Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Reed, 17-12699 (Oct. 28, 2019)

On remand from the Supreme Court, for reconsideration in light of the recent decision in Rehaif v. United States, 139 So. Ct. 2191 (2019), the Eleventh Circuit addressed the issue of whether plain error occurred when the indictment failed to allege, and the jury was not instructed, that Reed was a felon when he possessed a firearm. The Eleventh Circuit concluded that Reed failed to establish that the errors affected his substantial rights.

"When Reed possessed the firearm, he had been convicted of eight felony convictions in a Florida court. . . . And the jury could have inferred that Reed knew he was a felon from his stipulation and from his testimony that he *knew* he was not supposed to have a gun. Reed also admitted at sentencing that he had served a minimum of 18 years in prison before being arrested for possessing the firearm. . . . Because the record establishes that Reed knew he was a felon, he cannot prove that the errors affected his substantial rights or the fairness, integrity, or public reputation of his trial."

United States v. Ross, 18-11679 (Oct. 29, 2019)

Ross appealed the denial of his motion to suppress. Officers had arrest warrants for Ross and believed he was staying at a motel. As he was not registered, they set up surveillance. Ross emerged from a motel room, spotted officers, and started running. One officer headed back to the motel, believing Ross might have doubled back to the motel room. That detective obtained a room key and copy of the registration, in the name of a woman, from the front desk. The woman's name had no meaning to the detective at that time. Officers entered the room without knocking, testifying that Ross was known to have a history of violence. Inside the room, a protective sweep was conducted, and a grocery back was in plain view, with the outline of a firearm clearly visible. The gun was seized and the officers left.

Surveillance continued. After 11:00 a.m., the standard checkout time for the motel, officers reentered the room. They found and seized a cell phone and a bag containing packets of controlled substances.

The Court first rejected the government's argument that Ross abandoned any reasonable expectation of privacy when he fled the motel with no intention of returning. Although the government did not present this argument in the district court, prior case law from the Eleventh Circuit bound the Court, although it noted its misgivings about the prior decision, and the abandonment argument was deemed to implicate Article III standing, i.e., subject matter jurisdiction, and was therefore not waivable. On the merits, the abandonment issue was deemed "close," but the government was found not to have carried its burden because the first protective sweep occurred less than 10 minutes after the flight from the motel.

However, the protective sweep complied with the Fourth Amendment. To enter a hotel room to execute an arrest warrant, "a law enforcement officer 'must have a reasonable belief' both (1) that the room is in fact the suspect's and (2) that the suspect is inside." The officers had seen Ross exit the room, approach a truck in the parking lot, return to the room and then reemerge. When they returned from their unsuccessful pursuit of Ross's flight on foot, Ross's truck was still in the parking lot, increasing the possibility that he had doubled back to the room. It "was eminently reasonable for [the officers] to conclude that Ross had doubled back to the motel and taken refuge in his room." And, as the gun was observed and seized when it was in plain view, the motion to suppress the seizure of the gun was properly denied.

As to the second search, the Court held "that a short-term hotel guest like Ross has no reasonable expectation of privacy in his room after checkout time, and thus no standing to object to a room search that police conduct with the consent of hotel management after checkout time has passed." One caveat was noted, based on a guest asking for and receiving a checkout time that is later than the standard time set by hotel policy.

United States v. Harris, 18-11513 (Oct. 29, 2019)

Harris challenged the use of a prior Alabama conviction for attempted first-degree assault as a qualifying violent felony under the armed career criminal act's elements clause. The Eleventh Circuit disagreed and affirmed.

The Alabama offense was divisible into five alternative means of commission and the state sentencing court did not expressly state which Harris pled guilty to. An argument by Harris on appeal, that he did not assent to the State's factual proffer during the plea colloquy, was not preserved in the district court and was waived, especially insofar as Harris did not object to the PSI report's inclusion of the factual basis for the conviction.

