Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Bankston, 18-14812 (Dec. 23, 2019)

Bankston was convicted for possessing a firearm as a felon, possessing body armor as a violent felon, and distributing methamphetamine. On appeal, the Eleventh Circuit vacated the sentence, which had been enhanced under section 3B1.5 of the United States Sentencing Guidelines, for the use of body armor. There was no evidence to support that enhancement.

In the absence of any objection in the district court, this claim was reviewed for plain error. "Use" of body armor is defined in the commentary to the guidelines as either "active employment in a manner to protect the person from gunfire" or "use as a means of bartering." The only evidence in this case was that "Bankston sold the armor for money." This, however, did not qualify as bartering under the definition in the commentary. "[S]elling is an activity that under both common usage and dictionary definition falls outside of bartering. In fact, 'barter' means to trade goods or services *without using money*."

Although the government relied on legislative history to support a contrary result, the Eleventh Circuit found that the legislative history was irrelevant. "A 'guideline's meaning is derived first from its plain language and, absent ambiguity, no additional inquiry is necessary.'"

First District Court of Appeal

Ruffins v. State, 1D18-706 (Dec. 27, 2019)

Ruffins appealed multiple convictions, including having a firearm while committing or attempting to commit a felony (drug possession or trafficking).

Section 790.07(2), Florida Statutes, provides that "[w]hoever, while committing or attempting to commit any felony, displays, uses, threatens, or attempts to use any firearm. . . ." The jury verdict for this offense found that Ruffins was "guilty of possession of a firearm during the commission of a felony, as

charged." The relevant provision in the information tracked the statutory language, including the term "use," as opposed to the term "possession," which was used in the verdict. The caption in the information, however, used the term "possession." Ruffins argued that he was convicted of a non-existent crime, because the word 'possession" was not used in the statute. There was no objection to the instructions or verdict and the claim was reviewed for fundamental error.

The Court found that there was no fundamental error. The "jury was given the correct statutory citation, the correct statutory caption of the crime, the correct description of the language used in the amended information, the correct elements of the crime, and a verdict form setting forth the correct statutory caption and referring back to the crime 'as charged.'" All of the acts enumerated within the express language of the statute (display, use, threaten or attempt to use, and carry concealed) would constitute a form of possession; and even if 'possess' can be broader than 'carry,' the State did not argue possession at trial, but rather argued and presented evidence supporting the elements of carrying a weapon."

Berg v. State, 1D19-1031 (Dec. 27, 2019)

A motion seeking jail credit under Rule 3.801 is untimely if it is filed more than one year after the sentence becomes final.

Pollard v. State, 1D18-4572 (Dec. 23, 2019) (on motion for rehearing and certification)

The First District certified to the Florida Supreme Court the following questions of great public importance:

> WHAT IS THE PROPER LEGAL INQUIRY WHEN THE STATE SEEKS TO COMPEL A SUSPECT TO PROVIDE A PASSWORD TO THE SUSPECT'S CELLPHONE IF THE SUSPECT HAS NOT PREVIOUSLY GIVEN UP HIS FIFTH AMENDMENT PRIVILEGE IN THE PASSWORD? WHAT LEGAL STANDARD APPLIES IN DETERMINING WHETHER THE FOREGOING CONCLUSION APPLIES TO COMPELLED PRODUCTION OF PASSWORDS IN THESE SITUATIONS?

Wagner v. State, 1D18-4783 (Dec. 23, 2019)

Wagner was sentenced for second-degree murder and armed robbery in October 2015 and received concurrent sentences of 30 years in prison. He was a juvenile at the time of those offenses and sought resentencing under the 2014 juvenile sentencing laws. Resentencing was not required because the 30-year sentence was not a life sentence, a mandatory life sentence or a de facto life sentence.

The First District noted contrary case law from the Fifth District and further noted that a Fourth District decision, Pedroza v. State, 244 So. 3d 1128 (Fla. 4th DCA 2018), was pending in the Florida Supreme Court, which granted review as to the Fourth District's upholding of a 40-year sentence for a second-degree murder committed when the defendant was a juvenile.

Wilson v. State, 1D18-535 (Dec. 23, 2019)

The First District affirmed the summary denial of a Rule 3.850 motion and addressed the claim that counsel was "ineffective for failing to object to a jury instruction on first-degree felony murder based on the predicate felony of burglary where the alleged burglary occurred in a parking garage open to the public." The offense occurred after Wilson and two others followed the victim from a nightclub into a parking garage with the intent to rob him. The jury was instructed on alternative theories of felony murder and premeditated murder.

