S.C. s. 373, and there were some textual differences between the two statutes. Notwithstanding those differences, the Court concluded that the categorical approach of McGuire was binding precedent.

Using that approach, the Court then looked to the offense at issue – federal kidnapping based on inveiglement and/or decoy. The Court then concluded that kidnapping by such means did not satisfy the categorical approach of evaluating force based on inveiglement and/or decoy. The solicitation conviction was therefore reversed. One judge dissented as to the statutory interpretation of section 373; the dissenting judge rejected the applicability of the categorical approach and looked to the actual kidnapping conduct.

[United States v. Waters](#), 18-11333 (September 10, 2019)

Waters appealed convictions for two counts of wire fraud. The Eleventh Circuit addressed the issue of whether Waters' lie was one that was significant enough to qualify as a federal crime and other issues.

The district court did not abuse its discretion in denying a proposed jury instruction "on the difference between fraud and deceit." Waters' proposed instruction, however, was deemed incomplete and misleading. "The proposal emphasized the requirement that a defendant have the intent to harm, but it never defined what harm meant. And it introduced the distinction between a scheme to deceive and a scheme to defraud, but it didn't tell the jurors how to tell the difference between them." The defense added to the problem when it declined additional language proposed by the government. The Court summarized what the significance of these instructions was:

To recap: In a scheme to deceive, the victim of the lie hasn't been harmed because he still received what he paid for. But in a scheme to defraud, the victim has been harmed because the misrepresentation affected the nature of the bargain, either because the perpetrator lied about the value of the thing (for example, promising something costs \$10 when it actually costs \$20,), or because he lied about the thing itself (for example, promising a gemstone is a diamond when it is actually a cubic zirconium). . . . Either way, though, the victim didn't get what he paid for.

Because of the failure to renew a motion for judgment of acquittal, the Court reviewed the issue of the sufficiency of evidence under the manifest miscarriage of justice standard, under which a conviction will be vacated only if the court finds "either that the record is devoid of evidence of an essential element of the crime or that the evidence on a key element of the offense is so tenuous that a conviction would be shocking." Waters agreed that "tax liens were peripheral to the proposed loan transaction and, as a result, any lies about those liens (including letters he sent about the make-believe payment with the IRS) could not constitute wire fraud because they did not affect the bargain between the parties." One irony of this argument was that it was based on the proposed additional instruction language that the government had offered and Waters had refused at trial.

The Court rejected Waters' argument, emphasizing aspects of the case that highlighted the importance of the liens and rejecting Waters' minimization of them. "The bargain was to make a solid loan in the first place and to receive loan payments without the threat of outstanding tax liens getting in the way."

First District Court of Appeal

Jennings v. State, 1D17-4006 (Sept. 12, 2019)

The First District affirmed the denial of a motion to withdraw plea. The plea agreement called for a recommendation of a prison term of no more than 15 years; the State would not seek an additional term of probation. The State recommended 15 years and the trial court imposed a sentence of 15 years in prison plus 16 years of drug-offender probation. Jennings moved for withdrawal of the plea, alleging he was not advised of the possibility of additional probation.

The First District emphasized the voluntariness of the plea colloquy, in which Jennings acknowledged that he understood that nobody was "offering you any assurances other than [prison] will not be in excess of fifteen years."

Johnson v. State, 1D17-5170 (Sept. 12, 2019)

The First District affirmed the denial of a Rule 3.850 motion in which Johnson alleged counsel failed to fully advise him regarding sentencing. Johnson argued that "his sentence was illegal because he was forced to serve his state prison sentence first and then afterward, begin serving his federal sentence, thus, nullifying the condition that the state and federal sentences be served concurrently." The "concurrent sentence was merely a recommendation by the sentencing judge and the discretion to determine how and where the sentence would be served belonged to the Department of Corrections." In this case, the "sentence was not part of a plea bargain and his no contest plea was not based on the condition of concurrent sentencing." After the no contest plea "in a straight up plea to the State charges," defense "counsel requested that the state sentences run concurrently with a ten-year federal prison sentence Johnson was currently serving," and the sentencing judge granted that request.

One judge dissented, finding that the "trial judge's sentence should be enforced, not because Johnson agreed to it, but because the trial judge ordered it."

[Howard v. State](#), 1D17-1520 (Sept. 9, 2019)

The defendant was convicted of solicitation of a minor via computer, traveling to meet a minor, and lewd or lascivious molestation. “The evidence adduced at trial established multiple separate acts within each of those three categories, but the charging document alleged only that the acts occurred within a stated time span, leaving open the possibility that they only occurred once. The verdict form did not list separate acts under any of the three counts alleged in the information. The verdict was guilty as charged.”