Harris further argued that it was still unclear from the factual basis as to whether it related to an alternative means of committing the offense that constituted a violent felony. The Eleventh Circuit narrowed the factual proffer down to two of the five possible alternatives and concluded that either of them would be a violent felony under the elements clause of the ACCA. Subsection (1) of the state statute had previously been deemed a violent felony, as it entails proof that the accused "with intent to cause serious physical injury to another person . . . causes serious physical injury to any person by means of a deadly weapon or a dangerous instrument." The Eleventh Circuit now held, for the first time, that subsection (2) also qualified as a violent felony under the elements clause. Subsection (2) requires proof of "intent to disfigure another person seriously and permanently, or to destroy, amputate, or disable permanently a member or organ of the body of another person," and "caus[ing] such an injury to any person." Thus, regardless of which of the two subsections Harris pled guilty to, a violent felony had been established.

United States v. Hunt, 17-12365 (Oct. 30, 2019)

The Court vacated its prior opinion and affirmed the district court's rulings that "Alabama second-degree and third-degree robbery convictions qualify as predicate felonies under the ACCA," and that robbery was a violent felony under the elements clause of the ACCA.

The "use-of-force" element exists for all three degrees of robbery under the Alabama statutory scheme and "force sufficient to overcome the victim's resistance is enough to make an offense a violent felony under the ACCA."

Additionally, as to a similar challenge related to the career offender guideline, which has the same elements clause as the ACCA, the Court rejected a challenge to the career offender enhancement.

A Michigan state-court conviction for carjacking was also found to constitute a violent felony under the ACCA. The Court rejected the argument that Michigan

allows "the state to show that the defendant 'put[] the other person in fear' without the use or threat of physical force."

Cromartie v. Shealy, et al., 19-14268 (Oct. 30, 2019)

Cromartie, shortly prior to a pending execution date, appealed the dismissal of a section 1983 complaint. The Eleventh Circuit affirmed the dismissal. The complaint alleged "that Georgia's procedure for determining whether a prisoner is entitled to postconviction DNA testing violates his Fourteenth Amendment right to due process and his First and Fourteenth amendment right to access the courts." The district court's dismissal was based on the failure to state a claim upon which relief could be granted, as well as unjustified delay in filing the 1983 action.

The Georgia procedures were similar to those approved by the Osborne decision of the Supreme Court, which addressed Alaska's provisions for postconviction DNA testing. The one significant difference was that the Georgia statute added a requirement that the prisoner "show that the identity of the perpetrator is a significant issue in the case." That, however, was similar to a provision in the federal statute for postconviction DNA testing, which the Supreme Court's Osborne decision referred to as a "model for how States ought to handle the issue" of postconviction DNA testing.

The Eleventh Circuit addressed the Georgia requirement of due diligence and state that all "that the due diligence standard requires is, as it says, that the prisoner act with the diligence that is due under the circumstances. Which is an established principle of law." And, the "materiality" standard of the Georgia statute, requiring DNA testing results creating a reasonable probability of an acquittal, was found to have been approved by the Supreme Court's Osborne decision, as well.

Holland v. Secretary, Florida Department of Corrections, 17-15706 (Nov. 1, 2019)

The Eleventh Circuit affirmed the dismissal of a federal habeas corpus petition based on the lack of subject matter jurisdiction.

Although Holland filed a second federal habeas petition and entitled it a petition under 28 U.S.C. s. 2241 instead of s. 2254, it challenged the state court conviction and was subject to the successive petition requirements of 28 U.S.C. s. 2244(b), including the need for authorization of the Eleventh Circuit prior to filing the petition. As that authorization had not been obtained, the district court lacked subject matter jurisdiction to entertain the second petition.

A third petition was then filed, again without the Eleventh Circuit's authorization, and again, subject matter jurisdiction was lacking. Entitling the petition as one under s. 2241 did not avoid the reality that it was challenging a conviction and was still subject to the prohibitions against successive petitions.

First District Court of Appeal

Hamilton v. State, 1D18-1287 (Nov. 1, 2019)

A motion to withdraw plea alleging misadvice from counsel was properly denied as it was refuted at a hearing by the combination of a comprehensive plea colloquy and jail calls "in which Appellant indicted he was moving to withdraw his plea to game the system."

Ziegler v. State, 1D18-2314 (Nov. 1, 2019)

The trial court denied a Rule 3.850 motion, after giving the defendant leave to file two amended motions. The court had admonished the defendant about exceeding the 50-page limit and further ordered the defendant to have it written legibly. The defendant's final pleading indicated that he was relying on his previously-filed motion, which was 49 pages long and contained 42 grounds for relief. "The handwritten text is very small and illegible at times. Each page typically includes 40-50 lines of text and the margins throughout the motion are typically less than 1 inch. If the motion had been drafted with the required margins and line-spacing, it would easily exceed the 50-page limit." The order of dismissal was affirmed.

