Case Law Update
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Supreme Court of Florida

Gaymon v. State, SC19-712 (Jan. 23, 2020)

The Supreme Court granted review of a certified question of great public importance from the First District Court of Appeal, and addressed the question, as revised:

> What is the proper remedy for harmful error resulting from the court, not the jury, finding the fact of dangerousness under section 775.082(10) in violation of the Sixth Amendment?

The Court had previously, in Brown v. State, 260 So. 3d 147 (Fla. 2018), held a portion of section 775.082(10), in violation of the Sixth Amendment, as it required the court, not the jury, "to find the fact of dangerousness to the public necessary to increase the statutory maximum nonstate prison sanction."

The Court now held "that the proper remedy for harmful error resulting from the court, not the jury, finding the fact of dangerousness under section 775.082(10) is to remand for resentencing with instructions to either impose a nonstate sanction of up to one year in county jail or empanel a jury to make the determination of dangerousness, if requested by the State."

The Court recognized that empaneling a jury raised an issue of separation of powers, as the statute at issue did not expressly require a jury finding of dangerousness. However, when "'confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies.'"

State v. Poole, SC18-245 (Jan. 23, 2020)

The Supreme Court receded, in part, from its decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016).

In Hurst v. Florida, 136 S.Ct. 616 (2016), the Supreme Court held that "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." In Hurst v. State, the Florida Supreme Court then held that before "the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death."

The Court now receded from Hurst v. State "except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance."

Kocaker v. State, SC17-1975, SC18-878 (Jan. 23, 2020)

In an appeal from the denial of a Rule 3.851 motion, the Supreme Court concluded that the circuit court did not err in finding the defendant competent to proceed in postconviction proceedings.

The circuit court heard conflicting opinions from seven experts. Additionally, that court viewed video recordings of each expert's evaluation, and noted that the defendant remembered "a remarkable amount of information about his version of the night of the offense and what occurred at trial." The defendant's claim, on appeal, was viewed as one which "essentially invites us to reweigh the evidence and to . . . resolve conflicting expert testimony. But that is not our role. Instead, our task here is simply to determine whether any reasonable person could have reached the same conclusion as the circuit court."

The Supreme Court further found that the trial court properly denied claims that trial counsel was ineffective for failing to adequately cross-examine three witnesses. One witness testified at trial that he observed the defendant carrying a bag with shoes, pants and a shirt, the clothes which the State maintained the defendant was wearing at the time of the murder. At a pretrial interview, the witness said that he did not observe what was in the bag. There was no prejudice in the failure to cross-examine about this. The defendant himself testified at trial that he had put clothes and shoes in a bag, but that they belonged to someone else. The jury also saw a video of the defendant throwing something in a dumpster.

At trial, two witnesses testified that they observed the defendant in a blood-stained shirt. In a pretrial deposition, another witness said that she would never

forget that the defendant was wearing a white T-shirt; and when asked if she noticed blood, she said that she wasn't paying attention. This discrepancy was deemed by the Supreme Court to have had "only minimal impeachment value." The witness had said that she only "glanced" at the defendant at the time in question, and she did not have as good a view of the defendant as the two other witnesses, as she was in the front seat of a car that the defendant entered, and the defendant got into the back seat, which was dark.

A third witness testified that the defendant told her that there was a knife under a bed in his motel room, prior to the murder. The defendant argued that counsel should have made use of the deposition of another woman in the same room who did not make reference to the defendant telling them about the knife. This, the defendant maintained, would have enabled counsel to argue at trial that the women found the knife on their own, and that it had been left under the bed by a prior occupant of the room. There was no prejudice from making use of this, as it would have entailed argument to the jury based on "counsel's implausible speculation about the ownership of the knife."

In a Brady claim, the defendant argued that the state withheld evidence of deals with two witnesses in exchange for their trial testimony; both were being prosecuted for probation violations at the time of the trial and both denied having made any deal with the state. The defendant argued that both received lenient treatment for their probation violations after the trial. Additionally, a note in the state attorney's files indicated that one of the witnesses was told that they would not be able to discuss helping her out with charges until after the trial. That was insufficient to state a prima facie Brady claim. The note "contradict[ed] the existence of a deal. And we have previously held that the mere fact of lenient treatment, standing alone, does not show the existence of a deal between the state and a testifying witness."

