Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Annamalai, 15-11854 (Sept. 24, 2019)

Annamalai appealed convictions for "numerous offenses related to his operation of a Hindu temple in Georgia." Several, including bankruptcy fraud, conspiracy to commit bankruptcy fraud and money laundering were reversed; others were affirmed.

A challenge to the denial of severance of charges was rejected as they all "arose out of and were connected to the same general fraudulent scheme. Where, as here, there is an 'explicit connection between the groups of charges,' we need not look outside 'the four corners of the indictment.'" Annamalai was charged with using the Temple "to carry out a fraudulent scheme." The indictment then alleged that he "defrauded followers of the Hindu Temple, misled the financial institutions that charged those followers, moved the fraud proceeds (proceeds which he failed to report on his income tax return) to a foreign bank account, improperly concealed property belonging to the Hindu Temple's bankruptcy estate, committed money laundering with the proceeds of that bankruptcy fraud, and committed a number of illegal acts related to the criminal investigation into his fraudulent activities. . . ."

The Court further rejected due process, equal protection and freedom of religion arguments as "the government's case here was not an impermissible attack on the Hindu religion or on the truth or verity of Mr. Annamalai's beliefs. Rather, the government prosecuted Mr. Annamalai for a scheme in which he abused his position as a Hindu priest by, among other things, causing his followers' credit cards to be charged in excess of agreed amounts and without authorization, and submitting false documents to financial institutions to substantiate the unauthorized charges." Some comments by the prosecutor in closing argument went too far: "For example, the government twice referred to the individuals who served as priests at the Hindu Temple as 'so-called priests.'" And, the government "exaggerated at sentencing by saying that 'every dollar that was deposited into the [Hindu

Temple] was in fact a fraud,' as there was testimony from followers that some services they paid for were performed.

The bankruptcy fraud and related charges were "based on funds that the Shiva Vishnu Temple acquired or received *after* the Hindu Temple filed for bankruptcy in August of 2009 and *after* the trustee shut it down in early November of 2009." The Court agreed with the argument "that the new income generated by the Shiva Vishnu Temple, for post-bankruptcy religious or spiritual services provided to and paid for by followers, did not constitute property of the bankruptcy estate of the Hindu Temple. We also agree with him that the post-petition donation check made out to the Hindu Temple did not constitute property of the estate."

The Court rejected the government's arguments which appeared to be based on the belief "that the Hindu Temple and its bankruptcy estate were one and the same, so that any continuation of the Hindu Temple's business by the Shiva Vishnu Temple is necessarily equated with the estate and all it comprised." The bankruptcy estate, however, is separate and distinct from the corporate debtor. And, any effort to pierce the corporate veil failed for multiple reasons, including the fact that the jury was not "instructed on any alter ego theory of any kind." Also, efforts to pierce the corporate veil "must proceed under state law."

Money laundering charges were "predicated on proceeds generated from the specified unlawful activity of bankruptcy fraud." As the bankruptcy fraud charges were reversed, the money laundering charges likewise had to be reversed.

A charge of conspiring to harbor a fugitive was reversed because harboring requires an "affirmative physical act to help harbor or conceal and there was no evidence of an agreement or understanding that a conspirator would commit such an act. Merely giving advice to a fugitive is insufficient; here, the defendant instructed one individual to tell another "to use cash and not a debit card," and the latter individual complied with that instruction. Additionally, false statements to government agents about the fugitive's whereabouts "also do not constitute harboring or concealing." Airline tickets showing the fugitive intended to flee were insufficient, as the trip in question occurred before the defendant gave the instruction about using cash.

First District Court of Appeal

Frasch v. State, 1D17-754 (Sept. 25, 2019)

A conviction for first-degree murder was affirmed and several issues were addressed.

A Brady claim was raised in a motion for new trial. At the sentencing hearing, pursuant to the request of the victim's family, the prosecutor read a "rough translation" of an unsigned document from an unnamed family member. The defense argued that it provided a basis for further investigation regarding a prowler in the marital home. The trial court viewed the statement as a "very confused, rambling dissertation," from an unnamed family member who might not even reside in the United States and who might not be available for being subpoenaed. The First District agreed: "The unanswered questions abut the family statement leave it worthless as evidence or as a source of evidence. . . . the statement is not favorable to Appellant, as it clearly blames him for the victim's death and asserts that the victim was afraid of him primarily, not of a prowler." Development of a theory based on an unknown prowler as the murderer was "speculative," and the defense "could have discovered any video evidence earlier" as the marital home had a video security system.

