Case Law Update
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Supreme Court of Florida

Dailey v. State, SC19-1780, 19-1797 (Nov. 12, 2019)

In a postconviction appeal in a death penalty case, the Supreme Court held that an actual innocence claim was procedurally barred where it had previously been asserted in a prior successive postconviction motion. It could not be reasserted "'by merely reframing it as a challenge to the warrant.'" And, "we have repeatedly held that freestanding actual innocence claims are not cognizable under Florida law."

The Court also reiterated its prior holding rejecting "the assertion that the warrant selection process is arbitrary because there are no standards that constrain the Governor's discretion in determining which warrant to sign."

The Court rejected a Brady claim based on an affidavit from the former assistant state attorney. The prosecutor, Slater,

> recalled that he worked at the State Attorney's Office in Pinellas County at the time the victim, Shelly Boggio, was murdered. He stated that he was involved in the investigation of Boggio's death and the resulting prosecution of Jack Pearcy, Dailey's codefendant. Slater explained that he remembered being called to the crime scene where Boggio's body was recovered. He said that law enforcement told him that Pearcy attempted to have sex with Boggio, that Pearcy could not perform, and that Boggio teased Pearcy, calling him to become irate and stab her.
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> At the evidentiary hearing, Slater testified that his role in Pearcy's case was limited to appearing at the crime scene and testifying at a subsequent hearing. When Slater was asked whether he remembered law enforcement telling him that Pearcy attempted to have sex with Boggio but could not perform, he responded that, "[i]n [his]

> definition of law enforcement," he could not identify "any specific individual or source of that information." He explained that he "just had a general 34-year-old recollection that that's what this case was about." When asked if his recollection also included that Boggio teased Pearcy and he subsequently stabbed her, Slater replied, "That is what the affidavit indicated, yet."
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> Slater went on to explain that the longer he thought about it, "the less [he could] connect that type of mitigation to anybody involved in that case." He admitted that he was not sure whether he "had gotten confused with another case" he was prosecuting at the time. He also confessed to feeling "tugged in two directions" and to feeling uncomfortable speaking to Dailey's attorney's alone.
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> Slater later clarified that he was positive the statements were made to him. But he said that he did not know who made the statements, where he was when the statements were made, or the context in which the statements were shared with him. He stated that he accordingly "question[ed] whether [the statements] had anything to do with this case."

The Brady claim failed. Even if the affidavit were admissible, Slater made inconsistent statements and reflected a lack of clarity as to what had been said and what it had to do with this case.

A newly discovered evidence claim based on the same evidence also failed, as it was untimely. Slater had been listed as a witness for the State at trial and Dailey did not explain "why he could not have discovered the information to which Slater testified either prior to trial or at some point during the decades that followed."

A Giglio claim was rejected because Dailey did not identify "any false testimony presented during his trial, much less allege[] that the State knew of its falsity or prove[] that any such statement was material." This related to allegations of a detective meeting with a jail inmate, showing the inmate articles about the murder, and urging the inmate to get information about the defendant from other inmates. A newly discovered evidence claim based on the same evidence was found

to be untimely, as Dailey had been on notice since at least 1999 "that other inmates might have been questioned by" the detective, and Dailey therefore did not demonstrate why this information could not have been discovered until 2018.

Eleventh Circuit Court of Appeals

Brown v. State, 17-13993 (Nov. 12, 2019)

The Eleventh Circuit reversed the denial of a motion to vacate sentence under 28 U.S.C. s. 2255 and remanded for resentencing. Although the government opposed the motion in the district court, due to intervening events, the government joined Brown's motion for summary reversal of the district court's order.

The motion to vacate argued that conspiracy to commit Hobbs Act robbery failed to qualify as a crime of violence under the residual clause of the Armed Career Criminal Act, and relied on the then recent decision of the Supreme Court in Johnson v. United States, 135 S.Ct. 2551 (2015). At the time of the pendency of the motion in the district court, the Eleventh Circuit's case law had held that Johnson did not extend to the residual clause of the ACCA "when the conspired objective is a violent crime, such as Hobbs Act robbery." Subsequently, the Supreme Court, in Davis v. United States, 139 S.Ct. 2319 (2019), held that the residual clause's definition of "crime of violence" was unconstitutionally vague.

