Case Law Update
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Supreme Court of Florida

In Re: Standard Jury Instructions in Criminal Cases – Report 2019-04, SC19-549 (Dec. 19, 2019)

The Court approved amendments to the following standard jury instructions:

> 10.7(a), (b) and (c) (throwing, making, placing, projecting, or discharging destructive device)
>
> 10.13 (shooting or throwing [a missile, stone, or hard substance] (at, within, into or in a building or vehicle)

In 10.7(a), (b) and (c), a definition of "willfully" was added, and "possessing" was added to track section 790.161, Florida Statutes (2018). Instruction 10.13 was amended to include "'shot a firearm that would produce death or great bodily harm' as an optional element based upon case law interpreting section 790.19, Florida Statutes (2018)."

In Re: Standard Jury Instructions in Criminal Cases – Report 2019-02, SC19-424 (Dec. 19, 2019)

Amendments to Instructions 7.3 (felony murder -first degree), 7.5 (felony murder – second degree) and 7.6 (felony murder – third degree) were authorized for publication and use. The only significant amendment was to the italicized note following instruction 7.3, pursuant to the Supreme Court's prior decision in Williams v. State, 242 So. 3d 280 (Fla. 2018). The note previously read: "Give if the defendant was a juvenile at the time of the crime alleged. .. . If the jury were to find the defendant guilty of First Degree Premeditated Murder *in a case where no principals instruction is given,* the question of whether the defendant intended to kill or attempted to kill would inhere in that verdict. The italicized language was deleted from the note.

In Re: Standard Jury Instructions in Criminal Cases – Report 2018-01, SC19-419 (Dec. 19, 2019)

The Court addressed possible amendments to instructions 3.6(f) and 3.6(g), including whether the castle doctrine, in 3.6(f), "should be added to the instruction to cover the situation in which the defendant is in his or her place of business and is engaged in criminal activity." The issue had not been addressed by the Florida Supreme Court in cases, and the Court concluded that a standard instruction case was "not the proper means in which to resolve a substantive issue of law. Rather, absent clarification by the legislature, that matter must await this Court's resolution in an actual case and controversy. . . . Accordingly, instruction 3.6(f) is amended to include two italicized notes alerting courts and litigants of the issue."

Both instructions were amended to include a definition of "great bodily harm" consistent with prior decisions: "Great bodily harm means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises."

In Re: Amendments to Florida Rules of Criminal Procedure 3.692 and 3.989 – 2019 Fast-Track Report, SC19-1983 (Dec. 19, 2019)

The Court adopted proposed amendments to Rule 3.692 and 3.989 based, in part, upon recent legislation.

Rule 3.692 was "reorganized to pertain to the sealing and expunction of criminal history records pursuant to sections 943.0585, Court-ordered expunction of criminal history records, and 943.059, Court-ordered sealing of criminal history records." "New rules 3.693 and 3.9895 pertain to and are to be used by human trafficking victims seeking to seal or expunge related criminal records. New rule 3.694 pertains to sealing or expunging criminal records based upon a lawful self-defense pursuant to chapter 776, Florida Statues (2019). Rule 3.989 was "amended largely to remove portions of the form into new rule 3.9895."

These revisions and/or additions are extensive.

In Re: Standard Jury Instructions in Criminal Cases – Report 2019-07, SC19-1219, (Dec. 19, 2019)

The Court authorized for use amendments to standard instruction 3.3(a) (aggravation of a felony by carrying a firearm) and the deletion of standard

instruction 3.3(b) (aggravation of a felony by carrying a weapon other than a firearm).

The two instructions were merged into one. The language defining "weapon" was also modified. And, comments on the revised instruction were added regarding the special finding format required for reclassification under section 775.087(1), Florida Statutes. There is also an expanded comment explaining that the instruction should not be given "in conjunction with the instructions pertaining to any felony in which the use of a weapon or a firearm is an essential element.

In Re: Standard Jury Instructions in Criminal Cases – Report 2019-06, SC19-1091 (Dec. 19, 2019)

The Supreme Court authorized for use amendments to existing standard instructions: 10.18 (altering or removing firearm serial number), 26.2, 26.3, 26.4, 26.5, 26.6, 26.7 and 26.8 (all pertaining to RICO).

For instruction 10.18, the title was amended; the term "knowingly" was added to the first element for offenses under section 790.27(2)(a), and the definition of "possession" was modified in conformity with other recent modifications elsewhere in the standard instructions.

