Case Law Update
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Supreme Court of Florida

Rodgers v. State, SC19-241 (Nov. 21, 2019)

The summary denial of a successive Rule 3.851 motion was affirmed. Rodgers argued "that a diagnosis of gender dysphoria is newly discovered evidence that Rodgers was incompetent to plead guilty to first-degree murder."

The conviction and sentence became final in 2009 and the record showed that Rodgers knew of the diagnoses between February 2016 and January 2017, prior to the filing of an earlier post-conviction motion, where he argued that the diagnosis rendered him incompetent to waive a jury for the penalty phase, but did not raise the claim as one of newly discovered evidence or of ineffective assistance of counsel. The current claim of newly discovered evidence was therefore time-barred.

Additionally, the symptoms that were now attributed to gender dysphoria "were known to the courts that accepted and affirmed the validity of Rodgers' plea and waivers." "The medical community's subsequent assignment of a name to the cause of known symptoms is not newly discovered evidence, but even assuming that it could be, the record conclusively establishes that Rodgers failed to diligently pursue this claim." He was aware of it prior to January 2017, but did not raise it as a claim of newly discovered evidence until December 2018.

Calhoun v. State, SC18-340, SC18-1174 (Nov. 21, 2019)

In postconviction proceedings in a capital case, the Florida Supreme Court affirmed the denial of a Rule 3.851 motion and denied a habeas corpus petition alleging ineffective assistance of appellate counsel.

Evidence at trial linked Calhoun and the victim to his trailer shortly prior to her disappearance and to the victim's car shortly before her murder. DNA evidence placed both on the same blanket in Calhoun's trailer and partially linked Calhoun to duct tape recovered from his trailer. DNA evidence established that the victim's hair was in Calhoun's trailer and further matched items belonging to the victim to those found in Calhoun's trailer.

A claim of newly discovered evidence was rejected on the basis of a comparison of that evidence to the trial evidence, with additional concerns as to the admissibility of the new evidence at trial, and credibility issues that the new evidence raised. One witness Calhoun relied on, Robert Vermillion, asserted that Mixon, the father of Calhoun's former girlfriend, admitted to having murdered the victim. And, Natasha Simmons, whose former boyfriend was acquainted with Mixon, "had a suspicious encounter with Mixon" in the area where the victim's body was found.

Mixon allegedly requested forgiveness "for doing a lot of things he is not proud of." Those alleged statements to Vermillion were inadmissible hearsay. And, Calhoun directed counsel not to call Mixon as a trial witness, and that would have prevented impeachment of Mixon, who testified at the postconviction evidentiary hearing and denied involvement in or confession to the murder. The trial court also made a valid credibility determination when finding Vermillion's testimony was "false."

The suspicious incident narrated by Simmons included noting blood on Mixon's chest, while he was running with a gas can. Credibility issues were noted: The trial court found that Simmons did not convey this to law enforcement, even though she claimed to. And, this evidence was not of sufficient magnitude to weaken the State's case against Calhoun and give rise to a reasonable doubt as to his culpability.

A claim of ineffective assistance of counsel for failing to investigate Mixon's alibi was denied on the basis of conflicting evidence at the 3.851 evidentiary hearing and the trial court's credibility determinations. Counsel's failure to use a forensic pathologist and a digital forensic expert was found to be without merit based on counsel's strategic decision, as testified to at the 3.851 hearing. Additionally, Calhoun did not establish prejudice, and the opinion details the facts pertinent to the claim. The opinion also briefly addresses and rejects claims that counsel was ineffective for failing to object to testimony from three witnesses, and failing to investigate, cross-examine or impeach nine witnesses, and for eliciting harmful evidence from two witnesses during the defense case.

There was no entitlement to relief based on an alleged conflict of interest. Calhoun was represented by the Public Defender's Office and he argued that the entire office was precluded from representing him because one attorney in the office "who never represented Calhoun or had any involvement in or information pertinent to his case – was not assigned to represent Calhoun because the attorney knew the

victim and her family." This alleged conflict was "based on a 'personal interest' that did 'not present a significant risk of materially limiting the representation of [Calhoun] by the remaining lawyers in the [public defender's office].'"

