Case Law Update
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Supreme Court of Florida

State v. Ivey, SC18-372 (Dec. 5, 2019)

The Supreme Court addressed the following question which was certified as one of great public importance (as rephrased by the Supreme Court):

> DOES A REQUEST FOR A STANDING OBJECTION TO NONSPECIFIC THINGS PREVIOUSLY OBJECTED TO IN PRELIMINARY PROCEEDINGS RENEW A SPECIFIC OBJECTION TO A PEREMPTORY CHALLENGE WHEN THE DEFENSE HAS PRIOR TO THAT REQUEST ACCEPTED THE JURY WITHOUT RESERVATION?

The State exercised a peremptory challenge as to juror no. 46, the only African-American member of the jury panel. After defense counsel requested a race-neutral reason for the challenge, the court conducted an inquiry and accepted the State's reason and struck the panel member. The charge conference continued, and the next three jurors were "agreeable" to both parties. Defense counsel stated that counsel "agrees and accepts this jury." When the court asked about any further objections, none were raised.

The next morning, before the jury was sworn, the judge wanted to confirm that the challenge to juror no. 46 had been a peremptory challenge and not a cause challenge. Defense counsel agreed with that, and then added that there had been some objections by counsel during "preliminary proceedings and objected to different things. I would like to just make that as a continuing objection, so they don't come back and say we failed to object in the trial." The court accepted that continuing objection. The jury was then sworn and the trial commenced.

In Joiner v. State, 618 So. 2d 174 (Fla. 1993), the Supreme Court held that an objection with respect to a peremptory challenge was waived when counsel failed to state that the jury was accepted subject to the prior objection or failed to renew that objection. The Supreme Court applied the principles of Joiner to the facts of this

case and concluded that the objection to the peremptory challenge was waived. Counsel's action in "accepting the jury" led to the reasonable assumption that the earlier objection had been abandoned. The statement of counsel on the following morning regarding the continuing objections was not sufficiently specific. It referred only to "evidence," "different things," and "in preliminary proceedings." This could have been construed as a reference to pretrial rulings on motions in limine, for dismissal or for suppression of evidence.

Jordan v. State, SC18-899, SC18-2012 (Dec. 5, 2019)

The Supreme Court affirmed the denial of a Rule 3.851 motion and denied a habeas corpus petition which alleged ineffective assistance of appellate counsel on direct appeal.

Trial counsel was not ineffective for failing to object to multiple comments in closing argument. Two comments were alleged to violate the golden rule. The first comment related the plight of the victim who was tied to his bed. The prosecutor referred to the victim as having been left adrift on a raft, in an endless sea, with no ability to free himself, watching the minutes pass slowly by for three days, without water, until it was too late. A golden rule comment asks "the jurors to put themselves in the victim's position." "Although it would have been wholly proper for the prosecutor to describe, based on facts in evidence, the manner of death suffered by the victim as a result of Jordan's actions, the prosecutor at least came close to crossing the line by imagining the loss of hope that the victim would have experienced as he lay bound and tied to his bed."

In a second comment, the prosecutor, after stating that one can demand from another that which belongs to the demander, added that it can not be done by force, with guns, tape and rope. "If you could do that in America, then we'd all be in trouble because the mortgage companies would have us tied to the bed." This comment did constitute a golden rule argument. However, counsel's strategy of not objecting was deemed reasonable. A "more artfully crafted and wholly proper argument covering these facts would likely have been more impactful than the technical golden rule violation talking about mortgage companies in America."

A statement by the prosecutor – "Don't let him get away with this" – had to be considered in its context – permissible argument to convict for the highest-degree offense supported by the evidence, which contained a brief, improper statement. On direct appeal, this comment had been found not to constitute fundamental error. At an evidentiary hearing, the trial court found, and the Supreme Court agreed, that

counsel's stated strategy of limiting objections was reasonable under the circumstances.

A reference to Jordan's lack of remorse was not objectionable by the defense. The prosecutor made the reference in the guilt phase only after defense counsel, in opening argument, had offered condolences to the victim and his family, and had stated that he was "'sorry for' the fact that the victim 'ultimately pass[ed] away in the hospital.'" By "injecting remorse into his opening statement in a case where part of the defense was that Jordan did not know the victim was in danger and had not meant to kill the victim when he left him tied up, we find that trial counsel opened the door for the State to address the lack of any evidence of remorse in this case."

The tone of an argument by the prosecutor was found to have denigrated defense counsel, although the point could have been made in an appropriate way. The prosecutor argued:

> I told you it was coming, and there, there we heard it. It's everybody's fault but the defendant's. I mean, if he had stayed in the middle of the bed, he would still be alive. If these guys had come up from south Florida a day and a half earlier, he'd still be alive. Come on. Everybody's fault but his. I mean, he snapped? Is that a defense? He snapped?