In the RICO instructions, modifications were made in the definition for the term "enterprise." Some of the instructions were amended to address the issue of timing of the offenses if there was no express stipulation regarding dates. Instruction 26.8 (RICO conspiracy) includes an amendment as to the affirmative defense of renunciation.

In Re: Standard Jury Instructions in Criminal Cases – Report 2019-05, SC19-1063 (Dec. 19, 2019)

Multiple instructions pertaining to lotter offenses, 22.5, 22.6, 22.7, 22.8, 22.9, 22.10 and 22.11 were amended. The amendments relate to the comments and instructions to the judge as to when certain provisions of the instructions should be given.

Love v. State, SC18-747 (Dec. 19, 2019)

Effective June 2017, the legislature amended the statutory burden of proof at pretrial immunity hearings under the Stand Your Ground law. Amendments to

section 776.032(4) placed the burden of proof on the State, by clear and convincing evidence, once a prima facie claim of self-defense immunity has been raised by the defendant.

The Supreme Court concluded that the statutory amendment was procedural, not substantive. The Court then addressed the issue of whether the statutory amendment applied retroactively, and concluded that the "statute applies to those immunity hearings, including in pending cases, that take place on or after the statute's effective date."

Knight v. State, SC18-309 (Dec. 19, 2019)

Knight was convicted for attempted second-degree murder with a weapon and the jury had been given an instruction on the lesser included offense of attempted voluntary manslaughter which had been erroneous, as it included language requiring proof that there was an intent to kill – language which had been found to be improper in State v. Montgomery, 39 So. 3d 252 (Fla. 2010) and Williams v. State, 123 So. 3d 23 (Fla. 2013). There was no objection to the instruction and the issue was whether the giving of the erroneous instruction was fundamental error.

While Williams and Montgomery would have compelled the conclusion that the erroneous instruction constituted fundamental error on direct appeal, the Supreme Court now "recede[d] from this Court's precedents relying on a right of access to a partial jury nullification as a basis for finding fundamental error in jury instructions." The erroneous instruction was as to a lesser included offense, not the offense for which the defendant was convicted. The Court set forth the Court's current position regarding fundamental error:

> Properly understood, the fundamental error test for jury instructions cannot be met where, as in this case, there was no error in the jury instruction for the offense of conviction and there is no claim that the evidence at trial was insufficient to support that conviction. In such circumstances, one cannot plausibly claim that the conviction "could not have been obtained" without the erroneous lesser included offense instruction or that the error vitiated the basic validity of the trial.

Davis v. State, SC18-1627 (Dec. 19, 2019)

The Court addressed a certified question of great public importance regarding how "arrest" should be defined for purposes of starting the speedy trial period of Rule 3.191. The Court concluded that "'arrest' in the speedy trial context should mean formal arrest, which is the only type of detention by law enforcement that implicates the Sixth Amendment speedy trial right." "Using formal arrest to start the procedural speedy trial period would best match our procedural rule to the substantive right that the rule is designed to protect. However, because this is arguably not how our current rule is written, we refer this issue to the Criminal Procedure Rules Committee of the Florida Bar, requesting that the Committee propose a rule amendment to effect this change. In the meantime, we adhere to *Griffin v. State*, 474 So. 2d 777, 779 (Fla. 1985), which adopted the 'arrest' definition from *Melton v. State*, 75 So. 2d 291 (Fla. 1954), for purposes of determining when the speedy trial period begins under our current rule."

Sparre v. State, SC18-1192, SC19-389 ((Dec. 19, 2019)

The Supreme Court affirmed the denial of a Rule 3.851 motion and denied a habeas corpus petition alleging ineffective assistance of appellate counsel.

Trial counsel as not ineffective for failing to request a continuance "to investigate Sparre's competency to waive the presentation of mitigation to his penalty-phase jury after Sparre disclosed that he had stopped taking his prescribed antipsychotic medication." Sparre was colloquied when his medication stoppage was disclosed and he was "lucid" and "answered appropriately" when questioned about the waiver of mitigation. Defense counsel also stated on the record that there was "no reason to believe that there's any incompetency issue." At an evidentiary hearing on the 3.851 motion, counsel also stated that Sparre had been adamant about not wanting to present mitigation even prior to having stopped taking his medication. An expert testifying for Sparre at the evidentiary hearing acknowledged, based on jail records and "spotty medication-compliance history," that "it would be difficult to state definitively whether Sparre was medicated on the day he waived mitigation."

