Case Law Update
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Eleventh Circuit Court of Appeal

United States v. Ochoa, 16-17609, 18-10142 (Oct. 25, 2019)

Ochoa appealed convictions and sentences for Hobbs Act robbery, knowingly carrying a firearm during and in relation to a crime of violence, and knowingly possessing a firearm and ammunition as a convicted felon.

Ochoa argued that the district court erred in limiting cross-examination of Officer Starkey, who prepared a photo identification lineup including Ochoa and who participated in the interview of Ochoa. The defense sought to elicit evidence concerning the officer's misuse of police department computers and his efforts to conceal that misuse. The defense argued that the evidence was admissible under Rule 608(b) to show Starkey's character for untruthfulness.

The Eleventh Circuit found that the district court acted within its discretion. While the evidence of misconduct, especially the attempt to destroy evidence of misuse of police computers, was relevant to his character for truthfulness, the relevance was marginal in this case and the district court did not err in concluding that the testimony "would confuse or mislead the jury." "In both instances of misconduct, Officer Starkey engaged in deception to conceal embarrassing personal behavior, not to falsify or manipulate evidence in an ongoing criminal investigation of another person." Additionally, the disciplinary incidents had occurred more than 12 years prior to trial, thus further diminishing their probative value. Any error in limiting cross-examination was, in the alternative, harmless error.

The Court also addressed two issues regarding statements made by Ochoa – pre-Miranda and post-Miranda. Ochoa was in custody at the time of questioning about the presence of weapons in his residence, as he was handcuffed. The "public safety" exception to Miranda was applicable, as the interrogating agent "asked questions he reasonably believed were necessary to secure the scene following Ochoa's arrest." The agent "knew he was dealing with a potentially violent suspect who was in possible possession of a firearm," as probable cause for an arrest for an armed robbery existed. Although the agent did not have a specific reason to suspect any particular person remained in the residence, his concern "was reasonable,

considering the number of people who had already emerged from the house at that point." The agent was trying to ascertain "'if there's anything that could hurt my guys [law enforcement team] before we go in.'"

As to post-Miranda statements, the Court concluded that Ochoa did not invoke his right to counsel or to remain silent. During questioning, Ochoa stated that "he did not 'agree with' the statement that he was 'willing to answer questions without a lawyer present.'" And, he was initially hesitant to sign the Miranda waiver form. Neither of these constituted an "'unambiguous or unequivocal' invocation of either his right to counsel or to remain silent."

The statement that he didn't "really agree" had potentially different meanings – either he did not wish to answer questions without a lawyer present, or "an expression of confusion as to what he was agreeing to by signing the waiver form." And, after the initial hesitancy about signing the waiver, when he received a brief explanation of the waiver, he "quickly assented, further indicating he had only been confused previously and had not invoked his right to counsel or to remain silent."

This case involved a retrial as to one count, and the retrial did not occur within the 70-day period mandated by the Speedy Trial Act. The district court dismissed that count without prejudice, and the issue on appeal was whether the dismissal should have been with prejudice. The proper dismissal sanction is a matter within the district court's discretion, based upon three factors – the seriousness of the offense, the facts and circumstances that led to dismissal, and the "impact of a reprosecution on the administration of this chapter and on the administration of justice."

The offense at issue was serious – possession of a firearm and ammunition by a convicted felon. The Eleventh Circuit rejected the argument that the question of seriousness should be determined in comparison to the other charges in the case. The causes for the failure of the case to be retried within the 70-day period fell on both parties, as the district court had requested both parties to notify it if the scheduled retrial date was outside the speedy trial deadline and neither party complied. Also, court-ordered periodic reports from counsel had not been filed. And, the 70-day period had expired before successor defense counsel entered an appearance and requested additional time to prepare for trial. Finally, there was no prejudice from the delay affecting the ability of the defense to prepare for trial.

The Court also addressed the sufficiency of the evidence as to all offenses for which there were convictions.