Once again, given that the same points could have been made more artfully, defense counsel's strategy of limiting objections was deemed reasonable.

Counsel was not ineffective for failing to object to the admission of evidence of duct tape found in the victim's hair on the basis of the argument that it inflamed the emotions of the jury and appealed to the sympathy of the jurors. The evidence was admissible, as it was relevant, tending to prove the manner of the killing. The victim's face, neck and head had been tightly bound with duct tape; the pate and hair corroborated this.

A claim that appellate counsel was ineffective for failing to challenge the denial of a motion for judgment of acquittal as to felony murder – i.e., that there had been a break in the chain of events between the robbery and victim's death – was rejected. The Supreme Court always reviews the sufficiency of evidence on direct appeal in a capital case, and the law of the case doctrine therefore barred this claim. Beyond that, the claim lacked merit. "Because Jordan inflicted the injuries and

committed the actions that led to the victim's death at the scene of the robbery, before fleeing, cases involving a murder committed after fleeing the scene of the robbery or other felony are inapposite."

The denial of a motion for continuance where second-chair counsel was appointed three weeks before the trial was not an abuse of discretion, where nothing "int eh record indicates that [attorney] Smith lacked time to procure witnesses or interview or prepare them for trial." The Court also looked at the division of responsibility between the two attorneys at trial when coming to this conclusion.

First District Court of Appeal

Newcombe v. State, 1D16-4769 (Dec. 6, 2019)

Newcombe, who had convictions for unlawful use of a computer service and traveling to meet a minor, was not entitled to relief under Lee v. State, 258 So. 3d 1297) or Shelley v. State, 176 So. 3d 914 (Fla. 2015), based on double jeopardy. Both of those cases had proceeded to trial and, "absent separate and distinct counts of solicitation in the charging document, the dual convictions for solicitation and traveling after solicitation were necessarily based on the same conduct." Newcombe, however, did not go to trial, and "the basis for his plea negotiations was broader than just the charging document. It included not only the charging document but also information about potential solicitations that could have been charged, such as those mentioned in the probable cause affidavit, but were not. Unlike the situation in *Lee* and *Shelley*, where only charged conduct is allowable at trial, plea negotiations are not so limited and can be based on relevant uncharged information."

One judge, concurring in result only, stated that Lee should not apply retroactively. The concurring judge further urged the Florida Supreme Court to recede from its decision in Lee.

McDuffey v. State, 1D17-3250 (Dec. 6, 2019)

McDuffey was sentenced to life for offenses committed while he was aa adult – kidnapping and robbery. He qualified for the life sentence on the basis of prior predicate offenses that were committed while a juvenile and subjected him to sentencing as a prison releasee reoffender. He challenged the life sentences under Graham v. Florida, 560 U.S. 48 (2010) and Miller v. Alabama, 567 U.S. 460 (2012).

The First District held that “a trial court can consider a prior juvenile offense, where the defendant was adjudicated as an adult, in determining whether a defendant qualifies for a mandatory life sentence under the PRR statute.” The Court then went on to agree with decisions of other federal and state courts that “have rejected the claim that using prior juvenile offenses, to qualify adult offenders for mandatory life sentences under recidivist sentencing statutes, violate *Graham* or *Miller*.”

“In this case, McDuffey’s life sentence was a result of crimes he committed when he was an adult. The fact that his juvenile priors qualified McDuffey for a mandatory life sentence is irrelevant.”

Mosley v. State, 1D19-0466 (Dec. 6, 2019)

The First District affirmed the denial of a Rule 3.853 motion seeking DNA testing. Mosley had been convicted for a sexual battery, which was described as “a brutal rape of a 14-year old girl who was choked into unconsciousness during the crime and suffered extensive hemorrhaging of her eyes and face aw well as large bruises on her neck and back.”

Mosley sought “DNA testing of the samples from under the victim’s fingernails and her ‘light-gray panties’ because such will show that the girl had sex or a violent encounter with another man, because, he asserts, the young victim was prostituting herself in the area. But Appellant fails to describe the purported ‘other man’ and asserts no evidence that would show the victim had such an encounter.” These defenses were not presented at trial and the victim was not cross-examined about such a purported encounter with another man.

The motion was properly denied because the facts alleged in the motion “fail to specifically show that the testing of the samples taken from the victim’s fingernails would exonerate him.” “The foreign DNA sample located in the victim’s body was positively identified as Appellant’s DNA. The victim’s precise and unwavering description of Appellant, including her physical reaction to seeing his picture, was corroborated by the collection of his DNA from her body during the rape-kit investigation and the surveillance video showing Appellant’s car and the victim at or near the crime scene *at the time of the crime*.”

