Case Law Update
November 11, 2019
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Eleventh Circuit Court of Appeals

In Re: Joseph Demond Wright, 19-13994 (Nov. 7, 2019)

The Court denied a motion for leave to file a successive motion to vacate, set aside, or correct a federal sentence under 28 U.S.C. s. 2255.

Wright's motion was based on the Supreme Court's recent decision in Rehaif v. United States, 139 S.Ct. 2191 (2019), which the Eleventh Circuit already concluded did not announce a new rule of constitutional law and therefore did not apply retroactively. Wright alleged that he was actually innocent of his conviction under 18 U.S.C. s. 922(g)(1) under Rehaif because he did not know he belonged to a category of individuals barred from possessing firearms. He further alleged that counsel was ineffective for advising him to plead guilty even though his federal charges violated the Double Jeopardy Clause. In addition to Rehaif not applying retroactively, Wright did not identify any newly discovered evidence related to the claim; nor did he identify any newly discovered evidence to support his double jeopardy claim.

Supreme Court of Florida

Bell v. State, SC18-1713 (Nov. 7, 2019)

Bell appealed the denial of a successive Rule 3.851 motion. He argued that the motion was timely, as to a conviction and sentence that had been final for over 20 years, because the motion asserted "a 'fundamental constitutional right' that 'was not established within the [one-year time limitation] provided for in subdivision (d)(1) and has been held to apply retroactively.'"

Bell's argument was based on Buck v. Davis, 137 S.Ct. 759 (2017). Bell argued that this decision established a new fundamental constitutional right, "that the injection of racial bias into a criminal trial constitutes per se ineffective assistance of counsel." The Supreme Court disagreed. Buck did not establish a new right; it was merely an application of longstanding principles of ineffective assistance of trial

counsel being applied to the specific facts of the case before it. As a new per se rule had not been established, the 3.851 motion was untimely.

Brant v. State, SC18-1061 (Nov. 7, 2019)

The Supreme Court affirmed the denial of a successive Rule 3.851 motion. The motion presented an argument that the death sentence was unconstitutional under Hurst v. Florida, 136 S.Ct. 616 (2016) and Hurst v. State, 202 So. 3d 40 (Fla. 2016).

Portions of the claim had been raised in the prior Rule 3.851 motion and were procedurally barred. The claim also failed on the merits because the Florida Supreme Court previously "held that a defendant's waiver of his right to a penalty phase jury was not rendered invalid by the subsequent changes in the law wrought by" the two Hurst decisions.

First District Court of Appeal

Reager v. State, 1D19-1316 (Nov. 8, 2019)

On direct appeal from multiple convictions and sentences, Reager argued that a 40-year mandatory minimum sentence exceeded the maximum that the statute allowed and was a scrivener's error. The First District declined to address the issue because it was not preserved for appellate review either at sentencing or through a Rule 3.800(b) motion prior to the filing of the brief in the direct appeal.

Mongo v. State, 1D18-2208 (Nov. 8, 2019)

The First District affirmed the denial of a Rule 3.850 motion, in which Mongo alleged that counsel was ineffective for "failing to advise him properly during plea negotiations of the mandatory minimum life sentence he faced." Mongo, who was 62 years old at the time of the plea, rejected a 15-year plea offer. Counsel advised him that he could receive a 45-year mandatory minimum sentence with the possibility of life if convicted, but "counsel never told Mongo that he faced a mandatory minimum life sentence if convicted of the armed burglary count."

An evidentiary hearing was held and Mongo failed to demonstrate prejudice. Counsel testified that he rejected the 15-year plea offer because he "perceived it to be the equivalent of a life sentence." "Mongo also believed that a key witness would not show up at trial and testify," and, he was 62 years old at the time. "Under these

circumstances, the postconviction court did not err in concluding that there was no reasonable probability that Mongo would have accepted the plea offer had he been properly advised of the mandatory minimum life sentence."

Vowell v. State, 1D18-2018 (Nov. 8, 2019)

Vowell was convicted for murder, kidnapping, and accessory after the fact to first-degree murder. The conviction for accessory after the fact was vacated "because a person convicted as a principal to a crime cannot also be convicted as an accessory after the fact to the same crime."

