

Case Law Update
February 3, 2020
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Eleventh Circuit Court of Appeals

[In Re: Dailey](#), 19-15145 (Jan. 30, 2020)

The Court denied an application for leave to file a successive habeas corpus petition to challenge a state court conviction. Dailey, who had previously filed multiple state and federal postconviction motions, petitions and appeals, requested leave for the successive federal petition based on alleged newly discovered evidence.

A claim of actual innocence was rejected, in part, because Dailey had already raised such a claim and it had been denied. The current application differed from the previous one in that there were allegations of some new evidence as to each of the substantive claims previously presented. “As we have repeatedly held, however, new evidence does not a new claim make, not for purposes of s. 2244(b)(1).” What matters in the request for leave for a successive petition “is whether ‘the basic thrust or gravamen’ of the petitioner’s legal argument is the same.” Dailey was asserting now, the same thing he asserted in his 2007 claim of actual innocence – that he has always been innocent of the murder.

Additionally, a claim of actual innocence requires “(1) ‘clear and convincing evidence of actual innocence,’ and (2) another, separate ‘constitutional violation.’” That other “constitutional violation” must be something other than the claim of actual innocence itself. Dailey failed to make “a prima facie showing of another constitutional violation that is tethered to his actual innocence claim.”

And, while Dailey’s new evidence “casts some degree of doubt on some of the testimony the State presented at trial,” it did not satisfy the demanding standard for an actual innocence claim.

In addition to the requirements of both an actual innocence claim and a separate constitutional claim, leave for a successive petition under 28 U.S.C. s. 2244(b)(2)(B) also requires that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.” Dailey could not show the required reasonable diligence for a Brady claim he asserted. With respect to a police report Dailey alleged had not been produced at trial or during his

postconviction proceedings, he did not explain how his federal habeas counsel came into possession of it, let alone that his federal counsel did not have it prior to the filing of his first federal habeas petition.

[United States v. Cabezas-Montano, et al.](#), 17-14294 (Jan. 30, 2020)

Three defendants appealed convictions for conspiracy to possess with intent to distribute over five kilograms of cocaine while on board a vessel subject to the jurisdiction of the United States, and possession with intent to distribute. Multiple issues pertaining to both the convictions and sentences were raised, including, inter alia, the constitutionality of the Maritime Drug Law Enforcement Act (MDLEA), and the determination of subject matter jurisdiction under the MDLEA.

The defendants argued that the MDLEA was unconstitutional because “(1) Congress’s power to define and punish felonies on the high seas is limited to felonies bearing a ‘nexus’ to the United States; (2) due process prohibits the prosecution of foreign nationals for offenses bearing no ‘nexus’ to the United States; and (3) the MDLEA violates the Fifth and Sixth Amendments by removing the determination of jurisdictional facts from the jury.” Each of these arguments was foreclosed by prior binding precedent of the Eleventh Circuit.

Two defendants argued that the government did not prove subject-matter jurisdiction. The government relied on a statutory provision based on the vessel being one “without nationality.” The testimony in the district court was that Coast Guard members “asked the defendants to identify the master of the vessel and in response the defendants pointed at each other but no one identified himself as the master.” Upon further inquiry, no one wished to make a claim of nationality. The district court was found to have subject matter jurisdiction.

There was no plain error based on the government taking seven weeks in order to transport one defendant to Florida for a probable cause hearing, as opposed to bringing him promptly to a magistrate judge in California, the closest U.S. state. “A person violating the MDLEA ‘may be tried in any district,’ ‘if the offense was begun or committed upon the high seas,’ as was the case here.” Under Rule 5(a)(1)(B), Fed.R.Crim.P., a “person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.” In this case, the defendant was brought on board a Coast Guard vessel on October 25th, more than 200 miles off the coast of Guatemala/El Salvador. He made entry into the Key West Port on December 12th and was presented for his initial appearance on December 13th. Because the issue was not raised in the lower

court, the appellate court had difficulties assessing the claim, as there was no evidence regarding the reasons or circumstances behind the delay. It was the defendant's burden to show that the delay was unnecessary, and that could not be done. And, there was no controlling precedent to the effect that a 49-day delay, regardless of its circumstances, constitutes unnecessary delay under the rule.

One defendant argued that the district court erred in admitting evidence of post-arrest, pre-Miranda silence as consciousness of guilt. Prior decisions of the Eleventh Circuit precluded that argument.

