Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Kirby, 18-11253 (Sept. 17, 2019)

Kirby was convicted of five counts related to the production and possession of child pornography. His total offense level was 43, which "ordinarily recommended a sentence of a life term" under the Sentencing Guidelines. However, "because the statutory maximum punishment for Kirby's crimes was less than a life term, the district court concluded that the Guidelines recommended consecutive terms of the maximum sentence for each count of conviction." The Eleventh Circuit affirmed the challenged sentences.

Section 5G1.2(d) of the Guidelines states:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the [ordinary guidelines recommendation], then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the [ordinary guidelines recommendation].

The dispute in this case was "what sentence is 'equal to' life imprisonment." The maximum terms for the five convictions totaled 1440 months of imprisonment. Kirby argued that the Sentencing Commission defined a "'life sentence' for statistical purposes as 470 months, 'a length consistent with the average life expectancy of federal criminal offenders.'" The Eleventh Circuit disagreed with that argument and applied a definition of life imprisonment from Black's Law Dictionary: "Confinement of a person in prison for the remaining years of his or her natural life." As such, the combined consecutive statutory maximums of 1440 months was "the closest available sentence to indefinite incarceration."

First District Court of Appeal

Cummings v. State, 1D17-5191 (Sept. 18, 2019)

The Court addressed an issue of credit for time served under Rule 3.801, where the trial court had issued a corrected order regarding credit that had been orally pronounced at sentencing but was not included in the written sentence. The trial court's correction was limited to those sentences that had been concurrent, not to the consecutive sentences that followed. The oral pronouncement had been as to all counts.

The First District reiterated its prior holding that a "'trial court may not sua sponte rescind jail credit previously awarded **at any time** even if the initial award was improper." The Court directed the lower court to grant the credit as orally pronounced at the original sentencing proceeding.

Brownworth v. State, 1D18-4113 (Sept. 20, 2019)

Hearsay cannot provide the sole basis for proving a violation of probation; it must be corroborated by nonhearsay evidence. "Here, the only presented evidence of Appellant's failure to attend the appointment [for a required drug/alcohol evaluation] was the probation officer's hearsay testimony relating to her telephone conversation with an evaluation facility employee." The revocation order was therefore reversed.

Hollomon v. State, 1D19-1035 (Sept. 20, 2019)

A "restitution order is reviewed on appeal for an abuse of discretion and . . . there must be a causal connection between a defendant's offenses and the restitution."

Crowell v. State, 1D18-2039 (Sept. 18, 2019)

The defendant appealed a first-degree murder conviction for the killing of her baby. The jury was instructed on both premeditated murder and felony murder. Crowell challenged the felony murder instructions, which relied on the underlying felony of aggravated child abuse. The elements of that offense refer to willfully "torturing" or "caging" a child. Crowell argued that these alternative means of committing the underlying felony of aggravated child abuse were not supported by the evidence.

First, she argued, as to caging, "that this provision could only apply if there was evidence of 'confining a child in some type of wire or bar boxlike structure or a small restrictive enclosure.' . . . Here, there was no such hardened-material, box-like, physical barrier, only a plastic bag." As to "torture," she argued that the term "applies only when there is evidence of a 'level of brutality or extreme pain and suffering' or 'extreme and sadistic conduct,' which wasn't present here." The First District rejected both arguments.

First, the conviction was supported by evidence of premeditated murder. The defendant "admitted that she never checked to see if the baby was breathing or crying before depositing the baby headfirst in a trash bag and then abandoning the bag outside her home. She then lied about having a baby to both hospital personnel and law enforcement."

Next, the evidence was also sufficient as to felony murder based on aggravated child abuse. The "evidence showed that Ms. Crowell discarded her newborn outside in a trash bag, in forty-something-degree weather, where the baby remained for hours before dying of hypothermia and asphyxia."

The felony murder instructions covered four alternative methods of committing aggravated child abuse, including aggravated battery and "the knowing and willful commission of child abuse causing great bodily harm or permanent disability on the baby. There isn't a reasonable possibility that the jury relied on either the torture or caging theories of aggravated child abuse, which are the theories challenged in this appeal, without also finding that Ms. Crowell committed either aggravated battery, or child abuse causing great bodily harm."