The First District concluded that Wilson could not demonstrate prejudice. The trial court's order, which was affirmed, had found that the burglary statute had been amended in 2001 to allow for burglary convictions under similar circumstances and that defense counsel did not object and argue that a burglary could not exist because the parking lot was open to the public. The First District emphasized that the burden of demonstrating prejudice for a claim of ineffective assistance of counsel is high and it differs from the harmless error test that exists on direct appeal, where the burden is on the State.

The majority opinion of the Court contains little explanation of the First District's reasoning. Three separate concurring opinions from each judge on the panel articulate different rationales, none of which constitute the opinion of the majority of the Court. Disagreements exist within the concurring opinions as to whether the legislature's 2001 amendment to the burglary statute "effectively negated the 'open to the public defense' to the charge of burglary."

Hicks v. North Florida Regional Evaluation and Treatment Center, 1D19-896 (Dec. 23, 2019)

The First District affirmed a trial court order authorizing the Department of Children and Families to involuntarily medicate Hicks.

Hicks had been found incompetent to stand trial in a criminal case and was committed to DCF for treatment. The court authorized the administration of Hicks' psychotropic medications.

At an evidentiary hearing, Hicks testified and claimed he did not need treatment "because he was not harming anyone. He refused to take his prescribed medications because he was concerned about the side effects," but did not identify any particular side effects. A psychiatrist diagnosed Hicks with delusional disorder and recommended long-term psychotherapy. Hicks refused, however, to discuss his symptoms or illness, and medication was the next best option. The prognosis was better with the medication than without, and competency could not be restored without it. The court's order noted the foregoing points when it made the statutorily required findings under section 916.107(3).

Hicks argued that the court's order, even if complying with the statute, was constitutionally defective under Sell v. United States, 539 U.S. 166 (2003), because the court did not consider the factors set forth in Sell, requiring a showing that "(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." Those factors, however, are not applicable when the involuntary medication is being ordered for reasons other than restoration of competency. Here, the trial court found that Hicks constituted a danger to himself or others, and that was supported by evidence.

Second District Court of Appeal

State v. Smith, 2D18-2493 (Dec. 27, 2019)

The Second District reversed an order suppressing evidence, finding that implied consent existed and that a warrant was not required.

Officers learned that a car thief, Peterson, was in a motel room. They knocked on the door of the room and identified themselves. The defendant, Smith, answered the door. The officers asked if Peterson was in the room, and "Smith opened the door further, stepped aside, and pointed to a woman on one of the beds." The officers entered, arrested Peterson, asked Smith to sit on the adjacent bed and found drug paraphernalia and rocks of crack cocaine on Peterson's person. They then noticed "a burnt metal push rod near where Smith was sitting, a tool commonly used to clean out crack pipes." Smith was then read his Miranda warnings. When the officers asked if he had any illegal substances in the room, he admitted that he had marijuana in a suitcase and crack cocaine hidden under a nightstand.

In "this case Smith opened his motel room door, confirmed that Peterson was inside, and pointed at her. . . . [I]t was undisputed that Smith opened the door wide and stepped out of the way of the deputy sheriffs. It was thus reasonable to believe that Smith had invited them in, and express consent was not required to justify entry."

Third District Court of Appeal

Alexander v. State, 3D18=1747, 3D17-2012 (Dec. 26, 2019)

The Third District reversed a conviction for strong-arm robbery for a new trial.

The trial court failed to make an independent competency determination prior to trial. After appointing experts for competency evaluations and receiving one report finding Alexander competent [but not addressing whether there were any mental illnesses], the court held a hearing on November 21, 2016, and announced that it could not make a determination at that time as the report of the second doctor appointed had not yet been received. The matter was reset for November 28th, and a transcript for that date did not disclose any competency determination being made. On June 16, 2017, the trial court conducted a Faretta inquiry and granted Alexander's motion to proceed pro se. At that hearing, Alexander denied having any "mental issues."

Once the doctors had been appointed for competency evaluations, the court was required to make its own independent determination. That was not done. A statement made by the court at one of the pretrial hearings, that Alexander "presents very lucid in court," did not satisfy the requirement that an independent competency determination be made. That statement preceded any stipulation that the experts

would testify consistent with their reports. And, that statement did not reflect that it was based on the numerous relevant factors entailed in a competency determination under Rule 3.211(2).

In this case, the Third District did not authorize a nunc pro tunc determination of competency because of the lengthy time span between the inadequate competency hearing and the commencement of trial. The two doctors had both noted concerns in their reports that Alexander was not taking any medication for his bipolar disorder. The record did not indicate that the doctors had examined or observed Alexander contemporaneously with the trial.

Sims v. State, 3D18-1431 (Dec. 26, 2019)

On appeal from a conviction and sentence for burglary of an unoccupied conveyance, Sims argued that the trial court "erred in excluding testimony Sims was purportedly known to be homeless and restricting the scope of voir dire." The Third District found no error and affirmed.