A Giglio claim was "procedurally barred because it is based on information – Calhoun's statement to law enforcement and the associated trial testimony and closing argument – that was available to Calhoun and his counsel at trial." Alternatively, it was without merit because the testimony of the witness at issue at trial was not shown to have been false. Nor was it used by the prosecution at trial in a misleading manner.

A claim of ineffective assistance of appellate counsel for failing to present an argument as to venue or territorial jurisdiction was without merit as any error would have been invited and waived. Venue is a privilege which may be waived. The jury instructions on territorial jurisdiction for first-degree murder where a victim dies in another state did not lessen the State's burden of proving jurisdiction beyond a reasonable doubt. Under Florida law, the State must prove either that the premeditation was formulated in Florida or that the underlying felony for felony murder occurred in Florida. Evidence was presented as to both of those at trial and the jury was instructed as to the two alternatives.

Eleventh Circuit Court of Appeals

United States v. Jeremy Achey, 18-11900 (Nov. 21, 2019)

The Eleventh Circuit affirmed a conviction for conspiracy to distribute a controlled substance and found the evidence sufficient as to proof of the existence of a conspiracy.

Achey argued that the "government was required to prove Achey conspired to distribute a specific controlled substance and at trial it only proved that Achey distributed a generic controlled substance." The Court disagreed and held "that the government was only required to prove Achey conspired to distribute a generic controlled substance and that there was sufficient evidence to prove that multiple people conspired with Achey to distribute a generic controlled substance."

The indictment charged Achey with conspiring to distribute "a controlled substance analogue that was intended for human consumption, which violation involved a mixture and substance containing a detectable amount of . . . (Tetrahydrofuran fentanyl) Hydrochloride, a Schedule II controlled substance

analogue, and a mixture and substance containing a detectable amount of . . . (4-ACO-DMT), a Schedule I controlled substance analogue. . . .” Because the indictment charged the defendant only with conspiracy to distribute a generic controlled substance, it was not required to prove the existence of a conspiracy to distribute fentanyl or DMT, the two drugs for which there was evidence of Achey’s purchase.

“The specific type of drug involved is not an element” of the conspiracy offense, but “is instead ‘relevant only for sentencing purposes.’” “And, because the type of drug is not an element of the statutory offense, a finding of mens rea with respect to the specific type of drug is ordinarily not required.” However, a “different situation arises if the indictment charges a specific type of drug in the place of the generic drug element of the offense.”

The indictment in this case did “not charge a subset of the offense. The references in the indictment to fentanyl and DMT are not fairly read as charging Achey with conspiring to distribute those specific drugs. Instead, the references to the specific drugs in the indictment are fairly read to have been included for sentencing purposes.” Relevant factors supporting that conclusion were the indictment’s use of the term “involve,” and an additional statutory reference to 21 U.S.C. s. 841(b)(1)(C), which was a sentencing provision.

First District Court of Appeal

Trahan v. State, 1D18-1174 (Nov. 22, 2019)

A conviction for burglary was reversed because the trial court erred in admitting evidence of a collateral crime or other bad act.

The victim’s truck was broken into and his backpack was stolen from the truck. A few days later, the victim spotted Trahan, carrying what was believed to be the victim’s stolen backpack. After the victim confronted Trahan, the police were called, and the resulting evidence that was admitted at trial included a reference to a checkbook belonging to a third party that was found inside the backpack and which was “entirely unconnected to the charged crime.”

In this case, the defendant’s possession of the third party’s checkbook was not probative of any material issue regarding the charged burglary. And, “the rightful owner of the checkbook has no interest or claim on the backpack, nor any connection whatsoever, to the charged crime.” The checkbook did not contribute to the

identification of the backpack's owner, and the presence of the checkbook did not make it either more or less likely that the legitimate owner of the backpack was either the victim or Trahan.

Craven v. State, 1D18-5270 (Nov. 22, 2019)

The First District denied a petition for writ of prohibition seeking review of the denial of a motion for immunity under the Stand Your Ground law.