Smart v. State, 1D18-4119 (Nov. 8, 2019)

A habeas corpus petition was dismissed. Smart was unable to show manifest injustice because in Knight v. State, 267 So. 3d 38 (Fla. 1st DCA 2018), the First District held that "harmless error applies to a claim that the trial court failed to instruct on attempted voluntary manslaughter as a necessary lesser included offense of attempted second degree murder." Five weeks after the First District's opinion in Smart, the Supreme Court issued its opinion in Knight v. State, 2019 WL 6904690 (Dec. 19, 2019), and affirmed the First District's earlier decision in Knight and held that an erroneous jury instruction for a lesser included offense one step removed from the offense of conviction cannot be the basis for fundamental error.

J.A.W. v. State, 1D19-1974 (Nov. 6, 2019)

An adjudication of delinquency for violating section 790.163(1), Florida Statutes, the "bomb scare hoax" statute, was reversed due to insufficient evidence.

The incident occurred on April 1, 2019, and students at the school were "swapping April Fools' jokes in the classroom." J.A.W. "chimed in with an ill-considered joke: 'I'm going to shoot up the classroom, April Fools.'" The State proceeded on the theory that the joke "constituted a 'false report' concerning the violent use of firearms, intended to deceive, mislead, or otherwise misinform a person."

The statute applies "to false reports about live threats, such as 'when a person knowingly makes a false report that a bomb or other deadly explosive has been placed or planted.'" It "does not apply to threats of future action, to '"blow up" or "burn down" [a] school at some time in the future.'" "Because J.A.W.'s April Fools'

Day joke threatened future shooting, it was not a 'false report' made with intent to deceive, mislead, or otherwise misinform for purposes of s. 790.163(1)."

The Court did not reach "the issue of under what circumstances a joke or other statement that is explicitly not intended to be taken seriously can violate s. 790.163(1)."

Morris v. State, 1D18-1638 (Nov. 5, 2019)

An order summarily denying a Rule 3.850 motion was affirmed.

Morris alleged that counsel was ineffective "for failing to consult with or present an expert witness to show that Morris suffered from battered spouse syndrome (BSS) and, as a result, lacked the requisite mental state to commit murder." "'BSS is not itself a legal defense, but evidence that the defendant suffers from BSS is admissible in Florida to support a claim of self-defense when the defendant is charged with a crime against [his]abuser.' . . . However, a defendant cannot present evidence of an abnormal mental condition not constituting legal insanity to argue that he did not have the specific intent or state of mind necessary to commit an offense." Morris did not rely on self-defense at trial and BSS evidence therefore could not have been introduced.

A claim that counsel was ineffective for failing to move for judgment of acquittal as to premeditation being based on entirely circumstantial evidence was without merit because this case included both direct and circumstantial evidence and the circumstantial evidence standard did not apply. Even if it did, the argument would fail as the evidence was sufficient. "The record shows Morris's own testimony established that the pursued his wife downstairs as they argued, prevented her from calling for help, beat her in the face and head, grabbed her and pulled her back inside the home as she tried to escape, and then shot her seven times at point-blank range including the side of her head and chest."

Second District Court of Appeal

Nichols v. State, 2D18-1487 (Nov. 8, 2019)

Nichols appealed convictions and sentences for unlawful sexual activity with a person 16 or 17 years of age while the defendant was 24-year old or older, and delivery of a controlled substance to a person under 18.

The case was remanded for resentencing before a different judge because comments by the sentencing judge suggested that the judge may have considered an improper factor, an uncharged homicide. The judge stated: "And I'm sure the State would charge the homicide case if they had the facts to do so. They don't. But we'll never know really what caused her death other than it was tragic. And you are the primary cause of her death, period."

This was an unpreserved issue and raised as a claim of fundamental error. It was the State's burden to show that the trial court did not consider impermissible factors when sentencing the defendant. Consideration of subsequent misconduct or pending or dismissed charges in constitutionally impermissible. The comments quoted above left it "unclear whether the trial court (1) considered the circumstances surrounding the offenses for which Nichols was convicted, including the argument that he was the adult present but waited far too long to call 911; or (2) considered that Nichols was responsible for an uncharged homicide by giving the victim drugs that contributed to her death; or (3) considered both (1) and (2) above."