Pursuant to [Lee v. State](#), 258 So. 3d 1297 (Fla. 2018), a double jeopardy violation existed. The court could consider only the charging document to determine whether multiple convictions for solicitation and traveling existed, even if multiple, distinct acts were established by the evidence at trial.

[Burkhalter v. State](#), 1D17-2193 (Sept. 9, 2019)

The First District affirmed the denial of a Rule 3.850 motion. The defendant alleged that counsel was ineffective for failing to present three witnesses. The trial court found that the evidence at trial was sufficient and that the proffered testimony of the three witnesses was not exculpatory. The First District distinguished [Jacobs v. State](#), 880 So. 2d 548 (Fla. 2004), in which relief was granted where the trial court found that although the evidence at trial had been sufficient, the proffered evidence from uncalled witnesses was, in fact, exculpatory. Additionally, in this case, the trial court colloquied the defendant, who agreed with counsel’s decision not to call the proposed witnesses.

[Moran v. State](#), 1D17-4074 (Sept. 9, 2019)

[Newcomb v. State](#), 1D17-4440 (Sept. 9, 2019)

The First District affirmed Moran’s conviction for conspiracy to commit first-degree murder and found that a motion for judgment of acquittal was properly denied.

Moran knew the essential objectives of the conspiracy to kill Driver’s attacker and fully intended to participate in the murder. Moran approached the CI to obtain his help to kill the attacker. Besides asking the CI to put the man “six feet under,” Moran spoke with Newcomb several times about the plot to kill the man.

Moran made plans to confront the man at his home in Palatka. He talked with Newcomb about using insulin to kill the attacker and suggested chopping up the man's body before disposing of it. Moran's reaction to the staged photograph of the dead attacker underscores his knowledge of and participation in the murder plot. When shown the photograph, Moran was jubilant, not confused. He told the CI that the attacker's death was what he wanted, and he announced that the apparent murder resulted from a group effort between him, Newcomb, Driver, and the CI. His was not the reaction of a man with no knowledge of the murder plot.

...

Second, we reject Moran's argument that there could be no conspiracy because the CI was only the co-conspirator who intended to perform the essential objectives of the conspiracy. It is true that there can be no criminal conspiracy where two or more persons conspire with a government agent with the intention that "an essential element of the offense is to be *performed by, and only by, such government agent.*" . . . But here, the CI was not the only person who agreed to participate in the murder. Moran made many statements and took several actions that showed his intent to participate in the murder of Driver's attacker.

The Court made similar points with respect to Newcomb:

Newcomb knew the essential objectives of the conspiracy to kill Driver's attacker and fully intended to participate in the murder. Newcomb agreed with Driver and Moran that Driver's attacker needed to be put "six feet under." Newcomb and Moran spoke several times about the plot to kill the man. He was the one that contacted the CI and set the date for the group to drive to Palatka. Newcomb prepared to kill Driver's attacker by buying and cleaning special ammunition and by saving his wife's extra insulin to use as a murder weapon. Newcomb kept

the insulin chilled so it would not lose its potency and pre-loaded syringes with the drug. He was the first to suggest that they should snatch the man off the street. He also engaged in discussions about staging the man's body to make it appear that he died while fishing.

And, here, too, the CI was not the only person agreeing to participate in the murder:

Indeed, Newcomb was the person who kept in contact with the CI and made sure that the plan to murder Driver's attacker kept moving forward. He referred to the assault on Driver as "attempted murder" and expressed a willingness to do what he needed to do to protect his Klan family. Newcomb volunteered to walk up to the man and "put him out of his misery." He organized the men for the drive to Palatka for the sole purpose of finding Driver's attacker and murdering him. Newcomb brought his wife's insulin on ice to use as a murder weapon and had the syringes loaded and ready to use. If they could not get close enough to the man, Newcomb was willing to shoot the man with the ammunition he wiped clean of fingerprints. He even asked the CI to stop the car as they approached Palatka so he could have his guns ready.

[Dunn v. State](#), 1D17-5278 (Sept. 9, 2019)

The First District affirmed the denial of a Rule 3.850 motion, and briefly addressed each of 11 claims.

Some of the points noted were: Claims "of trial court error are not cognizable in a motion for postconviction relief." "Counsel cannot be found ineffective for failing to make a meritless objection," and a defendant cannot relitigate a claim in a 3.850 motion "by couching it in terms of ineffective assistance of counsel" after the appellate court previously rejected the underlying claim in the direct appeal. A claim that counsel should have presented an accident-reconstruction expert with medical credentials as that would have been "more persuasive" than the testimony presented by an expert without medical credentials was "speculative."

A Giglio claim was rejected. Even if trial testimony of witnesses conflicts, “the witnesses testified as to their own perception of the events. This conflict in testimony does not mean that the prosecutor knowingly presented false testimony.”