The Petitioner and his wife were at a country music festival and got into an altercation with the victim, whom they knew. This resulted in the wife shattering a beer bottle and striking the victim.

> During the altercation, Petitioner came up behind the victim, grabbed her, and threw her to the ground, laid on top of her and said, "You f---ing b----, you'll never hit my wife again." Petitioner's wife then began striking the victim in her face. Petitioner stopped hitting the victim when a woman told him to stop; Petitioner's wife then began to walk away, saying "We got to go. She's bleeding real bad."

At the evidentiary hearing, the trial court also viewed security footage of the incident.

The State sustained its burden of showing by clear and convincing evidence "that a reasonable person in Petitioner's position would not have used the same force as Petitioner":

> . . . Based on its own viewing of the security footage, the trial court found that Petitioner observed his wife and the victim fighting but did not immediately move to break them up. The trial court found that Petitioner followed the fighting women behind an SUV and watched them for a short time before he actually intervened. . . . Additionally, according to testimony from the victim and a witness, Petitioner struck the victim multiple times after he threw her to the ground.

In a companion opinion, Craven v. State, 1D18-5272 (Nov. 22, 2019), the Court denied the wife's prohibition petition. As to the wife, the First District emphasized that the trial court "found, based on its own viewing of the security footage, that the Petitioner [wife] made the 'initial strike.' There is evidence that Petitioner broke the beer bottle and used the shattered bottle on the victim." "The security footage also shows Petitioner grabbing the victim by the throat and striking the victim multiple times while the victim attempts to back away."

Dickerson v. State, 1D19-1320 (Nov. 22, 2019)

Dickerson was convicted on multiple charges, including attempted first-degree felony murder, attempted voluntary manslaughter, kidnapping, sexual battery, armed robbery and arson. He subsequently filed a Rule 3.850 motion, setting forth five claims of ineffective assistance of trial counsel. The First District affirmed the denial of the motion and addressed each of the claims.

Counsel was not ineffective for failing to move for a mistrial based on the admission of Dickerson's prior criminal record into evidence. The prosecutor cross-examined Dickerson, suggesting a lack of belief that Dickerson, as a drug dealer, would not have carried a gun with him. When Dickerson denied carrying a gun, the State introduced evidence of his prior convictions for being a felon in possession of a firearm. Defense counsel objected and the State argued that Dickerson opened the door to this. The trial court, at trial, accepted the State's right to rebut Dickerson's claim that his prior felony convictions were the reason he did not carry a firearm and limited the State's inquiry regarding the prior convictions. Based on these facts, the First District found that there was no basis for offense counsel's objection or for any further motion for mistrial, s no error occurred. Furthermore, even if there had been an error, it would not have been of sufficiency magnitude to warrant the granting of a mistrial.

Counsel was not ineffective for failing to object to alleged hearsay statements from a detective. The detective testified that he met with one of the victims and described her demeanor and behavior, and gave his opinion as to her physical and emotional state. He then set forth what the victim told him. This occurred while the fire department was still trying to get the fire in the room under control. The victim was bleeding and acting upset and, to the detective, "appeared to be under the stress of a traumatic event." The victims' statements were admissible as excited utterances. There was therefore no basis for an objection by defense counsel and counsel was not ineffective.

Counsel was not ineffective for not severing this trial from that of the defendant's brother. Both "testified only to their own innocence and neither of them attempted to implicate the other with their testimony."

Counsel was not ineffective for failing to object to the admission of a redacted video of the defendant's interview by officers. There was no demonstration that the redaction changed the context of the video or made it misleading. As to the contention that the jury should have heard it in its entirety to understand what happened, Dickerson testified at trial and gave his version.

Thomas v. State, 1D18-2024 (Nov. 20, 2019)

Counsel was not ineffective for failing to call two alibi witnesses. As to the first, Wingard, his deposition indicated that his "testimony would have been the same as the alibi testimony provided by another trial witness." And, he would have been subject to impeachment based on his prior felony conviction. As to the second, Braswell, a colloquy at trial, which included the defendant and defense counsel, regarding additional witnesses that the defendant wanted counsel to call, did not include Braswell. The defendant further assured the court that he was satisfied with counsel's performance. This claim was rejected because the defendant failed to communicate to counsel his desire to call Braswell as an additional alibi witness.