The trial court permitted the State to present testimony "of the victim's personal assistant, who claimed that he heard a heated conversation that the victim put on speakerphone. He heard the victim say to the other person,' Your are my husband'; and heard the other person say, 'I will kill you.'" Even if the trial court's conclusion that this was not introduced for the truth of the matter and was therefore not hearsay, the First District found that the "victim's assertion, in context, would be expected to draw a denial if it were not true, and the other speaker's failure to deny being the victim's husband can be deemed an adoptive admission by Appellant." Any error was further found to be harmless based on the totality of the evidence in the case.

The trial court did not abuse its discretion in denying a motion to withdraw a previously-exercised peremptory strike:

> . . . the defense used the sixth of its ten peremptory strikes against a prospective juror. Jury selection

> continued until five jurors had been selected. The defense then asked the trial court to allow it to withdraw its strike of the earlier juror, and instead use that strike against a new prospective juror, which would have made the earlier juror the sixth and final juror other than alternates. The trial court asked the defense for an explanation, noting that the belated withdrawal would deprive the prosecution of its ability to exercise strategic decisions on jurors already seated. Defense counsel argued that he had erroneously thought the earlier juror had previously served on a jury and struck her for that reason, but it turned out he was mistaken. The prosecutor undermined that stated defense rationale, pointing out that two other jurors whom the defense had accepted had previously served on juries.

The trial court concluded that it was too "late in the game"; that it would not be fair at this point in time.

Williams v. State, 1D18-661 (Sept. 25, 2019)

Williams appealed a conviction for tampering with a witness in the investigation of a first-degree felony punishable by life. The State appealed the downward departure sentence that the court imposed.

> The facts were largely undisputed. Appellant had been in a physical relationship with two women who themselves were in a relationship and wanted to have a baby. An incident occurred in which Appellant entered the first woman's residence, with the second woman also present; then he punched the first woman in the side of the head; and had an altercation with the second woman, including punching her in the face, as she tried to force him out.
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> The State charged Appellant with two counts of burglary with assault or battery, a first-

> degree felony punishable by life (later dropping the second burglary charge since there was only once entry). While Appellant was incarcerated before trial, he persuaded a friend to contact the first victim and try to get her to drop the charges. The State then charged Appellant with harassing or tampering with a witness in a first-degree felony investigation.

Williams was convicted of misdemeanor battery, a lesser included offense, and felony witness tampering, as charged. Williams argued that the tampering conviction should have been "reduced to a misdemeanor to reflect the misdemeanor battery verdict. This argument is contrary to the plain language of the statute, which equates the level of the tampering offense with the level of the crime *charged* during the investigation."

The witness tampering statute, s. 914.22(2)(d), provides that the offense is a "[f]elony of the first degree . . . where the official investigation or official proceeding affected involves the investigation or prosecution of a first degree felony. . . ." "The ultimate conviction or acquittal of the underlying charged crime is independent of the damage tampering can do during investigation and prosecution."

The trial court imposed a downward departure sentence because "there were conflicts in the evidence and in the second victim's testimony, and . . . 'the facts of this case do not support the ultimate sentence.' . . . As a matter of law, a trial court's personal view of the evidence and a defendant's guilt are not legally valid reasons for departure."

Plummer v. State, 1D18-1309 (Sept. 25, 2019)

A conviction for direct criminal contempt for filing fraudulent construction liens was reversed.

Direct contempt must be based on conduct committed in the actual presence of the court. The trial court based its finding on court filings, which were largely records that were not before the court.

Davis v. Gilchrist County Sheriff's Office, 1D18-3938 (Sept. 25, 2019)

The First District addressed several issues arising out of a case involving section 790.401, Florida Statutes (2018), "the Marjory Stoneman Douglas High School Public Safety Act." This "'red flag' statute requires courts to proactively remove firearms from individuals (upon petitions filed by law enforcement agencies) who pose a significant danger to themselves or others." The Sheriff's Office filed such a petition, believing one of its own deputies to have become a danger and the trial court granted an ex parte risk protection order, which Davis appealed.

Among other issues addressed, the First District rejected challenges, both facial and "as applied," to the constitutionality of the statute. There was nothing vague about the statutory terms challenged by Davis: "significant danger," "relevant evidence," and "mental illness."

Nor was the statute impermissibly broad. The Court emphasized the legitimate goal of the legislature – "providing law enforcement and the courts with the tools to enhance public safety [on school campuses] by temporarily restricting firearm possession by a person who is undergoing a mental health crisis and when there is evidence of a threat to violence, and by promoting school safety and enhanced coordination between education and law enforcement entities at the state and local level."