Furthermore, there was no error in giving the caging and torture instructions; they were supported by the evidence. "Cage" means "'to confine or keep in or as if in a cage.' . . . This definition easily fits the circumstances here where the infant was confined for hours headfirst in a trash bag."

"Torture" "refers to conduct that 'cause[s] intense suffering to' another person. . . . The evidence here indicated that the baby bled out, while being left for hours outside in the cold, after Ms. Crowell severed but didn't clamp the umbilical cord."

Bartletto v. State 1D18-3306 (Sept. 23, 2019)

The First District reversed the summary denial of a Rule 3.850 claim of ineffective assistance of counsel for failing to investigate an insanity defense.

The trial court relied on the plea colloquy in which the defendant agreed that he had discussed all possible defenses with counsel and the trial court concluded that guilty plea was a strategic decision to avoid the risk of a conviction and life sentence at trial.

"First, Bartletto's testimony that he reviewed all possible defenses with his attorney is insufficient, standing alone, to refute his claim that counsel failed to advise him of the insanity defense. . . . Second, this Court cannot review the postconviction court's determination on the merits because the court did not attach any documents supporting its conclusions that counsel's advice to enter a plea was a reasonable strategic judgment."

A.D.H. v. State, 1D18-4953 (Sept. 18, 2019)

The trial court failed to hold a competency hearing and render a competency determination after it had reasonable grounds to believe the juvenile was incompetent to proceed.

The trial court granted a defense motion for an expert to evaluate competency, but there was nothing in the record about any competency hearing or determination. A competency evaluation from an expert was filed after the disposition hearing.

Second District Court of Appeal

State v. Welch, 2D17-4520 (Sept. 20, 2019)

The Second District reversed an order suppressing evidence seized when the defendant was "discovered unresponsive behind the wheel of his car." The "officer had 'a particularized and objective basis for suspecting' Mr. Welch of criminal activity."

> It was shortly before midnight when the officer observed Mr. Welch's prolonged presence at the entry box with his car engine running and brake lights on and his subsequent failure to respond when a second vehicle whose path he

> was blocking repeatedly flashed its lights and honked its horn. When the officer approached Mr. Welch's car, he heard the engine slowly revving on and off as if the accelerator was being depressed and then released and then he saw Mr. Welch "passed out" behind the steering wheel. Despite the open car window, the officer was initially unable to wake Mr. Welch. We conclude that these observations provided the officer with an objective and particularized basis to suspect that Mr. Welch was unlawfully operating his automobile under the influence of alcohol or narcotics and thus, he was justified in conducting an investigatory stop.

Stephens v. State, 2D17-4964 (Sept. 20, 2019)

Where a trial court prosecution was transferred from Polk County to Hamilton County, and jurisdiction was never transferred back to Polk County, appellate jurisdiction rested with the First District Court of Appeal.

Meuse v. State, 2D18-659 (Sept. 20, 2019)

A restitution judgment was reversed for further proceedings. The trial court conducted the hearing without the defendant, when defense counsel "advised the trial court that he did not know if Meuse waived his presence, and he posited that a restitution hearing was not a critical stage of the proceedings. This was incorrect; a defendant has the constitutional right to be present at a restitution hearing."

Angeles v. State, 2D18-1870 (Sept. 20, 2019)

A motion to withdraw plea was erroneously denied by the trial court without having first appointed conflict-free counsel or hearing argument from the defendant, as the motion was "facially sufficient and established an adversarial relationship with counsel."

The motion was filed by counsel, stating that the defendant indicated that her plea was entered unknowingly and involuntarily; and that conflict-free counsel would be needed. At the hearing, counsel represented that the defendant advised counsel that she wanted to appeal; that counsel told her there was no legal basis for an appeal; and that counsel "realized that Angeles thought he had performed deficiently and might want to withdraw her plea on this basis." The trial court's

denial of the motion had been based on its perception of the plea colloquy having been sufficient and not having shown any hesitation on the part of the defendant.

Third District Court of Appeal

A.L. v. State, 3D18-1848 (Sept. 18, 2019)

The Third District affirmed an appeal in a juvenile proceeding and found that a speedy trial motion for discharge was properly denied.