A claim regarding the sentencing memorandum which was not included in the trial court 3.851 motion was not properly before the Supreme Court when it was asserted in the brief of appellant.

A claim of ineffective assistance for failing to impeach the trial testimony of the medical examiner with his deposition testimony was not preserved because it

was not raised in a timely and specific manner in the 3.851 proceedings. Although the deposition was moved into evidence, the defense did not "point out the specific deposition testimony at issue until more than two months after the evidentiary hearing, when he filed his written closing arguments. By then, it was too late for the State to respond." Alternatively, on the merits, the trial testimony and pretrial deposit were deemed consistent.

The failure to consult with and retain a forensic pathologist to support the theory that Sparre killed the victim in a frenzied state, and that the murder was not premeditated, was deemed a reasonable strategic decision based on testimony at the 3.851 evidentiary hearing. Counsel "testified that retaining a forensic pathologist would have allowed the State to emphasize the gruesome details of Sparre's attack on the victim." Counsel also effectively cross-examined the State's expert as to the points that a defense expert would have addressed.

Trial counsel's closing argument was deemed deficient for "failing to explain how the evidence supported Sparre's defense that he 'snapped' and committed the killing in a frenzy, rather than with premeditation. Sparre, however, did not establish prejudice for a claim of ineffective assistance of counsel. In opening argument, counsel had focused on recent revelations about the victim's marital status that "triggered memories and feelings of turmoil, pain, and neglect from Sparre's own life experiences." In closing, however, counsel mainly commented "negatively on the victim's lifestyle, history, and representations of herself online, without explaining how these comments related to the evidence presented at trial. . . ." Prejudice was not established, in part, because the jury found the defendant guilty of felony murder, in addition to premeditated murder, and killing in a frenzy was not a defense to felony murder. Additionally, there were evidentiary problems with the defense of killing in a frenzy.

Most claims of ineffective assistance for failing to object to comments by the prosecutor were briefly discussed and rejected. One, however, involved a comment that "crossed the line intro misrepresenting and mocking Sparre's defense that the killing was frenzied rather than premeditated." The prosecutor suggested that Sparre's rebuttal to the element of premeditation "was a claim that he was 'kind of just having fun with her' and was just committing a 'thrill kill and then he just kind of got a little carried away' and 'the knife just kept slipping.'" These were not accurate characterizations of the defense.

Additionally, a penalty-phase comment "crossed the line into denigrating Sparre's proposed mitigating circumstance that he was under the influence of

extreme mental or emotional disturbance." The prosecutor argued that "Sparre was apparently asking the jury to accept that he had 'decided just to kill [the victim] for the heck of it, for his enjoyment' because 'he was very emotional, disturbed, distraught because his grandmother was having surgery at the hospital.'" This, too, was an inaccurate portrayal of the defense.

As to both comments, however, Sparre failed to prove prejudice from counsel's failure to object. Once again, as to the guilt-phase, the frenzy defense was irrelevant to felony-murder. There was also no likelihood that counsel's deficiency in failing to object would have affected the sentencing recommendation or the court's rejection of the proposed mitigating circumstance.

Appellate counsel was not ineffective for failing to supplement the record on appeal with the defense sentencing memorandum; the record contained a comparable proffer by defense counsel regarding the mitigating evidence.

Appellate counsel was not ineffective for failing to raise the claims of prosecutorial misconduct as claims of fundamental error. For the same reasons the Court found that there was either no error or no prejudice as to the similar claims of ineffective assistance of trial counsel, for failing to object, the claims also failed here, as the comments in question would not qualify as fundamental error and appellate counsel would not have obtained relief on the basis of those claims, even if presented.

Appellate counsel was not ineffective for failing to challenge the admissibility of 35 photographs of the wounds of the victim. Because there were about 88 wounds, the injuries cold not be fully understood with a small number of photos. While there may have been some duplication, any such error would have been harmless.

Hooks v. State, SC18-1106 (Dec. 19, 2019)

The Court addressed a certified question of great public importance:

> IS A *FARETTA* INQUIRY INVALID IF THE COURT DOES NOT EXPLICITLY INQUIRE AS TO THE DEFENDANT'S AGE, EXPERIENCE, AND UNDERSTANDING OF THE RULES OF CRIMINAL PROCEDURE?