[Jones v. State](#), 1D18-1425 (Sept. 9, 2019)

In an appeal from a conviction for armed robbery, the Court affirmed and rejected a claim that the trial court should have granted a motion to exclude an out-of-court identification by the victim because the argument was not preserved.

While the defense moved to exclude the identification and presented several argument in the trial court, the argument that “the identification was unnecessarily suggestive because the victim was shown pictures of Jones in a BOLO before being shown the photo line-up” was not one of those arguments in the trial court.

Even if preserved, the argument lacked merit. An investigator “testified that the BOLO shown to the victim before he viewed the photo line-up did not include a picture of Jones. . . . There was no testimony that Jones was the only person in the photo-line up that matched the description given by the witness. . . . The video recording of the identification process shows that [Deputy] Martinez did not direct the victim’s attention to any one picture in the line-up. . . . Instead, Martinez told the victim that he did not have to make an identification and he should take his time when examining the photographs.”

[Singleton v. State](#), 1D18-2217 (Sept. 9, 2019)

The Court rejected an Eighth Amendment challenge to a sentence for a juvenile.

Singleton receive a mandatory life sentence as a prison releasee reoffender for an armed burglary committed when he was 26 years old. His qualifying predicate offense for the PRR sentence was an armed robbery committed when he was 15, for which he had received an eight-year prison sentence and for which he had been released prior to the commission of the current robbery.

The Court rejected the argument that Graham v. Florida barred the use of the prior juvenile conviction to enhance the sentence for a crime committed as an adult with the resulting sentence of life without parole.

[Bowden v. State](#), 1D18-2676 (Sept. 9, 2019)

Although the trial court entered an order in November 2015 “declaring nunc pro tunc that Appellant had been competent since May 2015, nothing in the record establishes that a competency hearing was held at any point, either before or after Appellant pled in October 2015.

The Court rejected the State’s argument that testimony had been proffered by an attorney representing the defendant regarding as to matters transpiring during the hearing on a motion to withdraw plea. The attorney testified at that time that “the court said yes [it received the report] and based on the reports [it] found [Appellant] competent.’ However, such testimony does not, in our opinion, show that a competency hearing, to which Appellant was entitled, was conducted. Although the trial court stated during the plea hearing that Appellant ‘has been found by this Court to be competent to proceed,’ it is unclear from the record when the court made that determination or what that determination was based upon.”

The case was therefore remanded for further proceedings, which included the possibility of a nunc pro tunc determination of competency.

[Jones v. State](#), 1D18-5209 (Sept. 9, 2019)

An offense may be reclassified to a higher degree based upon use of a firearm under section 775.087, Florida Statutes, only if the use of the firearm is not an essential element of the offense. Aggravated battery may be committed in two ways: with a deadly weapon, in which case, the firearm is an essential element, and reclassification is not permitted; or, with great bodily harm, in which case, reclassification is permitted, as the firearm is not an essential element.

When both theories are presented to the jury and the jury makes findings that the defendant committed the aggravated battery in both ways, the conviction for aggravated battery with great bodily harm may be reclassified based on the use of a firearm.

Second District Court of Appeal

[Evans v. State](#), 2D18-515 (Sept. 13, 2019)

The Second District rejected an argument that a sentence was vindictive. On the morning of trial, the court “asked whether the parties had tried to resolve the

case.” The State noted Evans’ qualifications for HFO and PRR enhancements, which the State was seeking, and that Evans had rejected a proposed seven-year sentence without any enhancements. The scoresheet reflected a base sentence of three years.

The judge encouraged counsel to confer with Evans about a plea, but Evans insisted on proceeding to trial. The judge proposed an open plea with an eight-year cap, which Evans rejected. At the ultimate sentencing hearing, post-trial, when the judge sentenced Evans as an HFO and PRR, to a sentence of 20 years with a 15-year mandatory minimum, the judge noted the severity of the offense and Evans’ significant criminal history since he was a juvenile.

Although the State made the original plea offer, and it was not initiated by the judge, the judge reopened the plea negotiation process with its own offer. This factor favored Evans’ argument. However, the trial court did not abandon its neutrality. The judge’s comments at the time of sentencing were objective and based on the facts and the prior record. The judge was viewed as having “attempted to save Mr. Evans from himself.” There were no express or implicit threats of harsher sentencing if Evans proceeded to trial. And, although the ultimate sentence was anywhere between 6.6 and 2.5 time greater than the rejected offer, that was “an inappropriate metric.” The court was “hamstrung by the State’s decision to seek HFO and PRR sentencing following the jury’s guilty verdicts.”

