Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Hill, 19-10647 (Jan, 3, 2020)

The Eleventh Circuit affirmed the denial of a motion to suppress evidence and held that the exclusionary rule does not apply to supervised release revocation proceedings.

First District Court of Appeal

State v. Petagine, 1D18-2086 (Jan. 2, 2020)

The State appealed an order dismissing a felony-hazing charge; Petagine cross-appealed the denial of a motion to dismiss the charge of misdemeanor hazing. The First District reversed the dismissal of the felony offense "because the State alleged a prima facie case of felony hazing in the statement of particulars." The Court affirmed the denial of the motion to dismiss the misdemeanor offense because "Appellant suffered no prejudice when the State added the misdemeanor count of hazing in the amended information."

The felony charge was dismissed upon the filing of a sworn motion to dismiss under Rule 3.190(c)(4). The defendant was charged with felony hazing by "aiding and counseling actions and situations that recklessly or intentionally endangered the physical health or safety of the victim, which resulted in his death." The facts set forth in the statement of particulars, which the Court found to be sufficient, were the following:

> . . . The State alleged that Mr. Petagine presided over the Executive Council and Fraternity chapter as a whole and directed all Pledge training, indoctrination, and other Fraternity activities. Mr. Petagine was explicitly trained and instructed on the dangers of binge drinking in this environment, and had actual knowledge that previous Big Brother parties had led to extreme intoxication. Mr. Petagine also had actual knowledge that previous Big

> Brother parties had led to extreme intoxication. Mr. Petagine also had actual knowledge that the 2017 Pledge class had previously displayed poor behavior at a Fraternity event due to intoxication. Regardless, Mr. Petagine was present for a meeting the week of the Big Brother party where the danger of Pledges becoming intoxicated was discussed, and he encouraged the event to take place.
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> In addition, as the leader of the Fraternity and Executive Council, Mr. Petagine lifted the liquor ban to allow the Big Brothers to supply liquor at the party, in violation of state law prohibiting "giv[ing], serv[ing], or permit[ting] to be served alcoholic beverages to a person under 21 years of age. . . ." [section] 562.11(1)(a)(1), Fla. Stat. (2017). This alone establishes that the State alleged a prima facie case of felony hazing, as underage drinkers are clearly more likely to become dangerously intoxicated in the context of a fraternity party in which that kind of behavior is encouraged and allowed, which is precisely the conduct targeted by the statute.

The victim was a Pledge member who attended Pledge events until his death. The Pledges were required to participate in events unless excused. Prior events involved "extreme intoxication." The party resulting in the victim's death was held off-campus. The victim's Big Brother "provided him with a 'family bottle' of bourbon and told him there was an expectation to finish the family bottle. The victim's blood alcohol level was .447 and would have been even greater before the autopsy.

One judge authored a lengthy dissent, emphasizing that there were no allegations of forced consumption of liquor. The dissent would have found that simply encouraging another to consume alcohol does not suffice; nor would allegations of "peer pressure."

Allen v. State, 1D18-3073 (Jan. 2, 2020)

The Court affirmed multiple convictions for sexual battery, video voyeurism and sexual performance by a child, and found that the evidence was sufficient.

As to seven charges of sexual performance by a child, the defendant argued that the evidence was insufficient because they were "based on photographs in which the child victim appeared to be sleeping. Appellant essentially contends that a sleeping victim cannot engage in sexual conduct because she can neither make nor receive contact with another's designated sexual area." The Court disagreed. "Sexual performance must include sexual conduct by a child." "Sexual conduct" is defined in section 827.071(1)(h), and it is "aimed at protecting children from sexual exploitation." The statute defines sexual conduct "'broadly enough to cover contact by one party with the designated sexual areas of another party regardless of whether the child victim is making the contact or receiving the contact.'" "A victim can receive contact with another's designated sexual area while asleep, as C.Y. did." "Nothing in the statute requires a child victim's active participation in sexual conduct." The photographs depicted Appellant's hand touching the child's genital area and depicted his penis touching the child's mouth.

As to the conviction for sexual battery, the argument that the evidence was insufficient under the special standard of review for circumstantial evidence cases was not preserved, where the defense, in the trial court "did not argue that it was a wholly circumstantial evidence case and he did not outline a theory of defense and explain why it was not inconsistent with the circumstantial evidence case." Alternatively, the evidence was sufficient. The appellate court reviewed the evidence to show why there was sufficient evidence that the hand and penis shown in the photographs were those of the defendant.