The Court answered the question in the negative and receded from two prior decisions "to the extent that those decisions state a categorical rule that a trial court conducting a *Faretta* colloquy 'must inquire as to the defendant's age, experience, and understanding of the rules of criminal procedure.'"

"'Accordingly, the omission of one or more warnings . . . does not necessarily require reversal as long as it is apparent' that the defendant knowingly and voluntarily waived the right to counsel. . . . A reviewing court will not 'focus' on the particular 'advice rendered by the trial court,' but instead will evaluate 'the defendant's general understand ding of his or her rights.'"

The Court further noted that age, experience and familiarity with the rules of criminal procedure are among eight factors to be considered. While a waiver of assistance of counsel requires a "thorough inquiry" into the accused's "comprehension" of the offer of counsel and the "capacity" to make a knowing and intelligent waiver, "the specific elements of that 'thorough inquiry' will vary depending on circumstances related to the defendant that are known to the trial judge."

Bogle v. State, SC17-2151 (Dec. 19, 2019)

The Supreme Court affirmed the denial of a successive motion for postconviction relief.

The motion raised a claim under Hurst v. State, 202 So. 3d 40 (Fla. 2016), and further argued that there was newly discovered evidence of Brady and Giglio violations regarding the hair analysis testimony of an FBI lab examiner.

The newly discovered evidence claim related to a 2013 FBI review of cases and report which found that the agent's testimony in this case "exceeded the limits of science" in three ways. The claim was properly denied as successive because it could have been raised in the prior postconviction motion. Additionally, even if the evidence was "newly" discovered, it would not entitle Bogle to relief because he could not demonstrate that the information would probably produce an acquittal on retrial. On cross-examination, the witness had already acknowledged that "'hair comparisons do not constitute a basis for absolute personal identification.'" And, compelling DNA evidence unrelated to hair analysis overwhelmed the significance of the testimony regarding hair analysis.

Eleventh Circuit Court of Appeals

United States v. Vineyard, 18-11690 (Dec. 20, 2019)

A motion to dismiss an indictment charging Vineyard with failing to register as a sex offender under 18, U.S.C. s. 2250(a) was properly denied. A Texas state court conviction for sexual battery qualified as a sex offense under SORNA.

The language in SORNA pertaining to sexual contact encompasses offenses that entail "a touching or meeting of a sexual nature." The Tennessee offense required proof of an "intentional touching" of a person's "primary genital area, groin, inner thigh, buttock or breast" "for the purpose of sexual arousal or gratification."

The Court employed the "categorical" approach to determine whether the Tennessee offense qualified under SORNA. This looks solely to the statutory elements of the offense; not to the facts of the case.

First District Court of Appeal

State v. Brumelow, 1D18-3631 (Dec. 20, 2019)

The trial court erred in suppressing evidence obtained when officers checked on the status of two people sleeping in a legally parked car with the engine running. An officer knocked on the driver's side window a few times. The defendant, in the driver's seat, began talking with the officer, but he was unable to waken the female in the passenger seat. The officer then asked the defendant to open the window and door and turn off the car, which the defendant did. Once the door was open, the odor of marijuana was detected, but the officers did not act on it until the two individuals were removed from the car and a search was then conducted.

"Under these circumstances, where the record shows that the car had to be opened without delay to access and attend to the unresponsive female passenger, the smell of marijuana emanating from within the vehicle was unavoidable and the discovery of illegal contraband inevitable."

Knots v. State, 1D18-476 (Dec. 20, 2019)

Evidentiary errors occurring at trial were deemed harmless. The only error that was briefly noted was "non-admissible hearsay testimony of an officer who

described a non-testifying 911 caller's inculpatory statements about appellant's involvement in the shootings." The First District cited Keen v. State, 775 So. 2d 263, 274 (Fla. 2000), for the proposition that an "officer's testimony, purporting to explain the police investigation but containing prejudicial third party statements of non-testifying witnesses, was improper hearsay 'even though the proponent of such evidence seeks to clothe such hearsay under a nonhearsay label.'"

Miller v. North Florida Evaluation and Treatment Center, 1D19-43 (Dec. 20, 2019)

An order authorizing the Department of Children and Families to involuntarily medicate Miller was affirmed, where the trial court complied with the requirements of section 916.107(3), Florida Statutes.

The trial court conducted an evidentiary hearing and Miller refused to appear. A counselor testified that he refused to take medication or participate in offered therapies. A forensic psychiatrist diagnosed Miller with "Unspecified Schizophrenia Spectrum Disorder" and stated that the only way to restore competency was through the medication. The prognosis was better with the medication; poor without it. The trial court ordered involuntary treatment.