As the residual clause was no longer applicable, only the elements clause of the ACCA remained. Applying the categorical approach to the elements of the offense of conspiracy to commit Hobbs Act robbery, the offense did not qualify: "Neither an agreement to commit a crime nor a defendant's knowledge of the conspiratorial goal necessitates the existence of a threat or attempt to use force. The same goes for the final element – a defendant's voluntary participation that furthers the goal of committing Hobbs Act robbery – because a defendant's voluntary participation may manifest itself in any one of countless non-violent ways."

First District Court of Appeal

House v. State, 1D18-4138 (Nov. 15, 2019)

The Court affirmed without written opinion. A specially concurring opinion of one judge was written to provide "guidance to trial courts regarding the sealing of affidavits in support of search warrants and to defendants when confronted with a trial court's refusal to unseal an affidavit."

Glover v. State, 1D19-2787 (Nov. 15, 2019)

The First District had relinquished jurisdiction to the trial court to appoint a special master and take evidence and determine whether a belated appeal should be granted. The special master issued a report which stated that the State had no objection to a belated appeal and that an evidentiary hearing was therefore not needed.

The First District disagreed and sent the case back to the special master for further proceedings. The entitlement to a belated appeal is a matter of jurisdiction and the agreement of the State cannot vest jurisdiction in the appellate court if the facts do not exist to support the jurisdiction of the appellate court.

King v. State, 1D18-1278 (Nov. 13, 2019)

The Second District affirmed convictions for manslaughter (as a principal) and aggravated battery, by striking the victim with a "flounder gig," a pronged spear used for catching fish.

The evidence was sufficient to support the conviction for manslaughter by culpable negligence as a principal. King "was the first person to instigate violence towards the victim" and she admitted that "she intentionally punched the victim because she was frustrated by his actions. Appellant also admitted striking the victim once with a flounder gig because he made her angry" and she knew that her companion, Hutchinson, had punched the victim "hard enough to knock him down. Appellant also heard Hutchinson tell the victim to leave, go, and swim back to shore. She did not attempt to dissuade the victim from leaving or offer to help him back into the boat." She knew the victim was intoxicated and after learning that Hutchinson stabbed the victim, she did not try to help him and she did not tell law enforcement officers about the victim's condition until a day later.

All three of the individuals had been on a boating trip to hunt for gators and all had been drinking. Arguments arose when the boat began taking on water and the victim refused to move from the middle to keep the boat from sinking.

The victim's body was found during a search, the next day, with multiple injuries, including puncture wounds, contusions, blunt force trauma, bruising and an incision to the left arm. The cause of death was accidental drowning.

Additionally, the flounder gig supported the conviction for aggravated battery as it was used in a manner qualifying as a deadly weapon. It was long and had three prongs and was capable of causing death or great bodily harm.

The trial court did not err in denying a specially requested defense instruction on causation for manslaughter as it was incorrect and misleading. "Because Appellant was charged as a principal to manslaughter, the State did not have to prove that Appellant's conduct was the cause of the victim's death. . . . Instead, the State had to prove that Appellant intended to participate in the crime of manslaughter, and in some way assisted the person who committed the crime." The requested instruction included language stating that the defendant's act or omission "caused the decedent's death," and that "but for the Defendant's act or omission the decedent would have died.

Both a flounder gig and photos of it were properly admitted into evidence as a sufficient nexus existed between that item and the one used during the offenses. A flounder gig was observed in the boat during the rescue of King and Hutchinson. A flounder gig was found in Hutchinson's residence the next day; it was the only one found. Its measurements matched those of the victim's wounds. Testimony that the weapon "is definitively the weapon that was used during the crime" is not required.

