

Case Law Update
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Supreme Court of Florida

McGraw v. State, SC18-792 (Nov. 27, 2019)

The Supreme Court addressed the following certified question of great public importance:

Under the Fourth Amendment, may a warrantless blood draw of an unconscious person, incapable of giving actual consent, be pursuant to section 316.1932(1)(c), Florida Statutes (2016) (“Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to [a blood draw and testing.]”), so that an unconscious defendant can be said to have “consented” to the blood draw?

During the pendency of this appeal in the Florida Supreme Court, the United States Supreme Court issued a relevant opinion in Mitchell v. Wisconsin, 139 S.Ct. 2525 (2016), where a plurality “held that when law enforcement has a reasonable basis to believe that an unconscious driver was intoxicated while deriving, the exigent circumstances created by the natural metabolization of alcohol in the blood stream combined with the driver’s unconsciousness ‘almost always’ permits law enforcement to secure a blood sample for blood alcohol testing without a warrant.” Based on Mitchell, the Florida Supreme Court declined to answer the certified question and remanded for further proceedings.

During the investigation of an accident – a single-car rollover – an officer smelled alcohol on McGraws’ skin, clothing and car, and, due to injuries, McGraw was taken to a hospital. The officer requested a blood sample because of the possibility of a DUI offense. McGraw was unconscious throughout this time. A search warrant was not sought.

While the United States Supreme Court’s plurality opinion in Mitchell adopted a rule “almost always” authorizing warrantless blood draws of unconscious

DUI suspects based on exigent circumstances, the Court recognized that in an “unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.” The Florida Supreme Court remanded its case to the trial court to give McGraw “an opportunity to demonstrate that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.”

Eleventh Circuit Court of Appeals

[United States v. Perez](#), 17-14136 (Nov. 26, 2019)

Perez pled guilty to one bank robbery and one attempted bank robbery. During these offenses, he exhibited a level of politeness to the tellers through his written notes and conduct: “Put \$5[,]000 in an envelope. Put the note inside as well. Stay calm. Do this and no one will get hurt. Press the alarm after I walk out. I have kids to feed. Thanks.”; “[A]ct normal and stay calm[.] [T]ake 20,000\$ [sic] and put it in an envelope and nobody gets hurt[.] [P]lease sound the alarm in 10 minutes[.] [T]hanks.”

The Sentencing Guidelines threat-of-death enhancement applies “when the defendant’s conduct ‘instill[s] in a reasonable person, who is a victim of the offense, a fear of death.’ . . . A ‘threat of death’ may be in the form of an oral or written statement, act, gesture, or combination thereof.’ . . . the defendant need not expressly threaten the victim with death for the enhancement to apply; an implied threat of death equally suffices.” The enhancer requires “something more” than the “general threat of harm inherent in every bank robbery.”

The district court applied the enhancement. Perez argued that the district court “found only that Perez’s threats would have placed a reasonable person in fear of ‘danger’ or harm,’ which is inherent in every bank robbery under s. 2113(a) but which, without more, cannot suffice to sustain the threat-of-death enhancement. Second, Perez argues that even if the district court applied the correct legal standard, it erred by finding the facts of this case warrant the imposition of the threat-of-death enhancement.” The government agreed with Perez’s argument and the Eleventh Circuit appointed an amicus lawyer to defend the district court’s judgment.

The Eleventh Circuit looked to the reaction of a reasonable person, applying an objective test. The Court considered what the defendant said or wrote, but “also what the defendant did or did not do during the robbery.” The “something more” that is required to transform the general threat inherent in every bank robbery into a threat of death was found to be lacking. In the first case, even “though the teller easily could have given Perez \$5,000 the first time he asked for it, the teller nonetheless felt comfortable enough not to comply with Perez’s demand *four* separate times. This is not the conduct of someone in fear of death.” (After each \$1,000 was dispensed, the defendant asked the teller for more.). In neither case was Perez wearing a disguise, and he was not “obviously carrying a weapon.” In the second case, he was wearing shorts, “leaving even less room for stowing a weapon.” The second teller “felt safe enough to altogether leave the bank counter for several minutes and report the robbery to a supervisor, who called 911. Then, even more surprisingly, the teller returned to the counter.” The Guidelines enhancement embodies a “distinction that helps separate bad robberies from worse ones.”

Second District Court of Appeal

[Garcia v. State](#), 2D18-4541 (Nov. 27, 2019)

The trial court denied a motion to dismiss based on immunity under the Stand Your Ground law. Garcia sought review through a petition for writ of prohibition. The Second District treated the petition as a petition for writ of certiorari. Review by prohibition is appropriate when the appellate court determines the merits of the entitlement to immunity. In this case, the appellate court granted the petition because the trial court erred in its construction of the Stand Your Ground statute and remanded for the trial court to reconsider in light of the proper construction of the statute.