Appellate counsel from the direct appeal was not ineffective for failing to argue that a comment by the prosecutor in closing argument improperly bolstered a witness. During prior cross-examination of the witness, defense counsel implied that the witness had made up testimony in the hope of gaining favorable treatment from the government. The prosecutor later argued that the witness did not get any preferred treatment; that he went to the police and told them the truth. The prosecutor's comment was an appropriate fair reply to the defense's attack on the witness's credibility.

Eleventh Circuit Court of Appeals

United States v. Bane, 18-10232 (Jan. 24, 2020)

The Appellants sought to use a petition for writ of error coram nobis to challenge forfeiture judgments, based on their contention that a new decision from the Supreme Court of the United States applied retroactively. The Eleventh Circuit held that they were not entitled to relief "because their failure to challenge their forfeiture judgments on direct appeals means they cannot challenge them now."

The forfeiture judgment was entered for more than $5,800,000, jointly and severally against two individuals. About eight years later, the Supreme Court held in Honeycutt v. United States, 137 S.Ct. 1626 (2017), that a "different forfeiture statute does not permit joint-and-several liability." On the basis of that decision, the Appellants sought relief through the retroactive application of Honeycutt. The Honeycutt decision did not involve a question of jurisdiction. As a result, the procedural bar based on the failure to challenge the forfeiture judgments on direct appeal could not be circumvented; non-jurisdictional errors had to be raised on direct appeal. The only way to overcome that procedural bar was to demonstrate cause and prejudice. The novelty of a claim can constitute cause for excusing a procedural default, but "only when the claim is truly novel," "meaning that 'its legal basis [was] not reasonably available to counsel.'" The claims at issue here did not qualify as being truly novel; they could have been raised on direct appeal. The Honeycutt decision was only a matter of statutory interpretation and it did not "announce a new constitutional right or overturn any Supreme Court precedent.'"

One judge dissented in part, and would have held that the error in question was jurisdictional in nature.

First District Court of Appeal

Weaver v. State, 1D18-2199 (Jan. 23, 2020)

Applying the recent decision in Knight v. State, 44 Fla. L. Weekly S310 (Fla. Dec. 19, 2019), the First District held that the failure of the trial court to instruct the jury on the lesser included offense of lewd or lascivious battery, as a lesser of sexual battery, was no longer per se reversible error. As the evidence was sufficient to support the conviction for sexual battery, the judgment of conviction was affirmed.

Horn v. State, 1D18-4858 (Jn. 23, 2020)

An order denying a motion for return of property was reversed for an evidentiary hearing. The trial court had denied the motion based on the State's representations that there was a possibility that the case that the property related to would have to be retried. "The State was referring to two postconviction proceedings which have since been resolved."

As the relevant pending postconviction proceedings were concluded, the defendant was entitled to an evidentiary hearing. The lower court's order did not refute the defendant's allegations, and the defendant was entitled to an opportunity to prove "1) whether the property is exclusively his own, 2) that the property was not the fruit of illegal activity, and 3) that the property is not being held for continuing evidentiary purposes."

Hicks v. State, 1D18-4130 (Jan. 22, 2020)

The trial court committed fundamental error by failing to conduct a competency hearing after "finding reasonable grounds to believe that Appellant was incompetent and ordering a competency evaluation." A nunc pro tunc determination of competency was permitted if the trial court was able to make such a determination.

State v. Griner, 1D18-4849 (Jan. 22, 2020)

The trial court granted relief on a juvenile sentence based on Atwell v. State, 197 So. 3d 1040 (Fla. 2016). As the Florida Supreme Court receded from Atwell in State v. Michel, 257 So. 3d 3 (Fla. 2018) and Franklin v. State, 258 So. 3d 1239 (Fla. 2018), reliance on Atwell was erroneous and Griner was not entitled to resentencing.