Rice v. State, 1D18-4451 (Nov. 13, 2019)

The First District affirmed convictions for first-degree murder and accessory after the fact to first-degree murder after the filing of an Anders brief by counsel for Rice, and wrote a multi-page opinion addressing the sufficiency of the evidence. The accessory charge was based on Rice helping Boyette evade arrest after the murders. She "bought ammunition and outdoor gear so she and Boyette could hide in the woods after the first two murders. While the couple was on the run from the police, Rice made several stops at convenience stores. She refueled the vehicles and bought a road map."

As to the other charge, felony murder based on a robbery,

> . . . Rice admitted that she and Boyette watched K.C. leave her house to start her car before K.C. reentered her home. Rice and Boyette followed K.C. back into her home. After holding her at gunpoint, Boyette bound K.C.'s hands with shoelaces while Rice tied a rope around K.C. to restrict

> K.C.'s ability to move her hands. Boyette shot K.C. in the head. The couple then fled in K.C.'s vehicle with Rice driving.

Second District Court of Appeal

Allenbrand v. State, 2D17-4787 (Nov. 13, 2019)

A motion to suppress evidence was erroneously denied because "the officer lacked a reasonable suspicion of criminal activity to support an investigatory stop."

> . . . the officer received a dispatch at around 1:00 a.m. regarding a dark pickup truck with a loud muffler in the area of 46th Avenue Northeast and Shore Acres Boulevard Northeast in St. Petersburg. An anonymous caller stated that the vehicle "had been in the area for about an hour driving back and forth between 49th Avenue Northeast and 48th Avenue Northeast." Notes on a second anonymous call only indicate that the "[s]econd call referenced the same vehicle."
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> The officer described the neighborhood as "Shore Acres or Snell Isle." He arrived in the area about ten minutes after receiving the dispatch and positioned his cruiser near the entrance to Shore Acres on the main road that goes in and out of the neighborhood. The officer observed a dark pickup truck and heard a loud exhaust. He estimated that he could hear the exhaust from 50 to 100 feet away. He pulled his cruiser behind the vehicle and saw it stop abruptly for several seconds in the roadway. There were no obstructions in front of the vehicle. The vehicle then continued on and made a turn on Shores Acres Boulevard Northeast. The officer conducted a stop of the vehicle. Allenbrand was the driver, and the officer noticed signs of impairment. Allenbrand was ultimately charged with DUI and driving with a revoked or suspended license.

There was no testimony as to what crime the officer believed might have occurred and there was no testimony as to a basis for believing, prior to the stop, that

the defendant was impaired. "Simply put, the facts known to the officer at the time he made the stop do not support any speculation as to a possible crime or driver impairment."

Berouty v. State, 2D18-2251 (Nov. 13, 2019)

In an appeal from a conviction for sexual battery, the Second District rejected arguments that comments by the prosecutor in closing argument constituted fundamental error.

In the initial closing argument, the prosecutor stated that it was the jury's job "to decide whose story is more credible, who we are going to believe," and that a conviction is "going to depend on who you believe." In the rebuttal argument, the prosecutor commented on defense counsel's "deflection tactics" being "thrown out here, and further stated:

> How, a mentor of mine once told me that if you can't win an argument with facts, argue the law. If you can't win the argument with law, argue the facts. If you can't win with either, just argue everything you want. Attack everybody, the victim, the police, the investigation, whatever you can get your hands on, argue that, and I feel that that's what is happening here. I feel like we're in a room and spaghetti is getting thrown over our heads in every which direction hoping something will stick.
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> This is starting to feel a little bit like an abusive relationship where the abuser is always shifting the focus and trying to put the blame on the victim and everything around. . . .

One other comment was that "it's all just been to me smoke and mirrors."

The Court was "very much troubled by the prosecutor's closing statements. . . . There can be no doubt that the State's spaghetti-throwing, smoke-and mirrors, abusive relationship 'arguments' were improper." In response to the State's argument that the comments "must be considered in their context," the Second District responded: "We have done so. If anything, the context of this kind of

criminal prosecution should have restrained a prosecuting attorney from employing the kind of loose bombast she chose to use."