The trial court made sufficient findings, supported by evidence, under section 916.107(3): "(1) Miller preferred not to take medication . . .; (2) Miller suffered from a medical condition that would require close monitoring if a certain psychotropic medication was administered; (3) Miller's prognosis without treatment was poor, and his competence could not be restored without medication; and (4) Miller's prognosis would be better with drug treatment than without it."

Miller further argued that the order authorizing forced medication did not consider all of the factors required as a matter of constitutional due process, as provided in Sell v. United States, 539 U.S. 166 (2003). The trial court concluded that Sell did not apply when the forensic client was dangerous and the refusal to take medication placed his health at grave risk.

Under Sell, when the government seeks involuntary medication solely for restoration of competency, four factors must be demonstrated: "(1) an important governmental interest is at stake, (2) the administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial without causing side effects that would significantly interfere with the defendant's ability to help counsel prepare a defense, (3) less intrusive treatments are unlikely to achieve the same results, and (4) the administration of the medication is in the forensic

client's best medical interest." The First District found that Sell did not apply where other reasons than restoration of competency existed, such as "when a defendant is dangerous to himself or others or to protect the defendant's own interests where the refusal to take medication puts the defendant's own health at risk."

Johnson v. State, 1D18-4554 (Dec. 19, 2019)

The First District addressed claims that motions for judgments of acquittal were improperly denied. The First District found that the evidence was insufficient as to a trafficking charge and reversed that conviction, and affirmed the conviction for possession crimes.

Initially, the Court found that an argument that the convictions were not supported by sufficient evidence under the special standard for circumstantial evidence cases – i.e., whether the State presented evidence inconsistent with a reasonable hypothesis of innocence – was not raised in the trial court and was not preserved for appellate review.

In this case, the State had to prove constructive possession. The Court agreed that the evidence was insufficient to show knowledge of and control over the substituted cathinones that were the subject of the trafficking charge. The contraband was found in a bedroom, but there was no evidence connecting Johnson to the bedroom. It was "undisputed that Appellant was in the living room when law enforcement arrived and that other individuals were in the house at the time." Although there was testimony that Johnson had on one prior occasion sold drugs from the residence, there was no testimony as to the date of that sale or what drugs were sold.

There was also a photo found on the defendant's phone, showing what appeared to be similar suspected controlled substances within that home. That, too, was insufficient. The photo was taken two days prior to the search, but it was taken in the kitchen, not the bedroom where the drugs were found. And, there was no testimony as to what the items in the photo actually were or appeared to be.

Nilio v. State, 1D19-106 (Dec. 19, 2019)

The trial court erred in summarily denying a Rule 3.850 motion, raising a claim of newly discovered evidence as successive, without making specific findings or attaching any portion of the record to support its ruling.

Phillips v. State, 1D17-5383 (Dec. 17, 2019)

Phillips was convicted of first-degree murder in 1999, and sentenced to life without the possibility of parole, for an offense committed while he was 14-years old. In 2017, in the aftermath of Graham v. Florida and Miller v. Alabama, he was resentenced to a term of life in prison with judicial review after 25 years. Phillips appealed from that sentence.

He first argued that "his life sentence is unconstitutional under the Eighth Amendment because he has proven himself to be neither incorrigible, irredeemable, nor irreparably corrupt." He argued that evidence at the resentencing hearing showed that he had become a mature adult who had bettered his life and become a positive influence for others. The First District rejected that argument because Phillips "did not receive an inescapable, irrevocable life sentence." The sentencing court "therefore did not have to conclude that he was 'the rare juvenile whose crime reflects irreparable corruption' as required by *Graham* and *Miller*.

There was also no abuse of discretion in the trial court's determination that "life" was an appropriate sentence. The sentencing court analyzed the ten factors set forth in section 921.1401(2) and entered a 31-page order analyzing those factors before finding that although the potential for rehabilitation might be present, that factor was outweighed by other considerations. Possible rehabilitation is just one of multiple relevant factors. The sentencing court addressed the effect of the crime on the victim's family and community, emphasizing the brutality of the murder. The court further emphasized that the facts of the offense were not consistent with "transient immaturity, impetuosity, or recklessness, but instead [were] a calculated, sexually motivated, heinously violent act that Phillips went to great lengths to conceal."