Ochoa's sentence included a classification as a career offender under section 4B1.1(a) of the Guidelines. The district court did not err in concluding that Florida state-court convictions for armed robbery and second-degree murder categorically qualified as crimes of violence under this classification. The sentence also applied an enhanced base offense level of 26 to the felon-in-possession conviction. That, too, was satisfied. First, the two Florida convictions again qualified as crimes of violence under this provision. And, the offense involved the requisite "semiautomatic firearm that is capable of accepting a large capacity magazine." The large capacity magazine was found in a bedroom drawer. The firearm was found outside the residence. The issue here was whether the magazine was found in close proximity to the firearm. However, the district court had based its close proximity conclusion on evidence that the defendant's brother took the firearm out of the house, along with other magazines, thus placing the gun in the same room, if not the same drawer, as the large capacity magazine. The ultimate location of the discovery of the two locations was therefore not dispositive.

First District Court of Appeal

Koon v. State, 1D18-2306 (Oct. 23, 2019)

The trial court failed to conduct an adequate admission colloquy with respect to a revocation of probation. It is not sufficient to merely accept defense counsel's representations that the defendant admitted the violations.

Kelly v. State, 1D18-1438 (Oct. 21, 2019)

A claim, in a Rule 3.850 motion, that a conviction for failing to comply with the sexual offender registration requirements because the defendant's did not qualify based on the release date for his qualifying offense was properly denied, as it was not cognizable in a Rule 3.850 motion; it could have and should have been raised at trial an on direct appeal.

Ancrum v. State, 1D18-1639 (Oct. 21, 2019)

A claim for jail credit beyond the amount agreed to in a plea bargain is not cognizable in a rule 3.801 proceeding.

Barton v. State, 1D18-1712 (Oct. 21, 2019)

A conviction for aiding and abetting requires proof "(1) that the defendant helped the person who actually committed the crime by doing or saying something that caused, encouraged, incited or otherwise assisted the person to commit the crime; and (2) that the defendant intended to participate in the crime."

Washington v. State, 1D18-2216 (Oct. 21, 2019)

In an appeal from a conviction for sexual battery on a minor the Court affirmed and rejected the argument that the trial court erred by excluding "testimony of a defense witness who was familiar with the victim's unusual sexual conduct and advanced sexual knowledge."

The victim's prior sexual knowledge and experience were at issue in the trial and testimony was introduced establishing that she had previously watched adult sex videos. The defense proffered a witness who had previously interviewed the victim during a DCF investigation, and the witness would have testified that at that time the victim's familiarity with sexual activity "was very surprising for her age."

The trial court did not abuse its discretion in excluding the testimony based on its finding that it was remote and not related to the criminal charge where the prior interview had occurred between three and four years prior to the incident in the current case. And, based on the testimony regarding the victim's knowledge of sexual activity, any error in excluding the testimony was harmless.

Second District Court of Appeal

Spera v. State, 2D18-1702 (Oct. 23, 2019)

A conviction for first-degree murder was reversed because the trial court failed to conduct a Faretta hearing. Prior to trial, the defendant filed a pro se "Motion to Faretta," which requested the court to conduct a Faretta hearing and alleged the "Defendant[‘] s right to self-representation." This was "an unequivocal request to represent himself," and the failure to conduct the required hearing was reversible error. The Court rejected the State's argument that the "request was equivocal because he did not also request to dismiss his counsel. While a request to dismiss counsel may go hand in hand with a request for self-representation, the failure to explicitly indicate one's desire to discharge counsel does not otherwise make a clear

request for self-representation any less so." Nor was the motion untimely where it was made about two weeks prior to trial.

Third District Court of Appeal

McCray v. State, 3D17-1438, 3D17-1300 (Oct. 23, 2019)

In an appeal from a revocation of probation, the Third District held that the defendant was entitled to a "new sentencing hearing because the trial court failed to follow the requirements of section 948.06(8)(e) [violent felony offender of special concern], which requires a finding that the defendant poses a danger to the community, before sentencing."