A substantive due process challenge was rejected because the statute's purpose was preventative, not punitive. Davis had argued that the statute could "potentially be used to punish entirely innocent activity." The Court further emphasized due process safeguards included in the statute: a hearing within 14 days, allowing a prompt opportunity to resist a final order; a heightened burden of proof – clear and convincing evidence; and a list of factors to be considered, such as mental health and alcohol abuse, which are being considered "within a specific context – the threat of gun violence."

Pelham v. State, 1D19-1010 (Sept. 25, 2019)

Pelham sought a belated appeal in a criminal case. The First District remanded the case to the trial court, with the appointment of a special master, with instructions for involvement by the State Attorney and for an evidentiary hearing if warranted. In the trial court, the State Attorney's Office announced that it did not object to the belated appeal and the special

master declined to hold an evidentiary hearing based on the State's lack of objection to the belated appeal.

The First District, upon further review, rejected those actions. The appellate court can grant a belated appeal only if the exceptions set forth in Rule 9.110(c)(4)(f), Fla.R.App.P. are satisfied. This is a jurisdictional requirement; it is not satisfied by the lack of objection of the State.

Upon further review in the appellate court, the State responded that "based upon the sworn representations of opposing counsel in the Amended Petition for Belated Appeal, the State does not object to the Court granting [Pelham] a belated appeal." The Court construed this lack of objection "as an admission of the allegations in the petition" and granted the appeal.

Second District Court of Appeal

Goodman v. State, 2D18-1632 (Sept. 27, 2019)

Goodman appealed convictions for multiple drug possession charges and one count of resisting without violence. The Second District reversed the denial of a motion to suppress "the contents of a pill bottle recovered during" an encounter between Goodman and a police officer because the officer lacked "probable cause to arrest Mr. Goodman for failing to comply with the officer's initial, nonverbal request to stop and failed to establish reasonable suspicion that Mr. Goodman was armed and dangerous to justify the subsequent frisk."

The officer was engaged in an effort to stop Goodman, who was observed riding a bicycle without a light at night. The officer pursued Goodman in a patrol vehicle, with lights activated. Goodman "looked back but continued riding." The officer then used a siren, briefly; the officer admitted there were others in the area. Eventually, Goodman got off his bicycle "and began walking away from the officer after first looking at the officer and 'acknowledging that [his] lights were activated for a traffic stop."

The officer started running after Goodman and ordered him to stop; Goodman "immediately complied, and then he began walking towards the officer with his bicycle."

The officer's camera picked up the remainder of the encounter:

> As the officer approached, Mr. Goodman parked his bicycle in between himself and the officer. Without being instructed to do so, Mr. Goodman walked a few feet to the curb and sat down. This forced the officer to walk around the bicycle to approach Mr. Goodman, who was seated on the curb, leaning forward with his elbows resting on his knees and his hands positioned in front of his body.
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> To the officer, Mr. Goodman appeared very nervous. Understandably, the officer attested to being nervous himself, in light of Mr. Goodman's initial failure to stop, his unprompted decision to sit down on the curb, and the fact that Mr. Goodman was "hunching over and leaning onto his right side." The officer believed that Mr. Goodman was "trying to conceal something," given the "way he was sitting" and his abnormal demeanor. The officer described Mr. Goodman as "using his right arm with his right leg and ha[ving] it extended to a point where he was almost resting and trying to avoid me seeing the right side of his body."

While Goodman was rummaging through his pocket in response to a request for identification, the officer asked him to stand up and started to frisk him, because Goodman was "acting as if 'he was hiding something which could possibly be a weapon on his right side.'" The officer felt a hard object, which he recognized as a pill bottle. Goodman then attempted to flee and was quickly stopped, handcuffed and arrested.

There was insufficient evidence for an arrest for intentionally fleeing from the officer before the pat-down: "The officer's initial command to stop – the activation of lights and the yelp of a siren – was nonverbal. Knowledge of an officer's intention to detain a pedestrian or bicyclist can be established by nonverbal communication under the appropriate facts. However, in this case the defendant actually obeyed the subsequent verbal command, strongly suggesting that the preceding, ambiguous law

enforcement activity could have been perceived by a reasonable cyclist as unrelated to himself. Without testimony about how closely the officer followed behind Mr. Goodman with his lights activated or for how long, we cannot surmise whether Mr. Goodman knew that the officer was directing him to stop." Until such time as the officer verbally directed Goodman to stop, there was no basis for concluding that Goodman knew or should have known that the officer was trying to stop him. Absent probable cause for an arrest, the search incident to the subsequent arrest could not be affirmed under the tipsy coachman doctrine.

Although there was a basis for a traffic stop based on the lack of a bicycle light at night, there was no basis for the ensuing pat-down search. The Second District found that Goodman did not "behave in a manner that would otherwise indicate that he was dangerous." Although the officer felt that Goodman was trying to conceal something, based on nervousness and body movements, there were "no specific facts indicating that what Mr. Goodman might have been attempting to conceal was a weapon, as opposed to some other type of contraband."