Phillips further argued that the juvenile sentencing statutes were facially unconstitutional because they did not place "the burden on the State to prove that a juvenile offender falls within the rare category of offender who is irredeemable before the juvenile may be sentenced to life." Once again, as the sentence imposed was not life without the possibility of parole, but life with judicial review after 25 years, that argument failed. The Court further held that even if the sentence had been an "irrevocable life sentence," the failure to place such a burden on the State did not render the statutes unconstitutional. "None of the Supreme Court case law, including *Miller*, requires the State to carry the burden of proof in a juvenile sentencing proceeding. In fact, just the opposite could be concluded based on

language in *Montgomery* which suggests that if a burden were assigned, it would be on the defense."

Porter v. State, 1D18-2360 (Dec. 17, 2019)

There was no abuse of discretion in excluding a defense alibi witness where the witness was not disclosed in its written response to a demand for notice of alibi and the defense did not request to call the witness until after the State rested and the defense motion for judgment of acquittal was denied.

A $300 public-defender lien was erroneously imposed without evidence to support it. Generic comments by the trial court "about the nature of the case and the work involved in it" were an insufficient evidentiary basis.

Second District Court of Appeal

State v. J.R.D., 2D18-2034 (Dec. 20, 2019)

The trial court correctly suppressed a small quantity of illicit drugs discovered on J.R.D. following his arrest, pursuant to a valid warrant. The "arrest resulted from a combination of human and computer error by the police" and was therefore illegal.

J.R.D. and his identical twin brother were stopped by an officer on routine patrol because the officer believed that one of them had an active warrant. The County Sheriff's computerized warrant system confirmed the officer's belief and reflected that both boys had active warrants. The officer confirmed the existence of the warrants with a dispatch officer, but learned that only J.R.D. had an active warrant, not the brother. J.R.D. was then arrested and the contraband was then discovered.

En route to the jail, the officer learned that J.R.D. did not have an active warrant at that time; only the brother did. The officer still completed the processing of J.R.D. and J.R.D. was charged with the possession of the contraband.

In this case, there were two errors, and both were "attributable to at least the negligence of law enforcement personnel. First, according to the arresting officer's testimony, the Sheriff's computerized warrant system incorrectly reflected that J.R.D. had an active warrant for his arrest. A police computer error that results in an erroneous arrest is a valid basis to suppress any evidence obtained as a result of that arrest." The State did not present any evidence "that this error was attributable

to anyone other than the law enforcement personnel responsible for keeping that system up to date."

"Second, according to the arresting officer's testimony, she followed the department procedure to confirm the warrant, and the Sheriff's dispatch officer mistakenly confirmed that J.R.D. had an active warrant, presumably because of 'confusion' between J.R.D. and his identical twin brother's somewhat similar names and their obviously identical birth dates." The State argued that this was an instance of isolated negligence attenuated from the arrest. The State, however, failed to carry its burden on that point, an argument which, with sufficient evidence, might have avoided the application of the exclusionary rule.

While the defendant had the burden to prove that a search was invalid, once the defendant established that the search was conducted without a warrant, the burden shifted to the State to prove by clear and convincing evidence that the warrantless search was legal. The State did not offer any "testimony from the dispatch officer concerning what steps she took to 'confirm' the warrant; it offered only the testimony of the arresting officer that the existence of the warrant was erroneously confirmed." It was the "State's burden to prove that such errors were not routine or widespread, and it failed to do so."

And, just as knowledge of one officer may be imputed to other officers under the fellow officer rule, "the same is true for their mistakes." Thus, it could not be found that the "act of the dispatch officer constituted some sort of independent negligence that should excuse the actions of the arresting officer."

State v. Stephens, 2D18-4647 (Dec. 20, 2019)

The Second District granted the State's petition for writ of certiorari, challenging an order granting Stephens' motion to compel discovery of "the operational plan that was prepared by the . . . Sheriff's Office . . . prior to the controlled drug buy that resulted int eh charges against him."

Such plans are beyond the scope of discovery enumerated in Rule 3.220, but a court may order their production if the defendant makes a showing of materiality under Rule 3.220(f). The Second District first held that the burden of establishing the materiality fell on the defense. And Stephens did not satisfy that burden, as "he advanced nothing more than a 'mere possibility' that the operational plan might aid his defense." To the extent that a defendant seeks to establish materiality based upon privileged information, such information can be entertained by the trial court in an

in-camera proceeding. The Court further noted that the "disclosure of the operational plan could impact the safety of law enforcement and compromise their investigatory techniques."