Garcia was charged with aggravated battery. In the version of alleged victim Melchild, several individuals were at Melchild’s house after an evening at a nightclub. Two individuals entered a bathroom, apparently to use drugs. Melchild became angry and tried to get several of the people in his home to leave, including Garcia, who kept saying that he was waiting for one of the other individuals there because he had to give her a ride. Melchild eventually grabbed Garcia to escort him out; Garcia resisted; the two men fell to the ground, with Melchild on top of Garcia.

In Garcia’s version, after the two fell to the ground, Melchild started “slamming his head into the ground,” that this went on repeatedly; one other man started punching him as well; that he was bleeding and dizzy. It was at this point

that he “grabbed Melchild’s head and pushed his thumb into Mr. Melchild’s eye.” Garcia though he had no chance of escape without incapacitating Melchild.

The trial court denied the motion for immunity “because Mr. Melchild used lawful force to remove a trespasser”; because there was “no evidence of any threat of imminent death or great bodily harm to Mr. Garcia, especially where the initial force used by Mr. Melchild was lawful”; and Garcia “was engaged in criminal trespass and was not in a place where he had a right to be.”

The trial court relied on s. 776.031(1). That provision was inapplicable, however, as it governed “the use of nondeadly force in defense of property; a person is justified in using nondeadly force against another when that person reasonably believes such conduct is necessary to terminate the other’s trespass on either real property other than a dwelling or personal property lawfully in his possession.”

The trial court also erred by relying on section 776.013, which provides “that person who is in a dwelling or residence is permitted to use nondeadly force against another if the person reasonably believes such conduct is necessary to defend against the other’s imminent use of unlawful force.” However, “[n]o evidence suggested that Mr. Melchild’s initial use of force was necessary to defend against any imminent use of unlawful force by Mr. Garcia.”

The trial court further found that “section 776.012(2) only applies if the person using deadly force is not engaged in a criminal activity and is in a place where he has a right to be,” and then found that Garcia was a trespasser when the affray started and could not rely on this statutory provision. That, too, was erroneous. “A defendant is not foreclosed from defending himself simply because he is in a place where he does not have the right to be, but he must first attempt to retreat from the situation if he can do so safely.”

Last, the trial court “failed to make any finding regarding whether Mr. Garcia reasonably believed his use of force was necessary to prevent imminent death or great bodily harm, or to prevent the commission of a forcible felony. To make that determination, the trial court must consider the circumstances Mr. Garcia faced.”

Third District Court of Appeal

Y.N. V. State, 3D18-45 (Nov. 27, 2019)

An adjudication of delinquency was reversed and remanded for a new trial because “the trial court admitted improper evidence when it overruled defense counsel’s objection to the State’s questions on cross-examination of Y.N. in regards to the truthfulness of the officer’s testimony.”

Y.N. and the officer were the only witnesses at the trial and they contradicted one another as to the three key questions – whether Y.N. possessed the marijuana cigarette; whether Y.N. dropped it upon the officer’s approach; and whether Y.N. “admitted to the officer that she was smoking marijuana just prior to the officer’s arrival.”

On cross-examination, the State asked if the officer was “not telling truth.” After an objection, in which defense counsel asserted the question “called for improper comment on the credibility of another witness,” was overruled, the questioning continued:

Q. You were sitting there when the officer testified, correct?

A. Yes.

Q. You hear the officer testify to the fact that he watched a marijuana cigarette go from your right hand to the ground, correct?

A. Yes.

Q. Which you are testifying that you never had marijuana in your right hand?

A. Yes.

Q. Therefore, you are saying that what the officer said on the stand is not the truth, is that correct?

Another objection from defense counsel was overruled, and Y.N. answered, “Yes.”

On appeal, the State argued that any error was harmless because this was a bench trial. Under Petion v. State, 48 So. 3d 726 (Fla. 2010), when improper evidence is admitted in a bench trial, “the trial court must make an express statement on the record that the erroneously admitted evidence did not contribute to the final determination. Otherwise, the appellate court cannot presume the trial court

disregarded evidence that was specifically admitted as proper.” As no such express statement was made by the trial court, it could not be presumed that the evidence was ignored by the trial court.

[Fair v. State](#), 3D19-1327 (Nov. 27, 2019)

When a trial court finds that a claim in a Rule 3.850 motion is facially insufficient, the trial court must allow 60 days for the defendant to file an amended motion.

[De Quesada v. State](#), 3D19-2018 (Nov. 27, 2019)

The Third District affirmed the denial of a Rule 3.850 motion in which he argued that the charging document was fundamentally defective, and that his plea was involuntary, as trial counsel misadvised him of the immigration consequences of the plea.

The 3.850 motion would generally have been untimely, however, the Court found that “[w]here an information wholly omits an essential element of the crime it is a defect that can be raised at any time.” The defendant had been charged with trafficking in cannabis in excess of 25 pounds but less than 2000 pounds. Prior to the negotiated plea, “the State manually reduced the charges on the face of the information, to reflect possession of cannabis with intent to sell.” The State “neglected to pen in the corresponding elements.” “However, ‘even where the body of a charging instrument omits an essential element, such an error is a waivable technical defect, if the charging instrument references the correct statute, and the state sets forth the required elements.’”