As to video voyeurism, the defendant argued that there was no proof "that he viewed, broadcasted, or recorded S.S." His emphasis was that there had to be an "actual recording." "S.S. believed Appellant was recording her in the dressing room and explained that the camera phone was inside the pocket of his pants and he kept pushing it further into her stall while moving around his hand. The jury could reasonably infer from the evidence that Appellant was pushing his camera phone towards S.S. to view or record her. While the State was not required to present evidence of an actual recording of S.S. in the dressing room, we note that Appellant was not arrested and his phone was not searched until weeks later, proving him with plenty of opportunity to delete any recording."

Jakubowski v. State, 1D18-1074 (Dec. 31, 2019)

The Court affirmed convictions for sexual battery and burglary and addressed evidentiary issues.

Evidence of prior collateral crimes was properly admitted based on the substantial similarity to the events in the present case and the prior incidents "were relevant to show that Appellant had a common scheme or plan." As to the charged offense, the victim was watching a neighbor's child. Appellant knocked on the door and inquired about furniture outside. The victim said he could take it. She went to another part of the house and upon returning, the Appellant was inside. He grabbed her, forced her into the bathroom, pulled out a knife, and committed a sexual battery.

In the prior incident a man knocked on the front door and asked if someone lived at the apartment. The victim said that person did not and closed the door. Later that day, the man approached again. After a friendly conversation in front of the house, the victim went inside to take care of her son. When she returned to the front of the house, the man was already inside. He exposed himself, grabbed her, tried taking her clothes off, and touched her in inappropriate places over her clothes before he stopped and left.

The trial court also permitted a nurse to read her report of the victim's statement as a hearsay exception for medical diagnosis and treatment. While this hearsay exception permits the introduction of statements reasonably pertinent to diagnosis or treatment, "statements of fault are generally inadmissible." Some of the statements referenced in the report went beyond what was reasonably pertinent to medical diagnosis or treatment, but they were deemed harmless.

Mathis v. State, 1D18-2183 (Dec. 31, 2019)

The Court affirmed convictions for sexual battery and lewd or lascivious molestation.

Mathis argued that it was fundamental error for the jury instructions "to include both of the terms 'union' and 'penetration'" when defining sexual battery, when the charges and evidence "were entirely 'union'-oriented acts." Any error was not fundamental: "Because the State's case focused on the 'union'-related evidence, there is no reason to think that the jury convicted Mathis based on an uncharged penetration-based offense."

There was no abuse of discretion in admitting evidence about the defendant's suicide attempt as evidence of consciousness of guilt. Mathis attempted the suicide within a few days of the victim confronting him about what he did. Once the defendant was found, hanging, he "made statements acknowledging that he had been accused of something he did not do and that no one would believe him. His

statements linking his suicide attempt to the victim accusations confirmed the trial court's view that this was admissible consciousness of guilt evidence."

In response to a defense question to the victim's mother on cross-examination, the mother referenced the defendant having watched porn at night. The trial court denied defense counsel's motion to strike. There was no error in that denial because defense counsel did not provide the trial court with any reason for striking what the witness said.

Smith v. State, 1D18-3208 (Dec. 31, 2019)

The trial court denied a motion for new trial, stating only that the evidence was "sufficient." A motion for new trial must also assess whether the verdict was contrary to the weight of the evidence. The trial court's finding was insufficient and the case was remanded to the trial court for further consideration of the motion for new trial.

Traffanstead v. State, 1D18-874 (Dec. 31, 2019)

The trial court violated the defendant's Sixth Amendment right to counsel "by prohibiting defense counsel from relying on the information contained in the victim's comprehensive assessments, which denied him a meaningful opportunity to present a complete defense."

The defendant was charged with two counts of sexual battery by a person in a position of familial or custodial authority and one count of lewd or lascivious molestation of a child. Prior to trial, the defense sent the State "two comprehensive psychological assessments of K.T. dated before any of the abuse charged to Traffanstead occurred." The defense maintained that these assessments referenced "troubling incidents and findings" related to K.T.'s "bias, credibility, and state of mind," including diagnoses for mood disorder, ADHD, and reactive attachment disorder. The trial court excluded evidence that would violate the psychotherapist-patient privilege.

Both parties agreed that the assessments fell under the psychotherapist-patient privilege and that the three statutory grounds for waiver did not apply. The issue was whether the defendant could overcome the privilege in order to cross-examine K.T. with "relevant information regarding K.T.'s bias and credibility." The appellate court rejected the State's argument that the information was not relevant. The RAD diagnosis, "a disorder known to cause irritability and fearfulness with

caregivers, "would help explain "K.T.'s concerning behavior with his prior foster family, including violent outbursts and incidents where K.T. was untruthful. These facts are relevant as to K.T.'s credibility or bias, especially in the context of allegations of child sexual abuse where K.T. was the outcry witness and arguably the only source of evidence for the State's case other than a possible DNA match on two items."