Edwards v. State, 3D18-0992 (Oct. 23, 2019)

The trial court did not commit fundamental error by departing from "its role as neutral arbiter when it questioned the probation officer to fill in the gap in his testimony on the element of willfulness necessary to revoke probation."

Lindo v. State, 3D18-1959 (Oct. 23, 2019)

The Third District reversed a conviction for attempted manslaughter by act because the trial court committed fundamental error "in instructing the jury on the forcible-felony exception to self-defense, as [Lindo] was not charged with an independent forcible felony."

The jury was instructed as to attempted manslaughter by act and the lesser offense of felony battery. The court then gave the following "forcible felony" instruction:

> However, the use and/or threatened use of deadly force is not justified if you find that Lamar Lindo was attempting to commit, committing, or escaping after the commission of attempted second-degree murder [the original charge which did not go to the jury], manslaughter by act, or felony battery.

Where, as here, the defendant is not charged with an independent forcible felony, the giving of the instruction is error and it effectively negates the defense of self-defense. Furthermore, the error was deemed fundamental, in the absence of a

defense instruction, because the sole defense was self-defense, there was significant testimony as to Lindo's contention "that he was attacked and overpowered" by another person, and "'that he responded with force to protect himself and his vehicle,'" and, although he State did not rely on the instruction in its closing argument, under the facts of the case, "'the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'"

Branch v. Junior, 3D18-2552 (Oct. 23, 2019)

A habeas corpus petition seeking release on Branch's own recognizance was denied because Branch "was not on pretrial release and was not in the physical custody of the State, as would be required to qualify for ROR pursuant to Florida Rule of Criminal Procedure 3.134."

Branch was already on house arrest, a form of pretrial release. Rule 3.134 provides for ROR when the State fails to file "formal charges on defendants in custody," within 30 days of arrest, and states that defendant cannot "remain in custody" beyond 40 days unless formally charged with a crime. "The plain language of the rule requires that a defendant be in actual physical custody in order to qualify for ROR."

G.C. v. State, 3D18-2563 (Oct. 23, 2019)

The Third District affirmed a withheld adjudication and found that a motion for judgment of acquittal was properly denied. G.C. was charged with violating section 316.1935(2), Florida Statutes, fleeing or attempting to elude a law enforcement officer. One of the elements is that the patrol vehicle be one "with agency insignia and other jurisdictional markings prominently displayed on the vehicle."

The officer testified "that he was in a 'marked police vehicle' that had '[v]isible police emblems, City of Miami Police emblems, stripes, visible police light bar, push bar.'" "After quoting definitions of "visible" and "prominent" from Black's Law Dictionary and the Meriam-Webster Dictionary, the Court concluded that "although the law enforcement officer did not specifically describe the size of the 'visible' City of Miami Police emblem or specifically use the word 'prominent' when referring to the City of Miami Police emblem," the evidence presented was sufficient.

Burks v. State, 3D19-1618 (Oct. 23, 2019)

The Third District previously reversed a sentence for resentencing, on the defendant's Rule 3.800 motion, because the trial court failed to impose the 10-20-Life mandatory minimum. On remand, the court imposed an additional 25-year mandatory minimum, to run concurrent with a PRR life sentence. On appeal, Burks argued that the additional 25-year mandatory minimum sentence constituted a double jeopardy violation. The Third District disagreed.

The resentencing resulting in the additional 25-year mandatory minimum was pursuant to Burks's own motion, and he therefore "'had no expectation of finality regarding his sentence where he opened the door to the district court's appellate jurisdiction on an issue of law that was clarified while his case was pending.'"

Fourth District Court of Appeal

Walker v. State, 4D18-3322 (Oct. 23, 2019)

The trial court, when sentencing the juvenile defendant as an adult, orally provided for judicial review of the sentence after 20 years under section 921.1402(2)(d), Florida Statues," but failed to enter the required written order. The trial court was directed to enter the written order on remand.