Bentley v. State, 2D18-2256 (Dec. 18, 2019)

Two convictions for possession of a firearm by a person under 24 who had previously been found to have committed a delinquent act were reversed for a new trial because the trial court "erred by allowing the State to present law enforcement testimony identifying Bentley as the person in a surveillance video."

"In general, a witness may testify as to the identification of persons depicted in photographs or on video when the witness is in a better position than the jurors to make that identification." Otherwise, "the witness's opinion is inadmissible because it invades the province of the jury." There was nothing in the record to show that the testifying officer was in a better position than the jurors to make that determination. The jury had before it numerous photos of Bentley, including his booking photo, and they were "fully capable of comparing Bentley to the man in the surveillance video to determine whether they were, in fact, the same person."

Although the officer had known Bentley for two years prior to the incident and had a special familiarity with him, "nothing in the record indicates that there was any need for someone with a special familiarity with the man in the video to identify him." The surveillance video was not shown to be "grainy or choppy or otherwise indecipherable." There was no showing that there was anything unique about Bentley or the man in the video.

Furthermore, when an officer identifies a defendant based on past contact, that creates a prejudicial inference of the defendant's involvement in prior criminal conduct. Here, the officer testified, not only that he had known Bentley since 2015, but that that was when the police had their "first call" with him, thus suggesting involvement in criminal acts going back to 2015.

Third District Court of Appeal

State v. Amaya, 3D18-754 (Dec. 18, 2019)

The trial court erred in suppressing evidence obtained pursuant to a traffic stop.

The defendant exited a gas station and made a right turn onto a four-lane road, consisting of a left turn lane, two through lanes, and a right lane. Amaya was traveling in an eastbound through lane, and was observed making an abrupt left turn, which was not allowed from the direction Amaya was proceeding or from the lane he was in.

The detective who stopped the defendant did not know the statute number for the violation and did not issue a citation for the infraction. The trial court suppressed evidence seized, concluding that no traffic violation occurred.

It was "undisputed that Mr. Amaya began his turn from an eastbound, through lane of traffic, not the extreme left-hand lane. In so doing, he committed a traffic infraction giving Detective Andreozzi a lawful basis to stop his vehicle." The trial court's conclusion that Amaya "positioned his vehicle as far north as practicable so as to be able to turn left without impacting traffic – is unsupported by the detective's testimony."

Freixa v. State, 3D18-1195 (Dec. 18, 2019)

Freixa appealed convictions for grand theft with a value of $10,000 - $20,000 and criminal mischief. The court reversed, finding insufficient evidence as to both charges.

As to grand theft, there was competent evidence of value of only $3,200. Other items entailed proof based on speculation: "worth anywhere between $4,000 and $8,000 if I had to guess"; "today's value, I don't know"; "couldn't have been more than a couple-hundred dollars".

The State conceded error as to the value finding for criminal mischief.

Chacon v. Junior, 3D19-2442 (Dec. 17, 2019)
Smith v. Junior, 3D19-2443 (Dec. 17, 2019)
Chacon v. Junior, 3D19-2442 (Dec. 17, 2019)
Smith v. Junior, 3D19-2443 (Dec. 17, 2019)

Habeas corpus relief was granted in the above four cases, with the State conceding error. The Court wrote identical opinions in each proceeding.

Chacon and Smith were charged with grand theft and ordered "held without bond following a failure to appear at arraignment." The trial court "failed to make

a finding that [his or her] nonappearance was willful and that 'no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process.'"

Fourth District Court of Appeal

Hines v. State, 4D18-1522 (Dec. 18, 2019)

On appeal from multiple convictions, the Court reversed for further nunc pro tunc proceedings regarding the defendant's competency. The trial proceeded although the trial court had left competency issues unresolved.

Guy v. State, 4D18-2054 (Dec. 18, 2019)

The Fourth District affirmed a conviction for first-degree murder.

The trial court "did not abuse its discretion by imposing a ninety-minute time limit (plus a ten-minute extension) on Appellant's voir dire of the jury panel." In addition to objecting to the limit prior to commencement, at the end of the 90 minutes defense counsel requested an additional 90 minutes and was granted an additional 10. The appellate court highlighted what it described as an unwise allotment of time by defense counsel during voir dire, focusing "almost exclusively on firearms safety and training." The Court did include a caveat for trial court judges, noting that inflexibility is not necessarily a wise path; that brief extensions of time are better than the many hours devoted to preparing and reviewing appeals on such issues, not to mention the many days that might be required for a retrial if the appellate court finds an abuse of discretion.