Furthermore, "strict adherence to procedural rules may give way to a defendant's right to present relevant evidence in his defense." While disclosure of privileged records "'is required only under rare and compelling circumstances,'" "'[t]his case is such an occurrence."

Second District Court of Appeal

W.J.M. v. State, 2D17-3530 (Jan. 3, 2020)

Evidence presented as to grand theft of a motor vehicle and third-degree grand theft was insufficient.

A golf cart with tools stored under a rear seat was stolen from an apartment complex. Hours later, four juveniles were seen departing in a golf cart and suspicious activity was reported to the police. An officer responded to a BOLO and observed four juveniles in a golf car in the area. The officer could not identify the driver of the cart and, when the officer activated his emergency lights and siren, the juveniles fled. The officer pursued them, ordered them to stop, and chased them, but they continued to run. They were apprehended shortly afterwards. The person who reported seeing the juveniles riding around in the cart identified W.J.M. as one of them.

Evidence "that a person was a passenger in a stolen vehicle is insufficient to prove that the person stole the vehicle, even if the passenger knew the vehicle was stolen." There was no basis for finding W.J.M. guilty based on a principal theory.

As to the grand theft of the tools, the "evidence did not show W.J.M. knew there were tools stored under the seat of the golf cart or that he had the specific intent to deprive" the owner of his property.

White v. State, 2D18-2732 (Jan. 3, 2020)

On direct appeal of convictions for burglary of a dwelling and criminal mischief, the Second District found that defense counsel was ineffective for failing to adequately raise that issue in the trial court and reversed the convictions.

White was found inside a vacant trailer owned by a mobile home park. White previously showered there with the consent of the then current renter. Only July 9, 2017, the property manager went inside the trailer and noticed that a television was missing. "A couple of days later, White was seen sitting inside of the trailer's screened porch." Upon discovery of damage that blinds and the shower had been damaged, White was charged with multiple offenses.

Defense counsel did not move for judgment of acquittal as to burglary or criminal mischief, and had argued that the evidence was "probably enough to get to the trier of fact . . . on everything except the TV theft." For criminal mischief, the State had to prove both that the defendant damaged the property of another, and "that the damage was done willfully and maliciously." No evidence was presented that White had damaged the inside of the trailer, let alone that he acted maliciously.

As to the burglary charge, there was no evidence "that White had an intent to commit a crime when he entered the trailer. And while stealthy entry into a structure can establish prima facie evidence of intent to commit an offense therein . . ., nothing in this record supports such a finding."

> The State offered no evidence to show that White entered the trailer in a stealthy manner. Although the property manager testified that his maintenance employee told him that the padlock securing the screened door to the trailer was locked at 11:30 the night before White was discovered, the padlock was found unlocked and undamaged on a shelf inside of the trailer and there was no sign of damage to the hasp. While there was damage to the screen and screened door, there was no evidence that White caused the damage or when the damage occurred. In fact, the property manager testified that the damage could have existed well before this incident. Finally, it does not appear that White was trying to conceal his whereabouts – his bike was parked outside of the trailer

> and he was sitting on the porch of the trailer at 11:30 in the morning.

Third District Court of Appeal

K.R. v. State, 3D18-2566 (Jan. 2, 2020)

The Third District reversed a withheld adjudication of delinquency for the charge of unlicensed carrying of a concealed weapon. K.R. was also found to have possessed a weapon on school property.

K.R. was charged with carrying a concealed weapon, a "knife." During a search of his backpack at school, a steak knife, with a 4 ½" blade and handle was found. The trial court found that based on its length and sharp blade that it was not a pocketknife and that it was a weapon.

K.R. was charged under section 790.01(1), with carrying a concealed weapon. Although the statutory definition of "weapon" includes any knives other than pocketknives, plastic knives or blunt-bladed table knives, the statutory definition of "concealed weapon" does not include any form of a knife, although it does include any "deadly weapon," which might include a knife based upon evidence of the manner in which it was used. As a result, the trial court erred in determining that the knife was a concealed weapon. The trial court, under the correct standard, would have had to find that the knife qualified under the definition of a "deadly weapon." However, there was no evidence that K.R. "used or threatened to use the knife to inflict death or great bodily harm."