Based on the facts of the case, however, although improper, the comments did not rise to the level of fundamental error where defense counsel did not object to the comments during the trial.

Usry v. State, 2D18-4435 (Nov. 13, 2019)

In an appeal from a conviction for second-degree murder, the State conceded, and the Second District agreed, that the omission of Standard Jury Instruction 3.7, or a related instruction, regarding reasonable doubt, constituted fundamental error. The jury "was never instructed as to reasonable doubt."

Cox v. State, 2D18-4718 (Nov. 13, 2019)

When "a defendant has reached the age of majority at the time he or she violates community control, the defendant is not entitled to be sentenced after the violation under the juvenile sentencing statutes."

Third District Court of Appeal

Aquino v. State, 3D18-751 (Nov. 13, 2019)

The Third District, in an appeal from orders revoking probation, remanded for a nunc pro tunc determination of Aquino's competence to proceed to trial, or to otherwise adjudicate competence anew, and, if competent, then conduct a new VOP hearing.

One year prior to the VOP hearing, counsel for the parties advised the court that the doctors had found Aquino competent to proceed and they stipulated to the determinations. There was no further discussion at that time or any subsequent time and the court failed to make its own independent determination of competence.

The issue on appeal was whether a nunc pro tunc determination was a possible remedy given the 11-month gap between the 2017 evaluations and the VOP hearing. The Third District concluded that it was possible that the nunc pro tunc determination could still be made by the trial court and left open that possibility.

Pujol v. State, 3D18-1045 (Nov. 13, 2019)

The Third District affirmed convictions for burglary, grand theft and criminal mischief.

A detective was erroneously permitted to testify that the perpetrator of the offenses was the defendant, on the basis of the detective's own review of surveillance videos. The error, however, was deemed harmless based upon the totality of the evidence and the isolated nature of the detective's opinion.

The evidence was sufficient to prove that the amount of damages for criminal mischief exceeded $1,000. A witness testified that it costs $1,000 to hire "someone to replace the broken window with a more expensive window with a new frame." The Appellant argued that the victim "should have replaced the window with a window of like value and that it was also improper to include installment price." The Third District disagreed and found that "using replacement cost when calculating damages" is permissible, pursuant to the Florida Supreme Court's decision in Marrero v. State, 71 So. 3d 881 (Fla. 2011).

Beiro v. State, 3D18-2479 (Nov. 13, 2019)

The Third District dismissed a successive petition alleging ineffective assistance of appellate counsel. "The mere incantation of the words 'manifest injustice'" did not suffice to circumvent procedural bars. Beiro did not allege facts constituting a manifest injustice and the concept of manifest injustice is "extremely limited." It is applicable "only in the rarest and most exceptional of situations."

Fourth District Court of Appeal

Harmon v. State, 4D18-1295 (Nov. 13, 2019)

A sentencing scoresheet error of .2 points would have changed the minimum recommended sentence from 49.73 months' imprisonment to 49.58 months' imprisonment. When such an error is raised on direct appeal, the test if whether the lower court "would have imposed" the same sentence. Based on the facts of the case, the Fourth District concluded that the trial court would have imposed the same sentence as the trial court had imposed a sentence of almost two years more than the minimum of a corrected sentence.

Spires v. State, 4D18-2210 (Nov. 13, 2019)

The trial court granted a resentencing pursuant to Rule3.800(a) because the sentence previously imposed exceeded the statutory maximum. The defense then moved for a downward departure sentence. A successor judge presided and found that his job "was limited to determining the intent of the original sentencing judge and crafting a sentence that comported with such intent." The Fourth District reversed the sentence that was then imposed as the resentencing that had been granted should have been a de novo proceeding, including the receipt of evidence relevant to the motion for a downward departure.