Additionally, Mosley was asserting a new defense that was contradictory to the one asserted at trial – that the victim may have had a motive to fabricate the rape accusation “because she was concerned about her mother finding out the victim had engaged in sexual relations with her boyfriend.” The victim’s “compelling

testimony on direct and cross examination would clearly have rebutted any accusation of prostitution."

Finally, the Rule 3.853 motion could not be used to litigate a claim that counsel was ineffective for failing to argue that the victim as a prostitute.

Rentz v. State, 1D18-3617 (Dec. 5, 2019)

The trial court erred in denying a motion to withdraw plea.

During the plea, the defense reserved the right to appeal the denial of a suppression motion, which the trial court found to be dispositive. The State was silent when the court ruled that the suppression motion was dispositive. The State agreed to the recommended sentencing range of 8-25 years.

Prior to sentencing, defense counsel withdrew. Successor counsel asked if the State would stipulate to the dispositiveness of the suppression motion; the State refused to do so. Successor counsel then moved to withdraw the plea under Rule 3.170.

The suppression motion in question was not dispositive. Even if the defense prevailed on the motion, the State had other evidence to prove the commission of the offense. The trial court therefore erred in finding that the motion was dispositive. When the State subsequently refused to stipulate to dispositiveness, the trial court abused its discretion in denying the motion to withdraw plea.

When a pretrial ruling is not dispositive, a defendant cannot reserve the right to appeal the issue when appealing after a guilty or nolo plea. An exception exists when the State stipulates to dispositiveness. Thus, the plea was entered by the defendant under "the mistaken belief that her motion to suppress was appealable. This was enough to show that her plea was not voluntarily and intelligently entered. As a result, Appellant showed good cause that she should have been permitted to withdraw her plea and the trial court erred in failing to let her do so."

West v. State, 1D18-3918 (Dec. 5, 2019)

In a direct appeal of a conviction for criminal contempt, after the filing of an Anders brief, the First District affirmed the conviction and wrote an opinion detailing the evidence and explaining why it was sufficient.

When the court denied West's motion to remove counsel, the court admonished West not to refer to the court in a derogatory manner. During further discussions about how West wanted to proceed, West addressed the court: "Do whatever you want. You say you going to do that anyway. Do whatever you want. Just do whatever you want." And: "You take it any kind of way you want to."

Williams v. State, 1D18-3426 (Dec. 3, 2019)

The robbery and photo lineup resulting in an identification were conducted in 2016. In 2017, the legislature enacted section 92.70, addressing the procedures to be used by law enforcement when conducting photo lineups. The standard jury instructions on eyewitness identifications were then amended. Williams argued on appeal that the trial court erred in using the 2016 version of the instruction. The First District disagreed.

The robbery and lineup both preceded the enactment of section 92.70, and "Florida law did not prescribe the same photo lineup procedures and remedies that s. 92.70 does now. Because the photo lineup performed in Mr. Williams' case occurred before the current statute and instruction existed, the trial court did not abuse its discretion by using the prior version of the standard jury instruction instead of the current s. 92.70-derived instruction."

Lynn v. State, 1D18-3816 (Dec. 3, 2019) (n rehearing)

The Court withdrew its prior opinion and issued a new opinion addressing multiple claims of ineffective assistance of trial counsel which were denied after an evidentiary hearing. Seven of the claims are addressed in the opinion and all are disposed of in one or two paragraphs with very brief factual background.

In one, the Court found that counsel was not ineffective for failing to object to photo lineup identifications by four victims as impermissibly suggestive when they were based on a single booking photograph. The witnesses had an independent basis for the identifications – they had previously purchased drugs from Lynn.

Second District Court of Appeal

J.K. v. State, 2D17-4190 (Dec. 4, 3019)

The trial court erred in denying a motion for judgment of dismissal on one count of grand theft and three counts of burglary on a conveyance. The burglaries pertained to three separate vehicles.

First, there was no evidence connecting J.K. to the theft of the vehicle or establishing that he had possession of the vehicle. The only evidence as to J.K. was that he was caught in the area. A co-respondent, J.A.H. had told an officer that they were only joyriding; that there were five individuals in the car, but the names were not provided.

As to the burglaries, there was no evidence that J.K. possessed stolen items and no evidence "suggesting here J.K. had been sitting in the stolen vehicle in reference to those items." The presence of "the stolen items int eh car was insufficient to establish that J.K. burglarized the other vehicles."

Chipman v. State, 2D18-2134 (Dec. 4, 2019)

The trial court erred in dismissing a Rule 3.170(l) motion to withdraw plea after resentencing. The motion was timely filed, within 30 days of imposition of the resentence and prior to the filing of a notice of appeal. The motion tolled the rendition of his sentence, and the appeal was thus premature and should have been held in abeyance until the disposition of the 3.170(l) motion. As the rendition of the judgment and sentence had been tolled, the trial court did have jurisdiction over the 3.170(l) motion.