Posey v. State, 1D19-1283 (Jan. 22, 2020)

The First District affirmed a conviction for first-degree felony murder based on the underlying felony of aggravated child abuse.

The cause of death according to the medical examiner was "mechanical asphyxiation," "or compression of the chest and torso which prevented the child from breathing." The child was nine-years old and weighed 109 pounds; the defendant was 320 pounds, and there was no dispute that she sat on the child. On appeal, she argued that the evidence of willful intent for aggravated child abuse was insufficient. That issue was not preserved for appellate review as the motion for

judgment of acquittal in the trial court asserted only that the striking of the child had been legally permissible corporal punishment.

Alternatively, the evidence of intent was sufficient. The defendant admitted in investigative interviews that "she intended to sit on the child and use her considerable body weight to restrain the child. She further admitted that she remained upon the child's body even after the second time the child told Appellant she could not breathe."

Hill v. State, 1D18-1355, 1D18-1357 (Jan. 21, 2020)

The trial court erred in finding one ground of a violation of probation – the condition prohibiting the defendant from associating with any person engaged in criminal activity. The affidavit alleged "that the appellant had violated this condition, the probation officer alleged that the appellant was engaged in criminal activity at a particular residence." The allegation in the affidavit was insufficient on its face to support a violation of the condition at issue.

Wendell v. State, 1D18-4156 (Jan. 21, 2020)

The First District affirmed a conviction and sentence citing two cases. One was for the point that "in a prosecution of sexual battery of a child, evidence of physical abuse against the child's mother was admissible to explain why the victim had not earlier reported the crime for fear of the defendant's retribution." The other was for the point that a "twelve-person jury is not required in prosecutions of sexual battery of a child."

Second District Court of Appeal

Robinson v. State, 2D17-3087 (Jan. 22, 2020) (en banc)

Robinson appealed a conviction for driving while his license was revoked as an habitual traffic offender (HTO). On appeal, he argued that there was insufficient evidence "that the Department of Highway Safety and Motor Vehicles (DHSMV) had sent the required 'notice' that his license had been revoked and that, relatedly, the circuit court should have granted his request for a special instruction because the approved instruction, Fla. Std. Jury Instr. (Crim.) 28.11(1), fails to include or define notice as an element of this offense."

The Second District disagreed and found that its own case law had "inadvertently grafted an element onto a statutorily defined criminal offense that the legislature did not see fit to include." Thus, the Court held that "notice" was not a required element of the offense defined in section 322.34(5), Florida Statutes.

The statute at issue provides that "[a]ny person whose driver license has been revoked pursuant to s. 322.264 (habitual offender) and who drives any motor vehicle upon the highways of this state while such license is revoked is guilty. . . ." The referenced statute, section 322.264, does not use the word "notice" either. Based on what the Court saw as the clear and unambiguous language of the statute, notice was not an element of the offense. The Court's opinion includes extensive analysis of its own prior decisions.

Five of the Court's judges concurred in result only; one dissented. The dissent found that the relevant statutory language was found in section 322.27(5)(a), which provides, inter alia, that "all orders of .. . revocation . . . shall be given either by personal delivery . . . or by deposit in the United States mail. . . ."

Lesende v. State, 2D18-2252 (Jan. 22, 2020)

Lesende filed a motion seeking clarification of his sentence and a motion for correction under rule 3.800(b). The trial court did not rule on the rule 3.800(b) motion within the required 60 days, and subsequently issued a written order stating that the motion was deemed denied because of the prior failure to rule on the motion within 60 days.

The direct appeal of the conviction and sentence resulted in an affirmance, and Lesende's counsel did not present argument as to the denial of the rule 3.800(b) motion. A separate notice of appeal was filed as to the rule 3.800(b) motion. However, the appellate court did not have jurisdiction to entertain that appeal. A rule 3.800(b) order may be appealed and addressed only as a part of the direct appeal, not as a freestanding appeal. Nor could the appellate court treat it as an appeal of an order denying a motion to correct illegal sentence, because the trial court lacked jurisdiction to entertain rule 3.800(a) motions during the pendency of the direct appeal.