The trial court further erred by including 1.6 points on the scoresheet for an originally charged offense that was later dropped. Resentencing was not required, however, because, when addressing a Rule 3.800(b) motion, the trial court expressly stated that without the 1.6 points, the court "would have" imposed the same sentence. That is the applicable standard for harmless error as to scoresheet errors when raised on direct appeal, or under Rules 3.800(b) or 3.850.

The court also failed to enter a written order of competency after orally announcing its independent determination of competency, and the trial court was again ordered to enter the written order on remand.

Alisme v. State, 4D19-429 (Oct. 23, 2019)

The summary denial of a Rule 3.850 motion must attach records from the case conclusively refuting the claim.

Branham v. State, 4D19-744 (Oct. 23, 2019)

The Fourth District affirmed the trial court's finding that a Rule 3.850 motion was untimely. The Appellant's "argument that the untimely filing should be excused because he retained an attorney who failed to timely file the amendment was not raised below and is not preserved for appeal. The proper avenue for presenting such a claim is through a sworn filing in the trial court, which can conduct an evidentiary hearing on the issue if necessary."

Chambliss v. State, 4D19-2858, 4D19-3085 (Oct. 23, 2019)

Habeas corpus is an unauthorized vehicle for seeking postconviction relief. Such petitions must be treated as rule 3.850 motions, subject to applicable procedural bars based on the two-year limitations period and the prohibition against successive motions.

Fifth District Court of Appeal

State v. Melendez, 5D18-1420 (Oct. 25, 2019)

A downward departure sentence, based on the victim's need for restitution, was reversed because it was not supported by competent, substantial evidence. The victim as a credit union and there was no evidence of its need for restitution.

Poole v. State, 5D18-1681 (Oct. 25, 2019)

While affirming convictions for multiple offenses, including human trafficking, the Court addressed the issue of admission of expert testimony. The trial court permitted a law enforcement officer to "present expert testimony on the sex worker subculture and human trafficking," based on the State's argument that it "would assist the jury in understanding the language, tactics, and coercion involved in relationships between pimps and their sex workers."

Testimony presented related how victims are "slow to open up about their status as victims, and they often distrust law enforcement and deny being physically abused. Pimps or traffickers, on the other hand, are typically controlling individuals, masters in manipulating, and business savvy." The officer also explained recruitment practices, including the use of the internet and canvassing of malls and strip clubs. The "grooming process" was also explained.

The Fifth District disagreed with the Appellant's argument and held "that expert opinion on human trafficking and the sex worker subculture can assist the trier of fact on subjects not within an ordinary juror's understanding or experience." The Court noted that that may not be true in "every case involving commercial sexual activity," but the trial court analyzed the relevant facts in this case:

> Among other things, Special Agent Ramirez discussed the use of technology in the human trafficking industry, provided examples of specific terms that are used within the relationships of pimps and sex workers, and offered insight as to why victims of human trafficking remain in abusive relationships with traffickers and why such victims hesitate to report the crimes to family, friends, or police. . . .

A Second District case which found expert testimony related to the battered spouse syndrome unnecessary was distinguished based upon the greater complexity of the facts of the instant case. The Fifth District also rejected the argument that this testimony constituted prohibited testimony about "general criminal behavior."

Batiz v. State, 5D18-1831 (Oct. 25, 2019)

The Fifth District affirmed a conviction for lewd or lascivious molestation of a person under 16 years of age and addressed arguments related to Florida's special maritime criminal jurisdiction.

The crime was alleged to have occurred on a cruise ship in international waters, but the information stated that the events occurred in Brevard County. After the State rested its case, the defense moved for judgment of acquittal, arguing that the information failed to properly invoke the maritime criminal jurisdiction of the court.