Williams v. State, 2D17-3959 (Nov. 6, 2019)

The trial court erred in misclassifying a second-degree murder conviction as a life felony instead of a first-degree felony. "'Second-degree murder is a first-degree felony punishable by imprisonment for a term of years not exceeding life. . . ." The error in treating the offense as a life felony also resulted in an excessive sentence being imposed and the case was therefore remanded for resentencing.

B.M. v. State, 2D17-4306 (Nov. 6, 2019)

Adjudications for carrying a concealed weapon by a person under 25 years of age who was previously found to have committed a delinquent act that would be a felony if committed by an adult, and being a minor in possession of a firearm, were both reversed due to insufficient evidence.

As to the concealed weapon charge, the State relied on prior disposition orders finding the commission of delinquent acts. Defense counsel, during the motion for judgment of dismissal, argued that the State failed to prove that B.M. was the person named in the earlier disposition order. The State argued on appeal that the defense should have objected to the introduction of the disposition orders when they were admitted into evidence. The Second District disagreed and found defense counsel's argument in the motion for dismissal at the close of the evidence to be a sufficient manner for presenting this argument.

As to the charge of being a minor in possession, the State failed to prove that B.M. was under 18, a necessary element. The arresting officer testified at trial that B.M. "was seventeen, I believe." An objection, based on speculation, was overruled. The officer did not state that B.M. told him his age and there was no evidence of prior knowledge of the age. And, while the State relied on the prior disposition orders noted above, once again, the State failed to prove that B.M. was the person named in those disposition orders.

L.C. v. State, 2D18-1398 (Nov. 6, 2019)

An adjudication of delinquency for making a false report concerning the use of a firearm was reversed due to insufficient evidence.

L.C. was sitting at a table with other students. They were discussing a gun threat that had occurred at another school, including bag checks that had been done. "L.C. said that he gets his bag checked almost every morning because he brings lighters and knives to school. After one of the students asked L.C. why, he responded that he hates the school, does not like his teachers, and 'wanted to kill them and shoot the school.' He then pointed out four students sitting at a table nearby that he wanted to kill While L.C. 'said that he was going to kill somebody,' he did not say 'he was going to kill somebody right at that moment,' 'right then and there.'"

The false reporting statute, section 790.163, does not apply to threats to take future action.

Molina v. State, 2D18-4081 (Nov. 6, 2019)

Predicate prior offenses for VCC sentencing under section 775.084 may include offenses from another state if those offenses "are substantially similar in elements and penalties to the enumerated Florida offenses."

Third District Court of Appeal

Hedvall v. State, 3D15-2368 (Nov. 6, 2019)

Hedvall's conviction and sentence for second-degree murder were affirmed.

Hedvall argued that the trial court erred in permitting a detective to testify as an expert on blood spatter pattern analysis where the detective was designated a Category A witness, but was not specifically designated as an expert witness. The defendant argued that a Richardson hearing was required; the State argued that listing the detective as a Category A witness was sufficient. The Third District did not address the issue of whether the State complied with the requirements of Rule 3.220, finding that any error was harmless as there was no evidence that the defendant's ability to prepare for trial was materially impaired. The defense had the opportunity to depose the detective about his report and opinions and the detective's curriculum vitae and report had been provided. The defense in the case was that someone other than the defendant killed the victim.

There was no error in permitting an expert opinion without determining whether the detective was a qualified expert under the Daubert standard. The detective testified that "he had taken a crime scene reconstruction course with 20 or more hours devoted to blood pattern analysis, had training at the medical examiner's office with 12 hours devoted to blood pattern analysis, and had taken a DNA course with 20 hours of blood pattern analysis. Detective Underwood further confirmed that he had been trained in the mathematical formulas on which blood pattern analysis is based and that he has completed 60 to 75 blood stain pattern analyses."