Faulk v. State, 1D18-2173 (Nov. 20, 2019)

The First District affirmed the summary denial of six claims of ineffective assistance of trial counsel; all of the claims are addressed in the First District's opinion.

Counsel was not ineffective for failing to seek sequestration of witnesses where one witness was alleged to have heard the testimony of a victim and then to have discussed the testimony with the victim of another robbery. Faulk did "not explain how these witnesses could have tailored their testimony or avoided impeachment by speaking to each other. They were each the victim of a different robbery at a different store." The claim was facially insufficient as it did not show prejudice.

Counsel was not ineffective for failing to seek suppression of an out-of-court photo lineup. Part of the claim was that the victims may have chosen the defendant because they believed that "all people of color look alike," and this was speculation, which is insufficient to provide a basis for postconviction relief. Part of this claim

was based on assertions that the victims should have been impeached with prior inconsistent statements – the initial description from the suspects was of "light-skinned males"; the subsequent description was of an African American. These statements did not contradict in-court testimony and did not establish a material variance between the in-court and out-of-court statements. One victim testified at trial that the suspects were black males; the other made no reference to race during trial testimony. The prior statements therefore could not be used by counsel for impeachment.

The failure of counsel to impeach the victims with pretrial statements that were inconsistent with trial testimony as to whether they observed tattoos on the suspect was rejected because the defendant failed to establish prejudice in light of the other trial testimony, which included surveillance footage and the defendant's videotaped confession.

Faulk also argued that counsel was ineffective for failing to seek a competency evaluation, asserting that Faulk had an extensive history of mental health issues. The First District found that the claim was refuted by the trial court record, based upon a combination of proceedings in which Faulk communicated appropriately with the court, and records in the PSI report which undermined the claim of severe mental illness.

Faulk also claimed that counsel was ineffective for failing to pursue an insanity defense. This, too, was found to have been refuted by details in the PSI report, including interviews of family members, as well as the videotaped confession.

Goodman v. State, 1D18-2264 (Nov. 20, 2019)

Goodman appealed multiple convictions, including attempted sexual battery by penetration. In one claim he argued that the jury instructions were erroneous when they included "union with" language when he was charged only with attempted sexual battery by penetration. The First District agreed and reversed as to the charge of attempted sexual battery by penetration.

Although there was no objection to the jury instruction, the instruction as given constituted fundamental error because the jury was "instructed on a crime not charged in the charging document." Although the Florida Supreme Court has held that fundamental error does not occur "when the State does not rely upon the erroneous jury instruction and presents no evidence to support the erroneous jury

instruction," in this case, the State did present evidence that would support the erroneous instruction and also argued that the jury could convict the defendant of the uncharged offense.

Roderick v. State, 1D18-4020 (Nov. 20, 2019)

The First District affirmed the summary denial of multiple claims in a 3.850 motion. Four of the claims of ineffective assistance of counsel were raised and addressed in the appeal. Roderick had been convicted for two counts of sexual battery on a child and other offenses.

Counsel did not object when an expert witness "improperly conveyed her conviction that the victim was telling the truth solely based on the patient-reported intake history." Although counsel was deficient, there was no prejudice based on the other evidence in the case – testimony of a hotel clerk, who testified that he saw a young girl "who appeared to be terrified, running and yelling for help"; "the victim's consistent account of the incident, and the absence of an affirmative denial by Appellant who told police he could not remember if he had raped his daughter." And, the improper testimony was mitigated by the expert's subsequent "admission that based on the physical examination, she could not determine whether the abuse had taken place."

There was no basis for counsel to object to the prosecutor's closing argument. Contrary to the defendant's claim, it did not improperly invoke religion. The prosecutor provided a version of the story of King Solomon and his wisdom in determining which of two women was the true mother of a child. The First District found that "the prosecutor focused on the jury's ability to assess the victim's credibility despite the fact the case lacked DNA evidence. The comments were a direct response to the defense's theory that the absence of DNA proved the victim fabricated the assault." And, the comments were not so egregious as to vitiate the entire trial.