The only disparity was between the 15-year minimum as a PRR and the 20-year FHO sentence. And the judge’s reasons for opting for the higher level of 20 years were “clear,” as the judge commented on the significant criminal history: “there’s very little time, very few years in which you were not arrested or convicted of a charge other than when you were in prison.” The judge also noted the severity of the current offense.

Third District Court of Appeal

[Barnes v. State](#), 3D17-1979 (Sept. 11, 2019)

Convictions for three counts of attempted first-degree premeditated murder and one count of witness tampering were affirmed.

The prosecution, during opening statement, referred to Facebook photos that were later deemed inadmissible. A gun was referred to as the one used in the attempted murder, and there was ultimately no evidence connecting that gun to the

defendant or the charged crime. Although the comment was improper, the denial of the motion for mistrial was not an abuse of discretion. It was a passing comment and “did not lead to substantial prejudice or compromise the fairness of the trial, especially in light of the three eyewitnesses’ testimony.”

There was no abuse of discretion in admitting a Facebook photo “showing Barnes partially displaying a gun similar to the one he was seen shooting. It was relevant to dispute the defense characterization of him as an innocent high-schooler with no involvement with guns, and probative of the State’s argument that Barnes was indeed the shooter.”

Fifth District Court of Appeal

[T.D. v. State](#), 5D18-773, 5D18-1884 (Sept. 13, 2019)

Evidence at trial was insufficient to demonstrate the value of a stolen cell phone to exceed \$100. The actual evidence at trial was not set forth in the opinion of the Court.

[Anglero v. State](#), 5D18-1289 (Sept. 13, 2019)

Issues regarding contradictory and conflicting testimony, the weight of the evidence, and witness’s credibility are for the jury, not for the trial court when determining a motion for judgment of acquittal.

[Alterisio v. State](#), 5D18-1821 (Sept. 13, 2019)

Evidence adduced by the State was insufficient to establish that the defendant qualified for PRR sentencing. Such sentencing requires proof that the defendant was released from a prison sentence within three years of commission of the crime for which sentence is being imposed.

At sentencing, the State relied on a certified document that “demonstrates Appellant was ‘released’ from a Connecticut correctional institution within three years of the instant offense. However, given Appellant’s specific history, that single document does not, by itself, establish that Appellant was released from a prison sentence instead of from temporary detention.”

[Madison v. State](#), 5D18-3663 (Sept. 13, 2019)

The denial of one claim of a Rule 3.850 motion after an evidentiary hearing was reversed for further proceedings. In this claim, Madison “argued that his trial counsel rendered ineffective assistance of counsel by failing to research, advise him of, file, and litigate a dispositive motion to suppress,” and that he therefore “pled without knowing about a potential, dispositive motion to suppress.”

The Fifth District’s review of the trial court evidence resulted in its conclusion that an “anonymous 911 call, combined with Madison’s mere presence in the general location, did not constitute reasonable suspicion to justify a stop at gunpoint.” Officers were responding to a complaint of a man “wearing a black shirt and black pants, with a gun in a high crime neighborhood.” An officer who responded observed Madison, “who fit the description, about two blocks from the described location. After getting out of his patrol car, he drew his firearm and told Madison to stop. He asked Madison if he had any weapons. Madison admitted that he had a kitchen knife in his pocket.” After the arrested for a concealed weapon, other items of significance were found during a search; Madison fled, and was then again apprehended.

Additionally, the defendant established prejudice as a result of counsel’s deficiency. The plea sentence for probation violations of 12 years was “double what [Madison] would have faced had the motion to suppress been granted.” Under such circumstances, there was “an objectively reasonable probability hat if he had known that he had a dispositive motion to suppress his substantive violations, he would not have entered a plea.”

[Acevedo-Soto v. State](#), 5D19-555 (Sept. 13, 2019)

The summary denial of several facially sufficient claims in a Rule 3.850 motion was reversed for further proceedings. The trial court had erred in finding the claims insufficient. And, although the trial court correctly concluded that the motion lacked a required oath, the defendant was entitled to leave to file an amended motion with the oath, and the trial court would then have to attach records to refute the sufficient claims or hold an evidentiary hearing.

[Termitus v. State](#), 5D19-583 (Sept. 13, 2019)

After a federal court granted habeas corpus relief and vacated on conviction, the defendant filed a Rule 3.800(a) motion for resentencing with a corrected

scoresheet for the remaining conviction. The trial court denied the motion, finding any scoresheet error harmless because the court could have imposed the same sentence under a corrected scoresheet.

The trial court's reliance on Brooks v. State, 969 So. 2d 238 (Fla. 2007) and the "could have imposed" standard was erroneous, as it applied to scoresheet errors; it was not an applicable standard when a conviction is vacated and a new sentence is required and the trial court has discretion as to the sentence to be imposed at that time.