The case had been continued once through emails between the Public Defender's and State Attorney's Offices. Shortly before the trial date, the State moved for a second continuance. Plea negotiations proceeded through email and defense counsel advised the prosecutor that the juvenile "'is taking the plea,' a plea which had been specified earlier in the email thread."

The State then withdrew its motion for continuance, days prior to the scheduled trial and expiration of the speedy trial period.

> Based on the representations of counsel at the hearing, the trial court instructed the courtroom deputy to change the date set for trial to "re plea." When the parties reported on that date, however, the case against the juvenile's co-respondent was nolle prossed because a key witness was unavailable. The juvenile then rejected the plea, and shortly thereafter, moved for dismissal and final discharge.

Under these circumstances, the trial court did not err in attributing the continuance to the respondent, and the entitlement to a speedy trial under the rule of procedure was waived.

Fourth District Court of Appeal

Beard v. State, 4D18-159 (Sept. 18, 2019)

The Court affirmed multiple convictions for armed robbery and found that the trial court "erred in admitting into evidence photographs of an individual who is purportedly the defendant, holding a handgun," but that the error was harmless.

Although there was evidence that the defendant possessed a firearm during the offenses, and the photos were taken off of the defendant's phone, there was insufficient evidence linking the gun in the photo to the one possessed during the offenses:

> Applied to the facts at hand, the victim was unable to provide any distinct features or meaningful details about the handgun, and there was no gun or evidence of a weapon recovered from the scene. The victim testified that the gun held on his neck was black and felt metallic. This description is insufficient to provide any meaningful link to the gun depicted in the photographs taken from the defendant's phone, which may or may not have been held by the defendant or his identical twin brother. Such vague testimony renders the victim's identification of the gun in the photos so inconclusive as to make the photos inadmissible. The jury should not have been allowed to weigh the photographs in relation to the testimony at trial. As such the trial court committed error.

Casiano v. State, 4D18-3255, 4D18-3257 (Sept. 18, 2019)

Casiano challenged the imposition of a sentence under section 775.082(10), Florida Statutes, on two grounds: the court, rather than the jury, made the findings as to him being a danger to the public; and the sufficiency of the findings to demonstrate that he would pose a danger to the community if sentenced to a nonstate prison sanction. The Fourth District dismissed the appeal as moot, because Casiano had already been released from prison.

The Court noted the potential collateral consequence, which could affect a sentence imposed on a future offense. However, that consequence had not yet materialized and the dismissal was without prejudice to assert the same claims if a future case if any consequence arose from the court's reliance on section 775.082(10).

Jones v. State, 4D18-3589 (Sept. 18, 2019)

The denial of a Rule 3.850 motion was reversed because the trial court lacked jurisdiction to vacate a resentencing order.

In the aftermath of Atwell v. State, 197 So. 3d 1040 (Fla. 2016), the trial court granted a resentencing hearing for a defendant who, as a juvenile, had committed a first-degree felony murder and had been sentenced to life with parole eligibility after 25 years. After the Supreme Court, in Franklin v. State, 258 So. 3d 1239 (Fla. 2018) and State v. Michel, 257 So. 3d 3 (Fla. 2018), changed its position on the legality of a life sentence with parole eligibility, the trial court vacated its order granting a resentencing. Neither party sought rehearing or appealed that order. As such, that order was final and binding and the resentencing had to proceed.

Davis v. State, 4D19-618 (Sept. 18, 2019)

Davis raised a similar issue to the one in Jones, above. However, in this case, "the circuit court did not enter an order granting the motion for resentencing. Because it had not ordered resentencing, there was no final order for the State to appeal. And, because there was no final order granting resentencing, the court was not required to resentence the defendant."

Algaba v. State, 4D19-1087 (Sept. 18, 2019)

Before a defendant can be sanctioned and barred from filing further pro se postconviction pleadings, the trial court must "issue an order to show cause and allow the defendant to respond before considering sanctions."

State v. Sills, 4D19-1585 (Sept. 18, 2019)

The Court granted a certiorari petition in which the State sought "to quash the circuit court's order granting the defendant's motion to preclude the state from presenting a physician to provide expert opinion testimony that the defendant, a medical doctor, did not prescribe controlled substances in good faith and in the course of professional practice."