The Second District further found that the search could not be upheld under the inevitable discovery doctrine. The officers could not have arrested Goodman for the infraction based on a bicycle light. Thus, they would not have discovered the pill bottle while conducting a search incident to arrest.

Heatley v. State, 2D16-4562 (Sept. 25, 2019)

After the Second District remanded the case for a new sentencing hearing, the trial court conducted it with a PSI that had not been considered previously, but the court did not grant a de novo resentencing; that was erroneous. "Where the court has discretion to impose a new sentence and is not merely performing a ministerial act, a defendant is entitled to a full de novo resentencing hearing," at which both sides may present additional evidence. The imposition of an HFO sentence is within the trial court's discretion, so a full de novo resentencing hearing was required.

State v. Lincoln, 2D19-508 (Sept. 25, 2019)

The Second District granted the State's certiorari petition which sought review of its pretrial request to present collateral offense evidence in a prosecution for lewd molestation and child abuse. The trial court used the

wrong standard to make its determination of admissibility and the case was remanded for reconsideration under the correct standard.

In cases of child molestation, section 90.404(2)(b)(1), Florida Statutes (2012), abrogated prior Florida Supreme Court case law. Under prior case law, the Supreme Court had acknowledged relevancy of collateral acts of child molestation to corroborate the victim's testimony. The Court had "relaxed the requirement for strict similarity between the charged and collateral offenses in the familial context, but there must be some similarity other than the fact that both offenses occurred in the family. We have not extended the relaxed standard of admissibility to nonfamilial cases. However, in both familial and nonfamilial cases, the required showing of similarity must be made on a case-by-case basis. . . ."

Section 90.404(2)(b) dispensed with similarity requirements; the only issue under the statute is relevancy. "But the similarity of the collateral acts and charged offense must still be considered hen making the determination of relevancy and the determination of the evidence's probative value."

The trial court in this case analyzed the evidence under the Supreme Court's case law preceding the statutory amendment and found that the two crimes "do not have enough significant common features to warrant its admissibility, even under the relaxed familial relationship standard."

Fifth District Court of Appeal

Norwood v. State, 5D18-3077 (Sept. 27, 2019)

Norwood appealed a conviction for knowing possession of a conveyance sued for trafficking based on the sufficiency of evidence. He argued that there "must be evidence of a nexus, beyond mere transportation, between the use of a vehicle and the sale, delivery, or trafficking of a controlled substance." As this argument was not made in the trial court, the Fifth District applied the fundamental error standard of review and affirmed.

Regardless of whether the Fifth District agreed with the analysis of two Second District cases on this issue, "those cases provide no support for Appellant, who transported the drugs in his van, actually sold the drugs while in his vehicle, and delivered the drugs from within his vehicle to the C.I. This was no happenstance as Appellant intended to – and actually used

– his minivan for the trafficking of the liquid morphine." There was neither fundament al error nor any error at all in submitting the case to the jury.

Yancy v. State, 5D18-3544 (Sept. 27, 2019)

This case was remanded for a nunc pro tunc determination of competency. Yancy had been found incompetent to proceed. His trial court counsel stipulated to competency, relying on three evaluations. The trial court accepted the stipulation to an evaluation. The Fifth District, based on the record before it, was unable to determine "whether the trial court read the expert's evaluation and made an independent determination."

Taylor v. State, 5D19-766 (Sept. 27, 2019)

The summary denial of a Rule 3.850 motion was reversed for an evidentiary hearing where the claim in the motion was facially sufficient. Taylor alleged "that a previously undisclosed plea offer revealed thirteen years after his conviction and sentence constitutes newly discovered evidence justifying his delayed filing of his postconviction motion." As to one of the two cases that had been pending at the time, although Taylor was aware that efforts were being made to negotiate a global plea, his counsel at the time allegedly told him that there was no offer.

Department of Children and Families v. State of Florida, et al., 5D19-1026 (Sept. 27, 2019)

The trial court's commitment of the defendant in the criminal case pursuant to section 916.13, Florida Statutes, was reversed due to insufficient evidence. Although two experts noted that the defendant "suffered from an intellectual disability and had a history of ADHD and bipolar disorder, neither expert opined that Rodriguez-Virella was incompetent due to mental illness. . . . Similarly, neither expert opined that Rodriguez-Virella met the criteria for competency restoration. Finally, while the parties agreed Rodriguez-Virella was incompetent to proceed, their stipulation alone cannot circumvent the statutory requirements for commitment to the Department."