Counsel was not ineffective for failing to object to the prosecutor's comments about the credibility of the child. The comments did not constitute improper vouching as they were based on the evidence adduced at trial.

Second District Court of Appeal

Brady v. State, 2D18-117 (Nov. 22, 2019)

Brady appealed convictions for multiple offenses, including attempted second-degree murder. Upon arriving home one night, after an evening out and having been drunk, and after having had an argument with his wife, who arrived home before he did, Brady retrieved his shotgun, which discharged, "spewing pellets through the bedroom door and into [his wife's] arm."

At trial, Brady asserted that the shooting was an accident, a result of a failed attempt at suicide. There was no objection to the jury instructions. The instructions on homicide omitted the instruction on excusable homicide.

The failure to provide complete instructions on homicide may constitute fundamental error, although there are some exceptions. One exception is when defense counsel affirmatively waives the giving of complete instructions. The mere failure to object does not constitute an affirmative waiver. And, an "affirmative waiver requires counsel to know of the omission before agreeing to the incomplete instruction." In this case, "the trial court specifically directed the parties to the missing definitions of justifiable and excusable homicide in the jury instructions. Defense counsel acknowledged the omission. Yet, she agree to the incomplete instructions without objection. Under the circumstances, Mr. Brady affirmatively waived any claim to assert fundamental error."

The Second District noted that some courts "have questioned – without making any definitive ruling on the matter – whether waiver further requires the record to reflect that counsel knew the omission itself was erroneous." As a result, the Court certified to the Supreme Court the same question of great public importance that it previously certified in Sams v. State, 44 Fla. L. Weekly D967 (Fla. 2d DCA Apr. 12, 2019):

> IS IT FUNDAMENTAL ERROR TO CONVICT A DEFENDANT UNDER AN ALTERED OR INCOMPLETE LESSER INCLUDED CHARGE WHERE COUNSEL AFFIRMATIVELY AGREES TO THE INSTRUCTION, BUT THE RECORD DOES NOT SHOW THAT COUNSEL WAS AWARE OF THE ALTERATION OR OMISSION AND AFFIRMATVELY AGREED TO IT AND IS IT ALSO

NECESSARY FOR THE RECORD TO DEMONSTRATE THAT COUNSEL WAS AWARE THAT THE INSTRUCTION, AS ALTERED, WAS ERRONEOUS?

Love v. State, 2D18-4461 (Nov. 22, 2019)

In a prior direct appeal of convictions and sentences for robbery and armed carjacking, the Second District reversed and remanded for resentencing before a different judge because the 12-year sentence had been based, in part, on impermissible sentencing factors. The jury found that Love did not carry a weapon during the offenses. On remand, the new judge imposed a sentence of 14 years imprisonment and Love appealed.

The new sentencing judge committed fundamental error by considering conduct for which Love was acquitted – i.e., possession of a firearm while committing the offenses. The second sentencing judge, when imposing sentence, made several references to testimony from the trial transcript referencing Love's use of a gun during the offenses.

The sentence was again reversed and remanded for resentencing before yet another new judge.

Wilson v. State, 2D18-4662 (Nov. 22, 2019)

An order denying a modification of probation is not appealable, but is subject to certiorari review "when the lower court bases its denial on the mistaken belief that it did not have jurisdiction to consider the motion." The Second District treated this appeal as a certiorari petition and granted the petition.

The trial court erroneously concluded that it was without jurisdiction under Rule 3.800(c) because the motion was premature as probation had not yet commenced. However, Wilson's motion was not a Rule 3.800(c) motion; it was filed under section 948.03(2), Florida Statues (2017), which states that "[t]he court may rescind or modify at any time the terms and conditions theretofore imposed by it upon the probationer."