The physician whom the State retained would have provided "expert opinion testimony on the impropriety of the defendant's actions as described in the probable cause affidavit, after having reviewed police reports, conversations between the defendant an [sic] undercover officer posing as a patient, and patient charts seized during a search of the defendant's office." The trial court excluded such testimony because it "would confuse and mislead the jury."

The State had a legitimate interest in negating the provision of section 893.05(1), Florida Statutes, which exempts from prosecution drug possession in

which a practitioner, "in good faith and in the course of his or her professional practice only," prescribes, administers, dispenses, mixes or otherwise prepares the controlled substance at issue. Expert testimony, in such cases, may "assist a jury in determining whether a defendant's prescription of controlled substances was 'in good faith and in the course of professional practice.'" The trial court's order prevented the State from "effectively negating or significantly impairing [its] ability to prosecute or present the case."

Fifth District Court of Appeal

Jones v. State, 5D18-3375 (Sept. 20, 2019)

Jones pled nolo contendere to trafficking and other charges and reserved the right to appeal an order denying suppression of evidence derived from a search of a vehicle after the stop of that vehicle. There was no error regarding the trial court's finding of the propriety of the stop; as to the subsequent warrantless search, Jones' argument was not preserved for appellate review.

As to the stop of the vehicle:

> The dispositive question of Officer Jimenez's authority to pursue Jones into unincorporated Orange County turns on whether Jones's failure to come to a complete stop at the red light at this intersection before turning right occurred within the boundaries of the city. If it did, Jimenez could properly pursue Jones into Orange County. Our resolution of this issue on appeal rests solely on where Jones was required to stop his vehicle at the intersection for the red light before properly turning right.

Jones argued that due to the configuration of the intersection, he had to enter the intersection to see if it was safe to make the right turn, and that the failure to come to the complete stop therefore occurred outside the city limits, thus barring reliance on the fresh pursuit doctrine. Based on statutory language in section 316.075, Florida Statutes, the Fifth District disagreed: "if an intersection has a stop line or crosswalk, the driver must stop there before making a right turn on the red light," and that occurred within the city limits.

After going through the intersection, Jones drove to his girlfriend's house, parked the car, exited and locked it. Officers located the car, saw Jones and ordered

him to stay, but he ran, and was eventually apprehended. Officers took his keys, placed him in handcuffs and searched the vehicle, finding contraband and a concealed firearm.

The Fifth District rejected the trial court's finding that the warrantless search was authorized as a search incident to arrest. Applying the principles set forth in Arizona v. Gant, 556 U.S. 332 (2009), it was held that "because there would have been no physical evidence in Jones's vehicle of the crime of fleeing and eluding, the trial court erred in finding that the search of his vehicle was authorized under the 'search incident to arrest' exception."

Gant also authorizes such searches "based upon probable cause to believe that the vehicle contains contraband." The trial court's order denying suppression encompassed that aspect of Gant as well, and Jones's appellate court brief presented no argument as to this aspect of Gant and was thus deemed abandoned.

The affirmance of the conviction s was "without prejudice to Jones timely pursuing any and all postconviction relief that he deems appropriate."

Turner v. State, 5D18-3772 (Sept. 20, 2019)

Convictions for drug offenses were reversed because the "trial court erred in disallowing [the defendant's] closing argument that the lack of fingerprint evidence relating to the baggie containing the methamphetamine constituted reasonable doubt."

Defense counsel explained that the argument went to whether the State satisfied its burden of proof, and the trial court sustained the State's objection, stating: "I don't see your nexus of how you've shown that fingerprints are something that is required for them to prove their cases."

"A defendant is entitled to highlight the State's lack of evidence – either the nonexistence of fingerprints or the failure to attempt to obtain fingerprints – as reasonable doubt. . . . The State often presents evidenced of the virtual impossibility of obtaining fingerprints from small baggies in drug-related trials. It elected not to do so in this case. Turner was entitled to argue that the State's lack of fingerprint evidence constituted reasonable doubt."

Wehr v. State, 5D19-147 (Sept. 20, 2019)

A trial court lacks jurisdiction to rescind an order granting resentencing when neither party sought rehearing or appealed the order.