Guy also argued that there was a discovery violation with an inadequate inquiry. During the second day of witnesses in the defense case, defense counsel advised the court that he "just learned from the State of a recorded jail call made two days prior (Sunday), in which Appellant 'basically . . . told someone that [he was] intending to lie and say what he was told to say.'" After hearing argument, the court ruled that the jail call would not come in "unless Appellant testified." The prosecution represented that the call had been recorded on Sunday night, and "came to the prosecutor's attention on Tuesday morning, after which she immediately brought the call to the attention of the defense and the court." A motion for mistrial was denied.

The Fourth District concurred with the trial court's conclusion that there was no discovery violation, as the prosecution provided the recording to defense counsel the same day that it became aware of it.

Guy further argued that the trial court "erred in failing to conduct a hearing to determine whether a conflict existed between Appellant and his appointed counsel based upon Appellant's statement on the jail call that arguably suggested counsel encouraged him to commit perjury." There was no ethical concern here, because the trial court inquired about this and "defense counsel stated that he did not believe that Appellant would testify falsely." The Court also listened to the recording and found that it was "not entirely clear . . . that Appellant actually intimate during the call that he had been instructed to give false testimony when called as a witness." "'Going to say what they want me to say' could very well include telling the truth."

Fifth District Court of Appeal

Roberts v. State, 5D17-3638 (Dec. 20, 2019)

The Fifth District reversed a conviction and sentence for attempted first-degree murder, directing the trial court to conduct a new stand-your-ground immunity hearing and make a nunc pro tunc determination as to entitlement to immunity.

At the pretrial hearing the trial court had erred by applying the pre-2017 burden of proof.

The Fifth District's opinion was issued the day after the Florida Supreme Court's opinion in Love v. State, which is discussed at pages 3-4 of this outline.

Keebler v. State, 5D18-3059 (Dec. 20, 2019)
Magill v. State, 5D19-1478 (Dec. 20, 2019)

As the Court has done in prior cases, it held that one an order granting resentencing became final, when neither party sought rehearing or appealed, the trial court lacked authority to rescind its own resentencing order and reimpose the original sentencing order.

Mason v. State, 5D18-3691 (Dec. 20, 2019)

The trial court imposed consecutive habitual felony offender sentences on two counts. "'[O]nce a defendant's sentences for multiple crimes committed during a single criminal episode [are] enhanced through habitual felony offender statutes, the total penalty [can] not be further increased by ordering that the sentences run consecutively.'"

The two counts at issue – attempted first-degree murder and burglary of a dwelling with a firearm, involved different victims. However, they occurred at the same time. The defendant shot at the attempted murder victim when entering the burglarized premises. Although there was a spatial and temporal break prior to a second shooting of the same attempted murder victim, several blocks away, the State charged only one attempted murder and presented evidence of it as a continuing event. The consecutive sentences were therefore reversed.

Andrews v. State, 5D19-1344 (Dec. 20, 2019)

The Fifth District had previously reversed and remanded for resentencing on one count. On remand, the trial court resentenced the defendant on that count and others. The resentencing on the other counts was without authorization, as it was beyond the scope of the prior appellate court mandate. Additionally, the court could not resentence for those counts because those sentences had already expired.

Justus v. State, 5D19-1903 (Dec. 20, 2019)

If a defendant is actually arrested while in custody in another county for unrelated charges, the defendant is entitled to credit for time served from that date. The rule differs when the defendant is held only on a detainer, as a detainer does not entitle the defendant to credit from the date of execution of the detainer.

Ortiz v. State, 5D19-1923 (Dec. 20, 2019)

The trial court erred in barring a motion for post-conviction relief under the doctrine of collateral estoppel. That bar applies only when previous postconviction motions litigated the same claim that was being asserted in the successive motion – the one subject to the collateral estoppel bar. In this case, although there were prior postconviction motions, they did not assert the same claims that were asserted in the current motion.

Sims v. State, 5D19-2919 (Dec. 20, 2019)

A second-amended Rule 3.850 motion added a new claim; it was not providing new information in support of the original claim. Under such circumstances, a new claim in an amendment must be filed within the two-year limit for a rule 3.850 motion. As the amended motion in this case was filed after the expiration of that two-year period, the amended motion was untimely.