The Court's opinion attaches a one-page excerpt from the handwritten motion to demonstrate its noncompliance with the requirements of Rule 3.850.

Ball v. State, 1D18-330 (Nov. 1, 2019)

The First District affirmed convictions and sentences for grand theft, money laundering, racketeering and solicitation to tamper with evidence.

The Court rejected an argument that convictions for two racketeering charges resulted in a double jeopardy violation. The question was "whether the State wrongfully chopped one single pattern of crime into two separate counts." The analysis of this issue is based on a five-factor, totality-of-the-circumstances test:

1. Whether the activities allegedly constituting two RICO "patterns" occurred during the same time periods;
2. Whether the activities occurred in the same places;
3. Whether the activities involved the same persons;
4. Whether the same criminal statutes were allegedly violated; and
5. Whether the overall nature and scope of the activities were the same.

Here, although there was some overlap, the evidence showed more than one pattern of racketeering activity through distinct enterprises. One count alleged that Ball and Noka World Energy "engaged not only in efforts to swindle the primary victim out of her money, but also schemes involving an automobile dealership, loan companies, banks and tax documents." The other count "charged acts of a different enterprise consisting of Mr. Ball, The Kessler Fund, LLC, and Noka World, LLC, over a different time period." It went beyond the first pattern, as it also involved "the Florida Department of Economic Opportunity and an attempt to unlawfully obtain unemployment benefits." And, it did not "include the auto-dealer, auth-financing, and tax-related allegations found" in the other count.

Dozier v. State, 1D18-0597 (Nov. 1, 2019)

A motion for judgment of acquittal as to one charge of sexual battery on a child should have been granted "because the State failed to present evidence establishing union between appellant's penis and the child victim's anus."

Jones v. State, 1D17-3833 (Oct. 30, 2019)

The First District affirmed the denial of a Rule 3.850 motion after an evidentiary hearing. Jones alleged counsel was ineffective for improperly advising him regarding the State's plea offer.

The trial court heard conflicting evidence at the hearing. Jones claimed one attorney advised him not to accept the State's plea offer. The two attorneys representing Jones testified that Jones chose not to accept his attorneys' advice when he rejected the plea offer.

Henderson v. State, 1D18-3098 (Oct. 30, 2019)

A trial court lacks jurisdiction to rescind an order granting resentencing once it became a final, appealable order, and neither party timely moved for rehearing under Rule 3.800(b)(1)(B).

Love v. State, 1D19-368 (Oct. 30, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion in which Love alleged that counsel was ineffective for "not objecting to a vindictive and disparate sentence."

The motion did not "show that the trial court sentenced him more harshly because he exercised a constitutional right. His counsel was not ineffective for not raising this meritless objection." Nor did the motion demonstrate disparate treatment of Love and his codefendant. The two were not similarly situated, as the charges against the two differed and the codefendant was eligible for youthful offender sentencing, whereas Love, who was 26 years old at the time of the offenses, was not.

Johnson v. State, 1D19-1225 (Oct. 30, 2019)

The Court dismissed an appeal from the denial of a motion to correct illegal sentence as the challenged order was not adverse to Johnson. The opinion notes a conflict between the First, Fifth and Third Districts on this question.

Evans v. State, 1D19-1341 (Oct. 30, 2019)

Reclassification of aggravated battery to a first-degree felony is proper where it is based on proof of great bodily harm, and the use of a deadly weapon is not an essential element of the offense.

Second District Court of Appeal

State v. Jones, 2D18-3535 (Nov. 1, 2019)

Jones was charged with driving on a suspended license. The county court suppressed statements of identity Jones made to the police at the scene of an accident on the basis of the statutory accident-report privilege, section 316.066(4), Florida Statues. The circuit court, on appeal, affirmed the county court's order, and the State sought certiorari review in the Second District, which granted the petition.