Third District Court of Appeal

Vinas v. State, 3D18-1433 (Jan. 22, 2020)

The trial court did not err in denying a motion to sever charges of drug offenses where alleged sales occurred on different dates.

"In the instant case, the recorded transaction that was the basis of count two was intertwined with or connected in an episodic sense to that in count four, when Det. Love completed the purchase of the bundle of heroin that he had ordered during the prior, recorded transaction."

Alternatively, any error in not severing count two was harmless. There were six charges and Vinas sought severance only of count two. Had the severance been granted, "the State would have been entitled to introduce evidence of Vinas' actions alleged in count two as Williams rule evidence." And, the jury's verdicts demonstrated an "ability to differentiate between the various charges, as Vinas was acquitted of counts five and six."

Fourth District Court of Appeal

Harris v. State, 4D18-1735 (Jan. 22, 2020)

The Fourth District affirmed convictions for first-degree murder and aggravated battery evidencing prejudice.

The evidence adduced by the State was sufficient to demonstrate premeditation. The defendant argued that he "did not arrive at the gathering with a weapon and never expressed an intent to kill anyone. However, Appellant acknowledged chasing and hitting Onesimo with an axe. While Appellant contends that Taggart struck the fatal blow with a rock, the medical examiner's testimony reflected that the fatal blow most likely resulted from the axe striking the victim's head while he lay face down on the ground."

Harris also argued that the trial court erred in failing to redact portions of his statements to the police in which he referred to a codefendant's prior assault of a Hispanic man on a bicycle and his own references to "Guat hunting." This argument was deemed unpreserved. In the trial court, Harris argued only that these portions of his statements would have been excessively prejudicial or confusing under section

90.403, Florida Statutes. On appeal, he argued that the unredacted portions were irrelevant.

Alternatively, the statements in question were relevant and admissible. One of the charges was that the aggravated battery was racially motivated. The State presented evidence enabling the jury to infer that Harris was not an innocent bystander; that he was involved in Taggart's "Guat hunt," and that the acts of violence against both victims were racially motivated. The portions of the statements at issue were relevant to the issue of racial motivation.

Jackson v. State, 4D18-3021 (Jan. 22, 2020)

Jackson appealed convictions for possession of a firearm by a convicted felon, carrying a concealed firearm, and improper exhibition of a firearm. The Fourth District reversed the conviction for carrying a concealed firearm. Based on section 790.01, Florida Statutes, as amended in 2015, "the State failed to prove, and the trial court failed to instruct the jury, on an essential element of the crime – 'The defendant was not licensed to carry a concealed firearm.'" Prior to 2015, the existence of a license was an affirmative defense, with the initial burden on the defendant.

The information in this case did not allege the absence of a license, even though the alleged offense occurred in 2017. The defendant did not file a motion to dismiss the information. The State and defense agreed to the use of the then-standard instructions, which had not been amended to include the lack of a license as an element.

The Fourth District agreed with the State's first argument regarding fundamental error – that the amended information referred to section 790.01(2), which defined all of the post-2015 elements of the offense and therefore "adequately notified the defendant that lack of a license was an element of the crime being charged." However, due to the absence of an instruction on the element, fundamental error exists unless the omitted element is not in dispute. The State argued that this element was not in dispute because it could be assumed that the defendant, as a convicted felon, "had not obtained the restoration of his right to possess a firearm, and thus, proof existed that the defendant 'was not licensed to carry a concealed firearm.'" The Court did not accept this argument. As the omitted element was not undisputed, the failure to instruct on it constituted fundamental error. And, as the State failed to prove the lack of a license, the conviction for this offense was vacated.

Morris v. State, 4D18-3035 (Jan. 22, 2020)

The Court affirmed a conviction and life sentence for armed robbery and related offenses without a written opinion. A specially concurring opinion from one judge, however, was written to express sympathy for Morris's argument.