K.T.B. v. State, 2D19-59 (Nov. 22, 2019)

K.T.B. appealed an adjudication of delinquency for possession of a controlled substance and argued that the court erred in admitting a confession without proof of the corpus delicti of the crime. The State conceded error based on N.G.S. v. State, 272 So. 3d 830 (Fla. 2d DCA 2019), but the Second District rejected that concession of error and affirmed the adjudication of delinquency.

An officer tried to stop K.T.B. for riding a bicycle at night without lights. K.T.B. fled, abandoned the bicycle and ran between several houses. The officer soon apprehended him, took him into custody for obstructing an officer, and rad him his Miranda warnings. When asked why he ran, K.T.B. said "he was scared," but later confessed that it was because he had "crumbs" or "clumps" on his person – apparent references to cocaine. During a subsequent search between he houses where K.T.B. ran, a baggie with cocaine was found. K.T.B. was not seen discarding any baggie.

The Second District has previously held that evidence of flight, even when coupled with the "location and proximity of contraband along the flight path, without more, is insufficient to prove constructive possession." K.T.B. argued that without the confession, there was no proof of actual or constructive possession.

Proof of corpus delicti is a question of evidentiary admission; sufficiency of evidence for a motion for judgment of acquittal is a question of evidentiary consideration. "Identity of the defendant is often an issue in motions for judgment of acquittal because the State must show that the defendant on trial was indeed the party responsible for the criminal offense that is being prosecuted. . . . Corpus delicti, on the other hand, generally asks the broader question whether there was some evidence, apart from a confession, that a crime had been committed."

The N.G.S. decision had stated that, "The corpus delicti rule does not require that the State prove the identity of the person who committed the crime, *except in those uncommon circumstances where proof of identity is necessary to show that a crime was committed at all."* In that case, the uncommon circumstance existed, where the charge of a delinquent in possession of a concealed weapon included the identity of the accused's status as a delinquent, and that was an element of the offense. The same was not true in this case, where the drug possession statute does not depend on the identity of the defendant. "As such, this contraband's presence in the proximity of K.T.B.'s flight and arrest established a sufficient corpus delicti of the possession offense with which he was subsequently charged."

Third District Court of Appeal

Rodriguez v. State, 3D19-1006 (Nov. 20, 2019)

A Rule 3.170(l) motion was timely filed, but should have been stricken as a nullity. The lower court treated the pro se motion as a Rule 3.850 motion.

The defendant pled guilty on December 31, 2018 and was represented by an assistant public defender. On January 17, 2019, Rodriguez tendered a pro se motion to withdraw plea to prison officials who forwarded it to the court.

As the motion was filed within 30 days of the rendition of sentence, it should have been treated as a Rule 3.170(l) motion. As Rodriguez was still represented by an assistant public defender at the time of the submission of the pro se motion, and the motion did not allege an adversarial relationship with counsel, the motion was unauthorized and should have been stricken as a nullity.

Villalona v. State, 3D19-1080 (Nov. 20, 2019)

A motion for additional credit for prison time previously served on an original probationary split sentence was remanded for the trial court to make further determinations.

A "defendant who, pursuant to a probationary split sentence, serves time in state prison, is released on probation, violates that probation, and is thereafter resentenced to prison, is entitled to credit for the time he previously served in state prison." The "trial court should have determined 1) whether defendant is entitled to credit for time previously served in State prison; 2) if so, the number of days served in State prison as part of the incarcerative portion of his probationary split sentence prior to being placed on probation; 3) whether the trial court, at the time of his sentencing following his probation violation hearing, properly directed the Department of Corrections to calculate and credit defendant for time previously served in State prison; and 4) whether defendant waived his right to any or all of the credit for time previously served in State prison."

The Court also noted that a motion seeking proper credit for prior prison time served is cognizable in a motion under Rule 3.800(a).

Fourth District Court of Appeal

Hunt v. State, 4D18-1577 (Nov. 20, 2019)

Hunt appealed a conviction for aggravated battery with a hate crime. The first trial resulted in a reversal for a new trial. On appeal from the conviction after the second trial, the Fourth District reversed for a new trial again.