Additionally, the information was amended to allow the parties to avoid the mandatory minimum term of imprisonment that would otherwise have been applicable, and a defendant “cannot take advantage on appeal of an error which he himself induced.”

The claim of an involuntary plea was deemed untimely, absent allegations that the defendant “could not have ascertained the immigration consequences of his plea during two-year period after his judgment because final with the exercise of due diligence.”

Fourth District Court of Appeal

[Lewis v. State](#), 4D18-2548, 4D18-2549 (Nov. 27, 2019)

Lewis’s Criminal Punishment Code score of 22 points entitled him to a nonstate prison sanction unless the court made written findings that such a sanction could present a danger to the public. The trial court found such a danger because the defendant was “a chronic, habitual thief.” After imposition of sentence, the Florida Supreme Court held that the statutory provision permitting the trial court to make such findings was unconstitutional “to the extent that it required the court, and not a jury, to make the dangerousness finding.”

The Florida Supreme Court’s opinion, [Brown v. State](#), 260 So. 3d 147 (Fla. 2018), included dicta in a footnote regarding possible resentencing options – “whether the appellate court remand should instruct that a non-state prison sanction be imposed or afford the State an opportunity to present the dangerousness to a jury.” Pursuant to [Brown](#), the Fourth District remanded the case to the trial court, and if the state seeks enhanced sentencing, a jury will be empaneled to make findings regarding dangerousness.

[State v. Martin](#), 4D18-3417 (Nov. 27, 2019)

The State appealed an order suppressing cell-site location information obtained through the use of a cell-site simulator and the Fourth District affirmed.

The Court first noted the distinction between cell-site records and a cell-site simulator. Records, which are obtained from a cell phone service provider, “reveal the general location of the cell phone user” by “linking an individual’s phone to a particular cell site at a particular time.” “A cell-site simulator, on the other hand, is a device that transforms a cell phone into a real-time tracking device. . . . It tricks nearby cell phones into thinking the device is a cell tower, causing the cell phone to send signals to the device. . . . A cell-site simulator allows law enforcement to track an individual’s precise location.”

In this case, detectives obtained a court order, in 2012, pursuant to sections 934.23, 934.42 and 92.605, authorizing them to “obtain CSLI from cell phone service providers.” At that time, they relied on the Fourth District’s decision in [Tracey v. State](#), 69 So. 3d 992 (Fla. 4th DCA 2011), which held that a warrant was not required to obtain CSLI. The affidavits supporting the application for the court

order did not make reference to the use of a cell-site simulator. Tracey was subsequently overruled by the Florida Supreme Court, which held that a warrant was required to obtain CSLI for real time tracking of an individual. Tracey v. State, 152 So. 3d 504 (Fla. 2014). The Supreme Court of the United States, in 2018, further held that a warrant supported by probable cause was required to CSLI, including historical data, not just the real-time tracking involved in Tracey.

As the officers' reliance on the court order, absent a warrant supported by probable cause, was no longer valid at the time of the current pretrial appeal, the State argued that the good-faith exception to the exclusionary rule was applicable to both the warrantless use of CSLI and the cell-site simulator.

As to the CSLI, the Fourth District stated:

Here, the State lacks the benefit of longstanding precedent authorizing the warrantless use of CSLI. However, *Tracey I* and the statutes authorizing law enforcements to access CSLI with a court order, taken together, provided sufficient precedent on which the detectives reasonably relied.

The analysis was different with respect to the simulator:

The cell-site simulator is another matter. Neither the application nor the court order mentioned a cell-site simulator. The State argues that the detectives reasonably believed the court order authorized use of a cell-site simulator because it authorized the disclosure of "real-time/live cell site locations" and the use of a "mobile tracking device." In 2012, no binding case law addressed whether police must obtain a warrant to use a cell-site simulator. The good faith exception applies when binding precedent affirmatively authorizes a particular police practice.

The Fourth District, in another intervening decision, State v. Sylvestre, 254 So. 3d 986 (Fla. 4th DCA 2018), had held that probable cause and a warrant were required before using a cell-site simulator.

“The CSLI data led detectives to a broad search area where the defendant was located. Unable to find the defendant’s exact location, the detectives went outside the scope of the court order and used a cell-site simulator to locate him. The government cannot rely on the absence of binding decisional law in this area to conduct a warrantless search.”

[Sims v. State](#), 4D19-1506 (Nov. 27, 2019)

In State v. Lewars, 259 So. 3d 793 (Fla. 2018), the Supreme Court held the under the prison releasee reoffender statute, “release from a state correctional facility operated by the Department of Corrections or a private vendor” does not include a county jail. “Therefore, the commission of a PRR-qualifying offense within three years of release from jail, rather than prison, does not satisfy the requirements of section 775.082(9)(a)1., Florida Statutes.”

Sims was sentenced as a PRR, for having committed his new qualifying offenses within three years of being released from county jail. He sought relief, based on Lewars, in a postconviction motion under Rule 3.800(a). The Fourth District affirmed the denial of the motion, finding that Sims’ conviction and sentence were final prior to Lewars and Lewars did not apply retroactively.