Cause challenges to three jurors were properly denied as to the first two jurors; the issue was not preserved as to the third. Juror F made statements suggesting the juror would place greater credibility in what officers say. However, that was later qualified, when the juror was asked "do you think they always do [pay greater attention]?" and responded, "I'm sure they don't." Juror S did not want to serve on the jury because a neighbor had recently been strangled, and the juror was "not sure" if that would result in bias or prejudice. In further questioning, the juror said that she did not think it would have any impact on her, and when defense counsel asked for clarification as to "I think," the juror responded that there was no doubt in her mind about it not having any impact. Juror H stated that she believed she could follow the court's instructions equally to a detective's testimony as to any other witness. Subsequent questioning resulted in responses that the juror would be fair.

Additionally, there was a preservation issue. After jury selection was complete, during which the defense used peremptory challenges for these three jurors and exhausted all of the allotted peremtpories. The defense then identified two jurors remaining on the jury whom it would have struck if granted additional challenges. As the defense was arguing that all three cause challenges were improperly denied, and the defense excused all three, and the appellant identified

only two remaining jurors who would have been challenged, and the appellate court found that there was no error as to jurors F and S, the Court did not need to decide whether reversal was required as to juror H.

Curry v. State, 3D18-141 (Nov. 6, 2019)

In an appeal from a conviction for first-degree murder, Curry argued that a discovery violation required reversal. The Court disagreed, finding that the remedy for an inadvertent violation was sufficient.

The State presented a fingerprint analyst who examined nine prints retrieved from the defendant's mother's vehicle. The State had failed to disclose the analyst's report. During the ensuing inquiry, defense counsel noted that in opening argument, counsel stated that there was no forensic work in the case and that counsel would not have made that statement if counsel knew about the prior report. The judge responded that counsel's opening argument was about the actual murder. The judge further prohibited the State from arguing in closing that defense counsel was wrong when counsel referred to the absence of forensics in opening argument.

Owens v. Department of Corrections, 3D18-2264 (Nov. 6, 2019)

Owens appealed the denial of his habeas corpus petition challenging his placement in Close Management in a prison in Bradford County. At the time of the filing of the petition, Owens was housed in Miami-Dade; by the time of the lower court's ruling, he had been transferred to Bradford County. Once that transfer occurred, the Eleventh Judicial Circuit lost jurisdiction over the case.

Fourth District Court of Appeal

Nebergall v. State, 4D18-2327 (Nov. 6, 2019)

The Fourth District reversed convictions for attempted sexual battery and simple battery for a new trial. The trial court erred in denying a motion for mistrial.

The alleged victim was found to have intentionally violated a prior court order which provided "that any testimony regarding law enforcement's efforts to identify the DNA found on the alleged victim's buttocks could only indicate that such efforts were 'inconclusive.'" The alleged victim, during cross-examination by defense counsel, stated: "You see the DNA results on me. And now you guys say the DNA's not on my butt, but it was on my butt. It was enough. . . ."

The appellate court's opinion concluded that the victim's statement made it sound like it was the defendant's DNA. The bulk of the Court's opinion addressed the facts of the case to determine whether the error arose to the level to support a mistrial and concluded that it did. The defense, at trial, declined a curative instruction. Based on the "closeness" of the nature of the case and the credibility issues regarding the alleged victim and defendant, the Fourth District concluded that a curative instruction would not have alleviated the knowing violation of the prior order.

Aslam v. State, 4D16-4339 (Nov. 6, 2019)

The Fourth District affirmed a conviction which presented a speedy trial issue, and rejected the argument that "trial counsel had been ineffective in filing a notice of expiration rather than a motion to discharge when the information remained sealed beyond the 175-day period."

The defendant, while driving, hit a pedestrian and left the scene in a panic. After the defendant contacted the police to report the accident, he was issued a notice to appear, but was not arrested. He appeared in December 2015, but no hearing took place. An information was filed in March 2016, but the capias was not served on the defendant. In November 2016, counsel appeared and filed the notice of expiration. The court unsealed the information. Upon discovering a defect in it, counsel argued that if the State amended it, the defendant would be entitled to an additional 24 hours before having to enter a plea and that that would take the case outside the speedy trial recapture period and entitle him to a discharge. The State orally amended the information at that time. The trial court found that the error was a scrivener's error; that it did not prejudice the defendant and did not require an extra 24 hours. The court announced that the trial would begin that afternoon. The defendant accepted an offer of probation from the court and reserved the right to appeal the speedy trial issue.