The relevant facts were that:

> There was a multivehicle accident during which a car Mr. Jones was driving was rear-ended. A deputy arrived at the scene and began a crash investigation. He did not administer Miranda warnings. He asked Mr. Jones for his license. Mr. Jones said he did not have one. The deputy then asked for his name, date of birth, and social security number. Mr. Jones complied.
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> The deputy used that identifying information to check on the Driver and Vehicle Information Database (DAVID) maintained by the Florida Department of Highway Safety and Motor Vehicles. He learned that Mr. Jones's license had been revoked. He asked Mr. Jones whether he knew that his license was revoked, and Mr. Jones responded affirmatively. Mr. Jones was arrested and, after further questioning not relevant her, charged with driving on a suspended license.

Jones argued that "under the accident-report privilege, when a law enforcement officer 'switches hats' from conducting an accident investigation to conducting a criminal investigation, the driver must be Mirandized and (2) that the statute contains no exception for statements of identity."

The Second District first addressed a fifth amendment, self-incrimination aspect of the issue and, relying on California v. Byers, 402 U.S. 424 (1971), found "that the compelled disclosure of a driver's identity at an accident scene pursuant to a reporting statute does not violate the privilege against self-incrimination." As to the defense argument that there was a "switching of hats" from the accident investigation to a criminal investigation, the circuit court affirmed the trial court's prior factual finding that the deputy "never began conducting a criminal investigation."

The Circuit Court, in the appeal from the County Court, failed to consider or apply the Byers decision.

The statutory privilege precludes admission of statements made by a person involved in a crash, with the exception that "a law enforcement officer at a criminal trial may testify as to any statement made to the officer by the person involved in the

crash if that person's privilege against self-incrimination is not violated." The Second District found that this statutory privilege against self-incrimination is co-extensive with the constitutional privilege against self-incrimination. "So long as the requirements of the statutory exception are met, the plain language of the statute means that statements of identity come in just like any other statement by a person involved in a crash. Because that is true, the circuit court could have held that the absence of a statutory exclusion for statements of identity required the suppression of Mr. Jones's statements only by using a metaphorical red pen to write the exception for testimony by law enforcement officers out of the statute entirely. Of course, that is not something the circuit court enjoyed any latitude to do.

The Second District granted the State's petition, but certified conflict with the decision of the Fourth District, in State v. Evans, 692 So. 2d 305 (Fla. 4th DCA 1997), which found that "there is no longer an exception to the privilege for statements made if the identity of the driver is in question."

State v. Rapson, 2D18-4206 (Nov. 1, 2019)

"'Section 316.1935(6) expressly prohibits the court from withholding adjudication of guilt for any violation of section 316.1935.'"

Romaine v. State, 2D17-4605 (Oct. 30, 2019)

The Second District reversed the summary denial of one claim of ineffective assistance of counsel for further proceedings. Romaine argued that counsel should have retained an expert to enhance the clarity of surveillance video where three eyewitnesses identified him as the perpetrator.

The trial court's order found that counsel was not deficient, but did not provide any explanation. Furthermore, the allegations were not conclusively refuted by the record attachments, which included the testimony of the three eyewitnesses. "If an expert had been able to enhance the surveillance and had defense counsel presented that enhanced video to the jury through the expert's testimony, there is a reasonable probability that the jury would have placed more weight on the video evidence than the eyewitness identifications and the result of the proceeding would have been different."

This claim was remanded for further proceedings, including an evidentiary hearing, if necessary.

Reese v. State, 2D18-916 (Oct. 30, 2019)

In one count of the information, Reese was charged with delivery of cannabis. The information did not allege selling or possessing with intent to sell in the alternative. In closing argument, the prosecutor referred to the elements for this charge as "sold, delivered, or possessed with intent to sell or deliver," in the alternative. The jury instructions similarly referenced all three alternatives.

Although there was no objection to the jury instructions, the erroneous instruction on uncharged theories constituted fundamental error under the facts of this case, as it was possible that the jury could have chosen to convict based on possession as opposed to delivery. An informant testified that Reese "made change and handed the drugs to the other man." The jury returned a general verdict.

The fact that the amended information referenced the correct statutory section, 893.13(1)(c)(2), did not make a difference because the information specifically excluded the alternative theories.

Rogers v. State, 2D19-2193 (Oct. 30, 2019)

A petition for writ of certiorari, challenging an order adjudging Rogers incompetent and compelling him to undergo competency restoration training was granted.

The order was based on written reports of two experts and "others." A competency hearing was not held.

Third District Court of Appeal

Tisdale v. State, 3D18-1717 (Oct. 30, 2019)

The Third District affirmed the summary denial of a Rule 3.850 motion, as the motion was untimely.