The cases Batiz relied upon stood for the proposition that the information or indictment must allege the elements of the charged crime, not the essential elements of jurisdiction. "The State is required to allege the essential elements of the crime charged, not the essential elements of jurisdiction. We find that no requirement existed for the State to allege maritime criminal jurisdiction pursuant to section 910.006 within the body of the information in order to invoke the trial court's jurisdiction."

The Court also addressed the sufficiency of the evidence to prove jurisdiction over the defendant. In this case, the cruise ship departed from and returned to Port Canaveral, in Brevard County. The Court then looked to the limited jurisdictional circumstances set forth in section 910.006(3)(a)-(h).

While the evidence was deemed insufficient as to several, it was sufficient under subsection (3)(f), which applies if the "act or omission is one of violence, detention, or depredation generally recognized as criminal, and the victim is a resident of this state." The violent aspect of the offense satisfied this provision. It is the nature of the act, rather than the offense charged, that is dispositive. However, even if the Court focused on the statutory elements of lewd or lascivious molestation, it would still have found that that was a violent crime because it is qualifies as a predicate under the "violent career criminal" statute. One judge concurred in the Court's opinion, but dissented from the alternative holding regarding lewd or lascivious molestation being a violent offense, as it was not necessary to reach that issue.

Bieber v. State, 5D18-2833 (Oct. 25, 2019)

A nine-year sentence for a youthful offender upon probation revocation was reversed because it exceeded the statutory maximum of six years. The opinion was based on the Florida Supreme Court's recent decision in Eustache v. State, 248 So. 3d 1097 (Fla. 2018), which rejected the distinction that Florida courts had previously made between probation revocations based on substantive violations and those based on technical violations. Regardless of the nature of the violation, the statutory limit for one originally sentenced as a youthful offender is six years.

Cottier v. State, 5D18-3213 (Oct. 25, 2019)

Assessments imposed n excess of the statutory amounts of $100 for the cost of prosecution and the Public Defender fee were reduced to $100 where neither the State nor court-appointed counsel requested more than the statutory amounts.

Stapleton v. State, 5D18-3291 (Oct. 25, 2019)

Article X, section 9 of the Florida Constitution, the savings clause, was amended, effective January 8, 2019, during the pendency of Stapleton's direct appeal, and now provides that "[r]epeal of a criminal statute shall not affect prosecution for any crime committed before such repeal." The prior language had

provided that "[r]epeal or amendment of a criminal statute shall not affect prosecution for any crime previously committed."

On the basis of the revised language of Article X, section 9, Stapleton argued that a statutory amendment to the sentencing provisions of section 775.087, in 2016, should apply. The Fifth District disagreed. The case was still governed by the principle that the statute in effect at the time of the offense was operative. The statutory amendment at issue did not reflect any intent on the part of the legislature to have it apply retroactively. The changes in the sentencing statute related to qualifying offenses for a 20-yearmandatory minimum. The changes were substantive in nature and did not apply retroactively.

State v. S.A., 5D19-735 (Oct. 25, 2019)

The trial court erred when it credited S.A. with time served in detention prior to adjudication. The 15-day minimum detention period under section 790.22(9), Florida Statutes, is mandatory, and there is no discretion to grant credit for time previously served in detention prior to the adjudication.

Additionally, the trial court failed to abide by a Third District decision to the same effect. The trial court did not believe it was bound by a Third District decision since the trial court was within the Fifth District. Pursuant to Pardo v. State, 596 So. 2d 665 (Fla. 1992), when "in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."

State v. Mellaci, 5D19-835 (Oct. 25, 2019)

An order granting a motion to dismiss was improperly based on the trial court's attempt "to divine the officer's reason for making the traffic stop in this case." That determination must be an objective one, based on the existence of probable cause for the stop. Here, the only testimony was that the officer observed the defendant "weaving across several lanes of rush hour traffic and causing nearby drivers to brake and take other evasive measures." There was no evidence to support a finding of a pretextual stop.