The Fourth District affirmed and the case proceeded to the Florida Supreme Court, which remanded for reconsideration in light of Born-Suniaga v. State, 256 So. 3d 783 (Fla. 2018), which the Fourth District describes as creating a "sea change in the application of" the speedy trial rule.

Prior to Born-Suniaga, the State was entitled to the benefit of the recapture period "if the charging document was filed within the requisite time frame, even if the defendant was unaware of the charges during that time." Under Born-Suniaga,

the "State is not entitled to the recapture period when it leads a defendant to believe that no charges are pending against him/her even though the State has pursued new charges based on the same conduct."

The issue here was whether defense counsel was ineffective in failing to foresee the 2018 "sea change in Born-Suniaga." At the time that this was in the trial court, counsel followed controlling case law and filed the notice of expiration. Counsel cannot be faulted for failing to foresee a change in the law on speedy trial.

Fifth District Court of Appeal

Petit-Homme v. State, 5D19-108 (Nov. 8, 2019)

A sentence was reversed for resentencing before a different judge. The evidence at trial covered multiple criminal acts, but the arrest affidavit referred to some that were "far more egregious." At sentencing, the judge referenced some circumstances that were consistent with the facts alleged in the arrest affidavit, which did not correspond to the trial evidence. It was unclear whether the "court weighed uncharged and unproven crimes alleged to have been committed by Appellant."

Alexis v. State, 5D19-1032 (Nov. 8, 2019)

After revoking the defendant's youthful offender probation for a substantive violation, the trial court imposed an adult sanction, a 20-year prison term. When the trial court does that, and elects to impose a sentence in excess of the six-year cap for a youthful offender, "the sentence necessarily becomes an adult CPC sentence such that the defendant does not retain his or her 'youthful offender status.'" The trial court therefore erred by requiring Alexis to retain his youthful offender status.

Derossett v. State, 5D19-0802 (Nov. 7, 2019)

After the denial of a pretrial immunity motion under the Stand Your Ground law, the Fifth District granted a petition for writ of prohibition and ordered a new evidentiary hearing, because the trial court made factual findings that were not supported by competent substantial evidence.

Derossett's adult niece answered a knock on the front door and a man reached in and began pulling her out onto the front porch. Two other men approached to assist. Derossett heard his niece scream and retrieved his gun. When he approached

the front door, one of the three other men announced that a man with a gun was approaching. The three men released the niece and "scattered on the front lawn." Derossett exited the front door and was on the porch; he raised his gun, called out and fired a warning shot up in the air. The three men then shot their firearms at him. He fired back. Derossett and his niece were both struck by gunfire as was one of the three men. More than 40 rounds were exchanged.

The three men were deputy sheriffs conducting a sting operation directed at the niece, who was believed to be engaging in prostitution form Derossett's home. Derossett was charged with three counts of attempted first-degree murder of a law enforcement officer.

Although Derossett was in his own home, the presumptions in favor of such a person would not be applicable if he knew or should have known the three men were law enforcement officers, or if he knew his home was being used to further his niece's prostitution activity.

In denying the motion for immunity, the trial court found that Derossett was not entitled to immunity because at the time he fired his warning shot, the deputies had not entered his home and they had not removed his niece.

However, the testimony at the hearing conclusively showed "that the first deputy reached into the home and pulled [the niece] out and that the deputies thereafter physically engaged with the now-screaming and agitated [niece] on the covered front porch to eventually remove her to the front lawn within seconds of Derossett coming onto his porch with a firearm." And, the trial court's "unsupported factual findings led the trial court to its legal conclusion that Derossett was not entitled to the statutory presumption under section 776.103(1) of having a reasonable fear of imminent peril of death or great bodily harm to his niece at the time he fired the warning shot." Although the three deputies were "scattered" on the front lawn, all of this had happened very quickly and the scattering of the deputies from something that had "just occurred" would not, in and of itself, refute the presumptions regarding immunity.

French v. State, 5D19-3181 (Nov. 4, 2019)

A habeas corpus petition was granted, ordering release on French's own recognizance, pursuant to Rule 3.134, Fla.R.Crim.P. ,because French was in custody for more than 40 days and had not been formally charged with a crime.