Tisdale argued that "his ignorance of the nondiscretionary sexual offender registration requirements sufficiently demonstrated a claim of 'newly discovered evidence, thus, he was untethered by the underlying time restraints." The Court disagreed. The registration requirements were included in the statutes at the time of the conviction and could have been ascertained through the exercise of due diligence.

A separate motion for DNA testing was properly denied as it failed to allege that it was seeking testing of previously untested evidence or that the defendant was relying upon facts unknown prior to a plea. The motion sought retesting of evidence that had both been tested and prominently featured at trial. There was nothing about those results that had been inconclusive and there was no basis for arguing that subsequent developments in DNA testing techniques "likely would produce a definitive result establishing that [he] is not the person who committed the crime."

Fourth District Court of Appeal

State v. Pickersgill, 4D18-3115 (Oct. 30, 2019)

The trial court granted a post-verdict judgment of acquittal. The State appealed and the Fourth District reversed, finding that the State presented competent, substantial evidence to support the verdict on all counts.

As a preliminary matter, the Court rejected the argument that it lacked jurisdiction for the appeal. The State may appeal a ruling granting a motion for judgment of acquittal after a jury verdict. The trial court granted the motion for JOA before the jury verdict was required. The Fourth District rejected the argument that there was no jury verdict until it was accepted by the trial court and filed with the clerk for recording.

On the merits of the argument, the lower court's comments indicated that it erred by weighing the evidence and making credibility determinations which were the sole province of the jury. While it was reasonable for defense counsel to call the credibility of testifying officers into question due to the failure to preserve the video of the defendant's confessions, there was no legal bar preventing the officers from testifying without the video or audio recordings.

Joshua v. State, 4D18-3724 (Oct. 30, 2019)

The Fourth District affirmed the summary denial of a motion for postconviction relief which was based on claims of newly-discovered evidence and ineffective assistance of counsel.

Even accepting Joshua's allegations as true, he did not demonstrate an entitlement to relief. "[R]egardless of the identity or motivations of the confidential informant or misinformation alleged to have been provided, and regardless of any

asserted ineffective assistance rendered by defense counsel, the anticipatory search warrant was nevertheless valid" for three reasons. First, on the basis of reasonable suspicion, there is no Fourth Amendment violation when an officer "temporarily detains items placed in the U.S. mail or placed with a private delivery service such as Federal Express." "Second, once the FedEx package was temporarily detained, a certified drug detection canine alerted on a package, indicating the presence of narcotics inside the package. The canine's alert on the FedEx package provided probable cause for a warrant to search the package." Upon receipt of the warrant, the package was opened, confirming the presence of narcotics. "Third, the execution of this valid search warrant, based upon the canine's alert to the package, and the discovery of crystal meth inside the package, provided police with a legally sufficient basis to obtain an anticipatory search warrant for Joshua's home – the location to which the FedEx package was addressed and bound for delivery. It was during the execution of this anticipatory search warrant (to search for and seize the crystal meth) that the officers observed ecstasy pills in plain view inside Joshua's home. . . ."

Fifth District Court of Appeal

Osborn v. State, 5D18-3039 (Nov. 1, 2019)

Multiple claims in a Rule 3.850 motion were summarily denied, and the Fifth District reversed because the trial court failed to attach court records conclusively refuting the claims. The motion alleged counsel was ineffective for failing to call three witnesses who would have supported Osborn's suppression motion. Nothing in the attached record conclusively refuted the proposed testimony of these three witnesses.

Reynolds v. State, 5D17-3820 (Oct. 30, 2019)

The Court affirmed the revocation of probation based on new law violations of domestic battery and resisting an officer without violence. One judge dissented, and the majority opinion addressed three points from the dissent. Several of the points relied upon by the dissent were found to have been unpreserved for appellate review. For example, Reynolds "did not argue below that the officer's observation of the victim's wound was insufficient corroboration because of the temporal break between the battery and observation by law enforcement."

Another point was found to go to the weight of the evidence, not its sufficiency – i.e., that "the officers in this case did not arrive at the scene in temporal proximity to the battery."

Last, the majority found that the dissent was viewing the evidence in the light most favorable to the Appellant, and was not viewing it in the light most favorable to the prevailing party.