Herrera v. State, 2D18-3709 (Dec. 4,2 019)

In an appeal from the revocation of probation based upon multiple violations, counsel for the Appellant filed an Anders brief. The Second District affirmed the revocation, but found that several of the violations found by the trial court had to be stricken.

The Court's opinion includes a lengthy footnote urging counsel for appellants, when filing Anders briefs, to include sufficient details in the briefs.

As to several alleged violations of probation based on new law violations, the record referenced arrests and nolle prosses, and those were not established by sufficient evidence, even though the State need not prove convictions for the new law violations.

A violation based on failure to pay drug-testing costs was not established. The affidavit of violation reflected that Herrera was unemployed and living with his mother and that his source of income was unknown. We are not convinced that Herrera's stipulation to the willful and substantial nature of the violations established his ability to pay, especially considering the summary nature of the VOP hearing and the vague reference to the 'technical violations' as a whole. Further, Herrera was entitled to a favorable determination on this alleged violation due to the absence of any evidence that the trial court inquired into his ability to pay."

Fourth District Court of Appeal

Jones v. State, 4D18-1945 (Dec. 4, 2019)

Section 985.565(3), Florida Statutes, provides that at sentencing, the court shall consider a PSI report "regarding the suitability of the offender for disposition as an adult or as a juvenile." The report "must include a comments section . . . with [DJJ's] recommendations as to disposition."

A claim on appeal that the PSI report in this case failed to include the recommendation was not preserved for appellate review. Although counsel attempted to cure the failure to object during sentencing with a motion for correction of sentence under Rule 3.800(b)(2) during the pending direct appeal, that did not suffice. The error was one in the sentencing process, not an error in the sentence, and such a claim was not cognizable in the Rule 3.800(b)(2) motion.

Alternatively, the error was deemed harmless "as appellant was an adult when he was sentenced and had thus aged out of the juvenile justice system." "It appears that the reason for comments from DJJ is to provide information to the trial court on various statutory criteria which the court must consider if it chooses to sentence a defendant as a juvenile."

White v. State, 4D18-3560 (Dec. 4, 2019)

As the Fourth District has held in prior decisions, once a trial court granted a resentencing under Graham v. Florida or Miller v. Alabama, and that order for

resentencing became final, the trial court lacked jurisdiction to reconsider the order and the trial court could not reinstate the prior sentence. The trial court had to proceed to a new sentencing hearing.

Velazquez v. State, 4D19-245 (Dec. 4, 2019)

An order denying a request to grant early termination of supervision is not appealable.

Barberian v. State, 4D19-1471 (Dec. 4, 2019)

Once a defendant appealed an order revoking probation and a judgment and sentence for other criminal offenses, the trial court did not have jurisdiction to entertain and rule on a subsequently filed pro se motion to reduce or modify sentence.

Fifth District Court of Appeal

Gabriel v. State, 5D18-3264 (Dec. 6, 2019)

The Fifth District, in a prior appeal, remanded for resentencing. In an appeal from the new sentence, the Court reversed once again.

Gabriel was resentenced for attempted robbery with a firearm, which had a statutory maximum sentence of 15 years; aggravated assault with a firearm and resisting an officer with violence, both of which had statutory maximums of five years. The Criminal Punishment Code scoresheet resulted in a base sentence of 107.25 months, which exceeded the statutory maximum for two of the three offenses. The trial court agreed with the State that section 921.0024(2), Florida Statutes (2012) mandated a sentence of 107.25 years for the aggravated assault and resisting an officer. The trial court imposed consecutive sentences of 15 years, 107.25 months and 107.25 months, for a total of about 33 years.

The CPC mandates the imposition of the lowest permissible sentence if it exceeds the statutory maximum for an offense. The Fifth District disagreed with the State's argument that the LPS had to be imposed for each offense. The Fifth District agreed with a dissenting opinion from a Fourth District case which found that the LPS was the collective total minimum sentence for all offenses, and that each still had its own statutory maximum.

The Fifth District certified conflict with another decision of the Second District and further certified the following question as one of great public importance:

> IS THE LOWEST PERMISSIBLE SENTENCE AS DEFINED BY AND APPLIED INS SECTION 921.0024(2), FLORIDA STATUTES, AN INDIVIDUAL MINIMUM SENTENCE AND NOT A COLLECTIVE MINIMUM SENTENCE WHERE THERE ARE MULTIPLE CONVICTIONS SUBJECT TO SENTENCING ON A SINGLE SCORESHEET?

State v. R.L.S., 5D18-3959 (Dec. 6, 2019)

The trial court found R.L.S. to be incompetent. The court "improperly shifted the burden of proof to the State in light of the fact that the child had not previously been declared incompetent."