German v. State, 4D18-3635 (Nov. 13, 2019)

Once the trial court granted a new sentencing hearing pursuant to Graham v. Florida, that order became final when neither party moved for rehearing or appealed. The trial court therefore lacked authority to vacate that order. The new sentencing hearing had to proceed.

Fifth District Court of Appeal

Dosal v. State, 5D18-2245 (Nov. 15, 2019)

Dual convictions for battery and lewd and lascivious molestation of a child constituted a double jeopardy violation. The opinion does not provide any facts regarding the act or acts that were involved.

Reynosopena v. State, 5D18-3856 (Nov. 15, 2019)

The trial court rejected requested sentencing under the Youthful Offender Act and the court, during the sentencing proceedings, referred to prior juvenile punishments as having no real consequences and being nothing more than "slaps on the writs." The Fifth District concluded that the trial court "understood its options under the Florida Youthful Offender Act."

Smith v. State, 5D19-101 (Nov. 15, 2019)

The summary denial of a Rule 3.850 motion was reversed and remanded for further proceedings on a claim of newly discovered evidence. The claim that a "juror concealed during voir dire that she had been the victim of sexual crimes as a child despite being questioned on that topic" was revealed in a post-conviction letter to

the editor, by that juror, in a local newspaper. The claim was not conclusively refuted by the record.

Niemi v. State, 5D19-325 (Nov. 15, 2019)

A revocation of probation was reversed as the evidence was insufficient. Niemi was required to notify the Sheriff's Office of a relocation within 48 hours. The probation officer testified that Niemi moved into a new residence on December 1st. Niemi was arrested the following day. The arrest was therefore premature as Niemi had 48 hours to report the change of residence.

The trial court also found a violation for failing to truthfully answer the probation officer's question regarding residence. Niemi was found to have just provided "general directions," as opposed to a complete address. However, the "probation officer knew the Rock Crusher Road address and provided it to law enforcement."

Washer v. State, 5D19-663 (Nov. 15, 2019)

Washer alleged that counsel was ineffective at a trial for multiple offenses for failing to request a self-defense jury instruction and failing to investigate and present GPS data related to the theory of self-defense. An evidentiary hearing was held and the trial court denied the motion. On appeal, the Fifth District reversed and remanded for a new trial on all counts except for a fleeing and attempting to elude charge.

The trial court found that defense counsel's decision was a reasonable defense strategy. The Fifth District disagreed, as it could not see any reason to make such a decision. The case involved a domestic violence incident. "At trial, every witness except Washer testified that Washer drove to his wife's home and punctured his stepson's friend's car tire with a knife. Washer's stepson confronted Washer outside the home and struck Washer multiple times with an axe handle. According to the State's witnesses, Washer drove away from the home but returned shortly thereafter and fired multiple gunshots into the home." Washer "denied damaging the tire or driving away from the home after being hit with the axe handle. He did not deny firing gunshots into the home, but instead asserted that he was assaulted from behind without provocation and discharged the gun in self-defense."

At the evidentiary hearing on the claim of ineffective assistance, counsel testified "that he thought Washer had a 'bad' self-defense case, so he opted to present

a diminished capacity defense instead. Further, counsel testified that he believed a pure self-defense instruction would not be available based on the evidence presented. However, on cross-examination counsel acknowledged that he argued self-defense during his closing argument. He explained that he did not ask the trial court for a self-defense jury instruction because the 'instruction for self-defense is awful.' Counsel testified that in his experience, sometimes the better strategy is to argue to a jury without the use or benefit of corresponding jury instructions."

Additionally, the GPS data, according to Washer, "would have demonstrated that he never left the home after being hit with the axe handle. If true, that evidence would have cast substantial doubt on the credibility of the State's witnesses." Counsel declined to investigate this because counsel "did not believe that Washer stayed at the home and that he suspected the GPS data might support Washer's wife's statement that Washer previously harassed her." While counsel might have been proven correct, it was "unreasonable for counsel to decline to investigate the GPS data." An appropriate course of defense could have been chosen afterwards.