As to the remaining offense at issue, the Third District addressed one issue and found that the trial court did not abuse its discretion "when it *sua sponte* allowed the State to recall" a witness. "K.R.'s attorney prevented the admission of any evidence regarding where the incident took place when he objected to the State addressing the issue because defense counsel had told the trial court that the defense was not challenging the search of K.R.'s backpack. As such, it is disingenuous for K.R. to now argue that there was no evidence of the investigation that was conducted because, as the State correctly contends, K.R. received the benefit of this issue not being explored as a result of the parties stipulating that the officers had probable cause to search K.R.'s backpack."

After K.R. moved for judgment of dismissal, the trial court sua sponte reopened the State's case and recalled the assistant principal for further questioning

regarding "where they got him from." Because of a concession regarding the existence of probable cause and reasonable suspicion, the court had not heard testimony as to the details of where the search occurred. "We thus agree with the State that once K.R.'s counsel made an issue out of the location of the incident in his motion for judgment of dismissal, the trial court properly exercised her discretion to revisit the objection and permit the State to continue its previous line of questioning."

Nelson v. State, 3D19-1558 (Jan. 2, 2020)

A claim that the Department of Corrections erroneously calculated gain time following resentencing should have been brought through a mandamus petition in Leon County, where DOC is headquartered, not through a Rule 3.800(a) motion, where there was no allegation of any entitlement to immediate release.

S.B. v. France, 3D19-2508 (Dec. 31, 2019)

A juvenile risk assessment instrument score of 13 points or more is needed for secure detention absent other statutory authorization. Under such circumstances, the trial court "is required to provide clear and convincing, written reasons if it orders a more restrictive placement than indicated by the RAI."

Fifth District Court of Appeal

Bailey v. State, 5D18-251 (Jan. 3, 2020)

Dual convictions for armed burglary and burglary with an assault or battery resulted in a double jeopardy violation. The facts of the case are not set forth in the opinion.

Cerrato v. State, 5D18-1387 (Jan. 3, 2020)

Dual convictions for possession of materials depicting a sexual performance by a child and use of a child in a sexual performance constituted a double jeopardy violation where "they concerned the same image."

Ramirez v. State, 5D18-3458 (Jan. 3. 2020)

Dual convictions for dealing in stolen property and grand theft were improper. Section 812.025 provides that as to those two offenses, the jury may return a guilty

verdict on only one of the two when they arise out of one scheme or course of conduct.

Latimore v. State, 5D19-457 (Jan. 3, 2020)

On appeal from the denial of a Rul3 3.800(a) motion, the Court found that the 10-20-Life sentence imposed was an illegal sentence. The sentence was imposed for the charge of attempted manslaughter. Section 775.087(2)(a) enumerates the offenses for which the mandatory minimum sentence applies, and manslaughter is not one of the enumerated offenses.

And, as to the conviction for armed robbery, the information did not allege that the defendant discharged a firearm or caused great bodily harm. When imposing the mandatory minimum sentence for armed robbery, the trial court could not rely on allegations contained in other charges in the information.

Goode v. State, 5D19-639 (Jan. 3, 2020)

Goode entered an open plea to several cases after a competency hearing at which the judge found Goode was competent to proceed. The Court, however, failed to enter a written order. The trial court was directed to enter a nunc pro tunc competency order on remand based on its oral finding of competency.

Adams v. State, 5D19-2540 (Jan. 3, 2020)

In Brown v. State, 260 So. 3d 147 (Fla. 2018), the Supreme Court held that section 775.082(10), Florida Statutes, was unconstitutional. That subsection provided that a nonstate prison sanction was not appropriate when the guidelines scoresheet was 22 points or less unless the defendant presented a danger to the public. Pursuant to Brown, the statute was unconstitutional because it permitted such findings to be made by the trial court, not the jury.

In this case, the judge made such findings and, when the trial court denied a Rule 3.800(a) motion based on Brown, the trial court found that Brown could not be applied retroactively. The Fifth District disagreed with the trial court's reasoning, but affirmed the denial of the motion. The trial court found that Brown did not state that it applied retroactively and therefore did not apply it retroactively. The trial court, however, absent a controlling opinion of an appellate court on the issue, should therefore have engaged in retroactivity analysis of its own.

The question the Fifth District resolved was "whether the holding in *Brown* should also be applied retroactively to offenders, such as Adams, when the opinion makes no mention of its retroactive application." For the same reasons that the Florida Supreme Court held that decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004), did not apply retroactively to previously final convictions and sentences, so, too, the decision in Brown did not apply retroactively. The decision in Brown relied upon Apprendi and Blakely and the same conclusion should therefore ensue.