Prior to trial, the court had granted a defense motion to exclude evidence of Sims' criminal past, including the arresting officer's knowledge of Sims as a "car burglar." During voir dire, defense counsel sought to examine jurors regarding their feelings regarding homelessness. The defense proffered that Sims "was seeking refuge within the vehicle" and that he therefore lacked the state of mind required for a burglary conviction.

The defense sought "to adduce testimony that officers well-acquainted with Sims had previously observed him sleeping in the street. It is inescapable that this knowledge was garnered as the result of Sims's prior deviance. Further, the trial court excluded his criminal past at the behest of the defense, pretrial. As homelessness is not an innate or immutable characteristic, the fact that one is without a permanent residence on a particular date may or may not have any bearing on one's later living arrangements. Thus, the State would have been entitled to explore the location of his current living quarters and the basis of the officers' knowledge. Accordingly, had the trial judge allowed the officers to testify as [to] Sims's homelessness, the ensuing cross-examination would have risked eviscerating the ruling in limine."

The Court further emphasized problems with admitting evidence of financial status, as its effect is to place "'a poor person under so much unfair suspicion. . .'" And, "the defense sought to introduce the fact of Sims's former homeless status in

abject isolation, entirely devoid of any nexus to the facts of the case. The interrelationship between homelessness and intent was neither represented nor proffered." "Accordingly, as astutely recognized by the lower tribunal, the absence of any evidentiary link between Sims's alleged homelessness and the element of intent required to either support or refute the charge of burglary of a conveyance rendered the proposed testimony wholly irrelevant, unduly prejudicial, and designed to cause jurors to engage in a prohibited exercise of abstract speculation."

Finally, because the exclusion of evidence of homelessness was not in error, the restriction on voir dire as to such questioning was not error: "any views harbored by the members of the venire were wholly irrelevant."

Fifth District Court of Appeal

Campbell v. State, 5D18-2091 (Dec. 27, 2019)

The Fifth District affirmed a conviction for DUI manslaughter and found that the trial court did not err in denying a motion to suppress blood test results obtained after an allegedly unconstitutional drawing of blood.

Campbell was arrested for DUI at the scene of the crash. The Fifth District accepted that probable cause existed for the arrest and did not detail the facts that established the existence of probable cause. Campbell was then taken to a DUI breath testing center. He was read an implied consent warning and asked to submit to a breath test. He blew "triple zeros," which indicated no alcohol in the system. He was then read an implied consent warning for a urine test. Campbell consented but then stated that he was unable to urinate. An officer considered this to be a "refusal," and Campbell was issued a citation for refusing to submit and advised that his license was suspended. Upon learning that the passenger of the car struck by Campbell's vehicle died, the officer told Campbell "that 'someone has passed' and that "[t]here may be a warrant or you can consent. It's one of those things. But the State will probably get your blood tonight.'" After an implied consent warning, Campbell consented to a blood draw.

The trial court found that the implied consent warning violated Campbell's constitutional rights, but found that the good faith exception to the requirement of a warrant existed. The United States Supreme Court, in Birchfield v. North Dakota, 136 S.Ct. 2160 (2016), held that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." Birchfield was decided one day prior to Campbell's arrest, and the trial court, in applying the good

faith exception, was based on the premise that an officer might be unaware of a controlling opinion within a day or two of its issuance. The Fifth District disagreed with the trial court's ruling on this and concluded "that the good faith exception cannot be applied where the police officer's acts occur subsequent to a binding appellate court decision which determines that such acts are violating of the Fourth Amendment."

The trial court had rejected the State's reliance on the inevitable discovery exception to the exclusionary rule based on the Florida Supreme Court's ruling in Rodriguez v. State, 187 So. 3d 841 (Fla. 2016), that the doctrine could not be applied where law enforcement was not already in active pursuit of a warrant at the time a search or seizure was effected. The Fifth District, however, concluded that the inevitable discovery doctrine did apply. The Court based its conclusion on the Florida Supreme Court's decision in Fitzpatrick v. State, 900 So. 2d 495 (Fla. 2005), which preceded Rodriguez and which the Supreme Court was found not to have overruled in Fitzpatrick. In Fitzpatrick, the police had initiated an investigation of Fitzpatrick prior to requesting a blood draw and probable cause existed for a warrant, even though the warrant had not been sought. The Supreme Court, in Fitzpatrick, found that the inevitable discovery doctrine was applicable, and, in Campbell, the Fifth District relied on Fitzpatrick to come to the same conclusion.