Hunt argued that a detective's testimony about the validity of his claim of self-defense invaded the province of the jury. The detective was questioned as follows:

> Q. Detective Huertas, during your investigation did you find that the defendant used the word n----r towards the victim[]. . . on March 5, 2016?
>
> A. Yes.
>
> During your investigation was there any evidence that the victim . . . was hitting the defendant?
>
> A. No.
>
> Q. Based on your training and experience, was there self-defense used in this case by the defendant?
>
> A. No.
>
> Q. Based on your training and experience, did the defendant stand his ground in any way?
>
> A. No.
>
> Q. Based on your training and experience, was the defendant defending anyone else?
>
> A. No.
>
> [Defense counsel]: I am going to object as to invading the province of the jury.

The Fourth District agreed that this testimony improperly suggested a defendant's guilt and invaded the province of the jury. The Court rejected the State's argument that the objection was untimely because the objection could have been made several questions earlier. The Court further concluded that the error was not harmless. "A police officer's testimony is especially prejudicial when it invades the province of the jury as to the defendant's sole defense." "In this case, the detective acted effectively as a fact-finder by neutralizing appellant's defense in front of the jury."

Searcy v. State, 4D18-2201 (Nov. 20, 2019)

Searcy appealed the denial of a suppression motion, apparently after reserving the right to do so when entering a nolo or guilty plea. The trial court did not make any factual findings or provide any rationale for its denial of the suppression motion. The Fourth District reversed and remanded, directing the trial court to provide a rationale and make necessary factual findings.

The trial court had heard conflicting testimony as to whether the defendant was arrested outside his home or whether the officers were invited in by the defendant's mother. There were conflicts in the testimony as to whether the mother was permitted to enter the house at the time that she had given consent for the officers to search the home. Officers provided testimony as to a protective sweep preceding the consent of the mother for a further search. The trial court's denial of the motion did not indicate whether it accepted the legality of the protective sweep.

The Fourth District addressed the reasons why it was requiring further findings by the trial court:

> While not an independent ground for reversal, unexplained rulings are generally anathema to a sound appellate opinion. While we decline to enunciate a ruling that would require factual findings following hearings on motions to suppress, we implore trial judges to consider such a routine procedure, whether they be written or orally pronounced.
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> . . .
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> . . . It is with that backdrop that we take this opportunity to encourage trial courts to exercise the

> prerogative to explain their adjudications and not cede that responsibility o a reviewing court. De novo review of unexplained rulings do not efficiently resolve this issue because the trial court is still in the best position to judge the credibility and demeanor of the witnesses at a pretrial suppression hearing.

Hopkins v. State, 4D18-2204 (Nov. 20, 2019)

The Fourth District reversed a conviction for first-degree murder because the prosecutor "made an impermissible comment on [the defendant's] right to remain silent."

Hopkins testified at the trial and stated that he was hanging out at a bar with his friend "Rico" when the shooting occurred; that he was not the shooter; and that he was misidentified by eyewitnesses. On cross-examination, the prosecutor asked: "And today in 2018 is the first time we're hearing about this guy name[d] Rico?" The trial court overruled an objection when the State argued that Hopkins waived the right to remain silent by testifying at trial.

The Fourth District, relying on the Florida Supreme Court's decision in State v. Hoggins, 718 So. 2d 761 (Fla. 1998), held that "a defendant does not waive this prohibition by electing to take the stand and testify at trial."

Whittaker v. State, 4D18-2336 (Nov. 20, 2019)

An order of restitution was improperly entered without providing the defendant with notice and an opportunity to be heard.

Scott v. State, 4D18-3682 (Nov. 20, 2019)

Once the trial court granted a post-conviction motion for a new sentencing hearing pursuant to the Supreme Court's decisions in Miller v. Alabama and Graham v. Florida, the trial court lacked jurisdiction to rescind that order once it became final, when neither party sought rehearing and no appeal was taken.

Franklin v. State, 4D19-390 (Nov. 20, 2019)

The trial court summarily denied a Rule 3.850 motion alleging newly discovered evidence and the Fourth District reversed for an evidentiary hearing.