The Court also addressed and rejected multiple challenges to the sentences, including the following claims: 1) the failure to receive a two-level minor-role reduction; 2) the alleged unconstitutionality of the "safety-valve" provisions of 18 U.S.C. s. 3553(f) and U.S.S.G. s. 5C1.2; 3) that the sentences imposed were not procedurally and substantively reasonable; 4) that the court "'gave no indication or explanation' as to why it chose a sentence at the particular point in the advisory guidelines range or as to why a sentence at the low-end of that range was sufficient"; 5) that the district court, in denying motions for downward variances, erroneously "considered that they exercised their right to trial."

One judge wrote a concurring opinion, but noted significant concerns about the "seven weeks between arresting the defendants and bringing them before a magistrate judge for a probable-cause determination." The concurring opinion further urged the Court to reconsider its holding in United States v. Rivera, 944 F. 2d 1563, 1568 (11th Cir. 1991), "in an appropriate case." The judge disagreed with the holding that "In the government's case in chief, the government may present testimony or otherwise comment on a defendant's silence when the defendant was in custody but before he received his *Miranda* warnings."

First District Court of Appeal

[Knighton v. State](#), 1D18-2133 (Jan. 31, 2020)

When the trial court denied a motion for new trial, alleging, inter alia, that the "verdicts were contrary to the weight of the evidence," the judge stated:

All right. With nothing more to consider, I mean, I dealt with these issues at trial, and I don't know that I can -there's anything that would change my mind. I think

there was sufficient evidence on all three counts to support the verdict of guilty and actual possession.

The motion for new trial also referenced the denial of the motion for judgment of acquittal.

When ruling on a motion for new trial based on the weight of the evidence, the judge is ruling, “in effect, as an additional juror.” The defense did not object to the judge’s language when the judge announced the ruling, and the argument on appeal was therefore not preserved. If “it is unclear whether the trial court used the wrong standard, the potential that the trial court may have erred does not constitute fundamental error.”

The First District further found that lower court’s reference to the sufficiency of the evidence “can fairly be read as ruling on the propriety of the motions for judgment of acquittal,” one of the alternative grounds in the motion for new trial. The remainder of the motion was not specifically addressed, and it was therefore unclear whether the trial court applied the wrong standard to the claim based on the weight of the evidence, and fundamental error could not be demonstrated.

[Martin-Godinez v. State](#), 1D18-4531 (Jan. 31, 2020)

The First District reversed the summary denial of one claim of a motion for postconviction relief. The defendant’s motion alleged that counsel was ineffective “for failing to object to the victim’s videotaped Child Protection Team (CPT_ interview being provided to the jury during deliberations.”

The trial court erred when it concluded that it was proper to send the video to the jury room. The Florida Supreme Court previously held that such videos could not be sent to the jury room during deliberations. Counsel was therefore deficient for not objecting. However, the defendant’s motion did not include sufficient allegations of prejudice as a result of counsel’s failure to object.

The appellate court rejected the argument “that a defendant can demonstrate prejudice under *Strickland* by arguing that if counsel had objected, the defendant would have secured relief on direct appeal. First, it does not allege that the result of the proceeding would have been different, as *Strickland* requires. More importantly, it implies that, had counsel objected, the court would have erroneously overruled the objection, thus giving the defendant a ground for appeal.” . . .

Moreover, this implication runs contrary to well-settled law that an appellate court presumes that a trial court correctly applies the law.”

The case was remanded to the trial court with directions to provide the defendant 60 days in which to amend the motion.

[King v. State](#), 1D19-130 (Jan. 31, 2020)

The summary denial of a Rule 3.850 motion was reversed and remanded for an evidentiary hearing.

The motion alleged that defense counsel failed to advise him that insanity was a defense based upon PTSD resulting from military service. The motion further alleged “that a road-rage incident triggered his disorders and caused him to engage in the conduct for which he was arrested.” The State, in the trial court, argued that “these disorders are not ‘insanity’ per se.

[Stevens v. State](#), 1D18-1483 (Jan. 29, 2020)

The trial court may not rule on a Rule 3.800(b)(2) motion to correct a sentence after the 60-day period for ruling on the motion expired.

[Jackson v. State](#), 1D18-1603 (Jan. 29, 2020)

Jackson appealed a conviction for first-degree murder. On appeal, he argued that the trial court erred by excluding “evidence that someone else sold the victim the lethal heroin dose.”