The Fifth District noted that probable cause for a DUI arrest existed; Campbell had been advised that his blood sample would have been tested whether by warrant or Campbell's consent; and it was not speculative to conclude that a warrant would have been obtained if Campbell refused.

Rivera v. State, 5D18-3385 (Dec. 27, 2019)

Dual convictions for aggravated battery and battery which took place in a single criminal episode or transaction with no meaningful temporal break, with a single victim at a single location, resulted in a double jeopardy violation. The conviction for battery was reversed.

"Appellant began his attack on Rojas by attempting to pull Rojas from his car and then stabbing him in his side. When Rojas pushed him away, Appellant paused his attack only long enough to put his knife to Rojas' throat and threaten to kill him. After Rojas pushed him away again, Appellant immediately resumed stabbing Rojas. The entire attack lasted only a minute or two. The fact that Rojas was able to push Appellant away twice during the attack does not transform it into multiple criminal episodes."

State v. Thornton, 5D18-3726, 5D18-2727 (Dec. 27, 2019)

The Fifth District reversed two suppression orders. The Court disagreed with the trial court's finding that the defendant's car was parked in the curtilage of his residence. And, video evidence showed that "the crack cocaine located in the interior of Appellee's truck was plainly and openly observable." There was probable cause for a warrantless search of the truck under the "automobile exception" to the requirement for a warrant.

Officers arrived at the residence in question with a warrant for the defendant's arrest. After knocking and being told by a woman that the defendant no longer lived there, the officers observed a truck pull into "an open lot by the residence." The truck matched the description provided by the victim, as noted in the arrest warrant. The officers then recognized the defendant from his picture on the warrant. They ordered the defendant out of the truck. One officer testified that the defendant was making furtive movements, "as if he was trying to conceal something under the driver's seat." Once out of the truck, the defendant was handcuffed and placed in a patrol car.

One officer then used a flashlight to look into the truck's interior, while standing outside. He saw a "clear plastic container 'in plain sight between the driver's seat and the center console.'" A white, rock-like substance was visible through the container, and the officer recognized it as crack cocaine. The officer then entered the truck and seized the container and then search the vehicle and found a loaded firearm under the driver's seat, more cocaine in the center console, and a small amount of marijuana.

Only one factor supported the trial court's conclusion that the truck was parked on curtilage – it was about 20 feet from the residence. The other factors were to the contrary. The unpaved parking lot which was used for this housing complex was not "within a fenced or enclosed area." It was used as a parking area, not for any "private, domestic activities or activities otherwise associated with the sanctity of a home." And, the defendant "made no effort to conceal the area from observation by the public."

Because significant evidence consisted of the video, the appellate court gave "less deference to the factual findings made by the trial court that [were] based on its observation of this same video." Contrary to the trial court's findings, the video showed "that the container and its contents that were located on the driver's seat of

Appellee's truck were readily and plainly observable to the deputy as he stood outside the truck looking in with his flashlight."

Maddox v. State, 5D19-352 (Dec. 27, 2019)

Although the trial court erred by applying the wrong burden of proof at a pretrial immunity hearing under the Stand Your Ground law, the trial court made the alternative finding that the State provided clear and convincing evidence that Maddox was not entitled to immunity. The denial of the motion for immunity was therefore affirmed.

Price v. State, 5D19-993 (Dec. 27, 2019)

After an order granting a resentencing becomes final, when neither party moves for rehearing or appeal, the trial court lacks authority to rescind the original resentencing order.

Sharon v. State, 5D19-1298 (Dec. 27, 2019)

The trial court denied a motion for return of personal property following an evidentiary hearing. The police department no longer possessed the property and could not be ordered to return that which it did not have. The remedy, "if any, would be a civil action against the agency that had possession of the personal property."

Hauter v. State, 5D19-2921 (Dec. 27, 2019)

A petition for writ of prohibition, seeking the disqualification of a judge, was granted. The first order denying the trial court motion was based on the motion being legally insufficient. Fifteen minutes later, an order denying a motion to mitigate sentences was filed.

The motion for disqualification alleged "facts showing that prior to his presentation of any evidence or argument at his sentencing hearing for a downward departure sentence, the judge had made comments that indicated that he had predetermined that Hauter would receive lengthy prison sentences." Those comments, as alleged, must be taken as true, and provided the defendant "with a well-grounded fear that he would not receive a fair sentencing hearing before the judge."

The order on the motion to mitigate sentence was also vacated, to allow a successor judge to rule on its merits.

Pirie v. State, 5D19-3123 (Dec. 27, 2019)

On appeal from the denial of a Rule 3.800(a) motion to correct sentence, the Court held that after one of two convictions was reversed, the defendant was entitled to be resentenced under a corrected scoresheet.