"Post-trial confessions from codefendants can amount to newly discovered evidence that provides an exception to the two-year time limitation of Rule 3.850(b)." The allegations of such a confession, from a codefendant who had been acquitted at trial and now confessed, set forth a facially sufficient claim and the records from the case did not conclusively show that Franklin was not entitled to relief.

Sylvestre v. State, 4D19-2753 (Nov. 20, 2019)

A defendant in a pending criminal case sought certiorari review of an order granting the State's request to have the third competency evaluation video-recorded. The Fourth District denied the petition, as no departure from the essential requirements of law was shown.

Both the rules of procedure and case law permit counsel to be present during any court-ordered competency examinations. Video-recording was not materially different from a lawyer being present and it "ensures a complete and accurate record of the evaluation is available." It also avoids the possible need for testimony from counsel for the State at a competency hearing had the attorney been present in lieu of the video-recording.

Fifth District Court of Appeal

Singer v. State, 5D18-1783 (Nov. 22, 2019)

A conviction for first-degree murder was reversed based on the failure of the court to grant a defense requested continuance which was prompted by the State's "disclosure of an expert DNA report received shortly before trial." The report was produced 12 days prior to the trial and "concluded for the first time that blood found on Singer's headboard matched her husband's [victim's] DNA profile." Defense counsel had asserted a belief that the blood was that of Singer's kittens, whom the husband killed shortly before his disappearance.

After review other facts leading up to the trial, the Fifth District concluded that "[b]ased on counsel's limited experience with DNA cases and lack of familiarity with FDLE's current procedures, combined with the complexity of the expert report at issue here, we conclude that twelve days was wholly inadequate to prepare for trial." And, an inability to challenge the report would have left it unchallenged and drastically changed the theory of defense.

Ruiz v. State, 5D18-3402 (Nov. 22, 2019)

The Fifth District affirmed a conviction for vehicular homicide and challenged the sufficiency of the evidence, asserting that the State "merely presented evidence that [the defendant] drove at an excessive speed," and that that did not establish recklessness in and of itself.

The Court disagreed, finding that the State had presented evidence that Ruiz was racing at the time of the crash. The State presented evidence of eyewitnesses observing two vehicles zigzagging at speeds of 60-75 miles per hour in a 45 mile per hour zone, with less than an arm's length between them. Forensic evidence had Ruiz's vehicle travelling at 91 miles per hour when it began making skid marks prior to the crash.

Evidence also refuted Ruiz's claim that the racing ended prior to the crash, as Ruiz's vehicle accelerated from 75 miles per hour to 90, when it began to skid off the road.

Owens v. Flowers, et al., 5D19-3366 (Nov. 22, 2019)

The Fifth District granted a habeas corpus petition because a sentence had been illegal. For a second-degree murder with a firearm, a life felony, committed in 1991, Owens received a sentence of 40 years in prison plus 15 years of probation. Under the sentencing statutes in effect at the time of the offense, a life felony could be sentenced by a term of life in prison or a term of imprisonment not exceeding 40 years. The combined sentence of 40 years in prison plus 15 years of probation exceeded the 40-year statutory maximum.

State v. Henry, 5D19-2288 (Nov. 18, 2019)

The Court granted the State's petition for writ of certiorari which sought review of a trial court order "granting the defendant's motion to compel the disclosure of certain witnesses, the identities of whom the State wishe[d] to keep confidential."

Henry was being prosecuted for attempted first-degree murder, shooting into an occupied vehicle, and possession of a firearm by a convicted felon. As to the witnesses at issue, who were listed by the State as potential witnesses, the State argued in the trial court that it did not intend to call them and that they had all expressed concerns for their own safety and agreed to speak with law enforcement

"only in confidence." The trial court ordered disclosure of two of the five witnesses' names.

The Fifth District granted the petition because Henry's "motion failed to raise a legally cognizable defense, did not include any sworn proof or an oath of any kind, and alleged prejudice only in vague terms related to speedy trial and the potential for a conflict. Further, at no point did Henry assert in his motion below that failure to disclose the witnesses would result in an unfair determination of the cause at issue – a requirement of Rule 3.220(g)(2)."