Morris was previously prosecuted as an adult for carrying a concealed firearm and possessing a firearm as a delinquent, for offenses committed when he was 16. After violating probation, he was sentenced to a term in prison. That conviction then became the predicate offense for his mandatory life sentence as a prison releasee reoffender, for an armed robbery and other offenses committed when he was 20. After noting a trend towards criminal justice reform, the specially concurring judge noted that the Florida Legislature might, in the future, "consider exclusion of sentences served for underage crimes from qualifying under recidivist statutes, or at least grant sentencing judges the discretion to decline to apply such statutes where a predicate offense was committed by a juvenile." Until then, however, the prior conviction qualifies as a predicate offense for PRR sentencing.

State v. Timianski, 4D18-3409 (Jan. 22, 2020)

The trial court granted a post-verdict motion for judgment of acquittal on a charge of grand theft and the State appealed. The Fourth District reversed and found that the trial court erred by applying the circumstantial evidence standard of review where the State's evidence consisted of a combination of direct evidence and circumstantial evidence.

The defendant was in a hardware store and used an employee's-only ladder to retrieve a $379 drill kit from a top shelf. Its packaging was nearly identical to that of a $179 drill kit on the ground level. The store had a purchasing system which involved the use of prepaid invoices, for which the customers would then pick up their merchandise. The defendant took the $379 item, put it in a cart, and started walking to the exit. When approached by a security guard, the defendant produced an invoice for the $179 item, indicating that it had been sold to a remodeling business. "The only circumstantial evidence of guilt upon which the state relied was the reasonable inference, in the light most favorable to the state, that the defendant 'knowingly' obtained the $379 drill kit by using the $179 drill kit's invoice."

That, however, did not make the State's case entirely circumstantial, and the other evidence, the security officer's observations and the store's surveillance, constituted direct evidence. Applying the correct standard of review, the evidence

was sufficient – i.e., whether the evidence, when viewed in the light most favorable to the State, was such that a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt.

Alternatively, even under the circumstantial evidence standard, the State met its burden by "presenting evidence of the defendant using the employees-only ladder to retrieve the $379 drill kit from the employees-only top shelf, and then presenting the $179 drill kit's invoice which contained a stamp in large visible print, stating, "NOT VALID FOR MERCHANDISE CARRY OUT.'" That evidence was inconsistent with the defendant's theory that he simply made a mistake in showing the $179 drill kit's invoice to the security guard while trying to walk out of the store with the $379 drill kit."

Brown v. State, 4D18-3592 (Jan. 22, 2020)

The Court addressed two Criminal Punishment Code scoresheet issues in a direct appeal from the convictions and sentences.

First, the Court held that burglary of a dwelling or structure causing damage in excess of $1,000, as charged in section 810.02(2)(c)2., Florida Statutes (2014), was properly scored as a Level 8 offense.

Second, the scoring of grand theft, with a value between $10,000 and $20,000, was erroneously scored as a Level 4 offense; it should have been scored as a level 2 offense. As a result of this scoring error, the minimum sentence that the trial court could impose without departing was reduced by two months. Although that amount was low, a new sentencing hearing was still required, because it was not clear that the trial court would have imposed the same sentence but for the scoring error. The fact that the trial court had originally imposed a sentence equal to the exact minimum of the originally prepared scoresheet (with the scoring error), suggested that the court may well have intended to impose whatever sentence was the minimum on the scoresheet.

Fifth District Court of Appeal

Jones v. State, 5D19-2945 (Jan. 24, 2020)

Upon review of a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel, the Fifth District found that the trial court erred in denying a motion to suppress evidence obtained during a search.

In the direct appeal, the Fifth District upheld the search of a vehicle without a warrant when that vehicle was stopped for a traffic infraction. The Court relied on the automobile exception to the requirement of a warrant. Appellate counsel, however, had not argued that the automobile exception was inapplicable under Maryland v. Dyson, 527 U.S. 465 (1999), which held that a "warrantless search is permissible only if the surrounding facts and circumstances establish probable cause to believe that the vehicle contains contraband." In this case, neither the failure to stop before turning right on a red light, nor the flight from the attempted stop, created "probable cause to believe that Jones's vehicle contained additional evidence of the alleged crimes because the offenses neither involved nor generated physical evidence."