The trial court did not abuse its discretion in excluding the evidence, which was hearsay. The evidence at issue was a text message sent by the victim after purchasing heroin. Within “minutes of purchasing heroin from Jackson, the victim sent a text message to a third party saying: ‘Damn, my boy got some fire, boy.’ Jackson argued that this message showed that the victim used and survived the heroin dose sold by Jackson at the time the text message was sent.” Jackson was seeking to use the text message to prove the truth of the matter asserted – that the victim used and survived the heroin he had just purchased from Jackson.

[Rogers v. State](#), 1D18-5207 (Jan. 27, 2020)

Rogers filed a pretrial certiorari petition, arguing that the trial court erred by requiring him to present evidence in support of his immunity claim under the Stand Your Ground law. The First District denied the petition because “Rogers agreed to the procedure employed by the trial court.”

Under the Stand Your Ground law, as amended in 2017, once a defendant raises a prima facie claim, the State has the burden of disproving the self-defense claim by clear and convincing evidence. The First District has not yet addressed the issue of “whether a party seeking immunity must present evidence to raise a prima facie claim.” The Second and Fourth Districts have come to contrary conclusions on this. Because Rogers agreed to the trial court’s suggestion that he present evidence to support his prima facie claim, the First District did not reach that legal issue.

[Cave v. State](#), 1D19-103 (Jan. 27, 2020)

The Court reversed the summary denial of a Rule 3.850 motion; the trial court found that the motion was time barred.

The defendant entered guilty pleas to four cases on February 12, 2016 and did not appeal from the convictions and sentences. Within 30 days, however, he filed a Rule 3.170(l) motion to withdraw, and the appeal from its denial did not end until the issuance of the appellate court’s mandate on June 29, 2018. The trial court had erroneously found that the two-year period for the filing of the Rule 3.850 motion commenced on July 29, 2016, the day after the trial court denied the Rule 3.170(l) motion to withdraw. However, a Rule 3.170(l) motion to withdraw is part of the direct review process and tolls the rendition of the finality of a conviction and sentence, and that includes any appeal from its denial. The convictions and sentences therefore became final with the issuance of the mandate on June 29, 2018. That started the running of the two-year filing period and the subsequent Rule 3.850 motion was therefore timely filed.

Second District Court of Appeal

[Riley v. State](#), 2D17-2534 (Jan. 31, 2020)

The Second District affirmed a conviction for direct criminal contempt, but found that the trial court employed an improper procedure.

Just prior to voir dire, the defendant sought to discharge counsel and the trial court denied the request. The defendant “repeatedly disrupted the voir dire process and the trial court repeatedly instructed Mr. Riley to remain quiet.” During a bench conference, Riley was observed communicating with the venire and the judge overheard what was believed to be an “inappropriate comment.” The court conducted a hearing and a bailiff related that Riley called one of the potential jurors “racist.” The court gave Riley an opportunity to show cause why he should not be held in contempt of court. Riley did not deny making the statement and asserted that the juror had prejudged him. The judge instructed Riley not to speak to the venire. Riley became argumentative and the court found that his intention in making the comment was to sabotage jury selection. Riley was then found in direct criminal contempt.

Because the trial court did not fully see or hear the original conduct which was deemed to constitute contempt of court, an error occurred when the court relied “on the unverified statements of the bailiffs as the sole evidence of Mr. Riley’s direct criminal contempt.” “Additional evidence supporting a direct contempt judgment is required when a trial court does not personally witness or hear the allegedly contemptuous conduct.” Although the trial court’s procedure was incorrect, “the mere fact that Mr. Riley communicated at all with the jury venire, which the trial court personally observed, supports a finding of direct criminal contempt.”

[Lobb v. State](#), 2D18-4137 (Jan. 31, 2020)

The trial court erred in denying a motion for judgment of acquittal for resisting an officer without violence.

Emergency medical technicians responded to a call about a woman lying in a grassy area on the side of a road in a gated community. When they approached the woman, she was awake and alert and said that she was lying down because she was lost; she was unfamiliar with the area; she was from out-of-town and was staying with a relative in the area. She had gotten into an argument with a friend and exited the car she was in, but left her phone in the car. After the emergency personnel cleared her, a deputy directed her to stand up and a scuffle ensued within a minute. The deputy said that she knew Lobb was under the influence of something because she was acting emotional. The deputy had intended to have Lobb detained under the Marchman Act. When the deputy tried to grab Lobb’s wrist, Lobb resisted.

A Marchman Act commitment provides for protective custody based on a good faith belief that the individual is substance abuse impaired. Additionally, the substance abuse must impair the person's judgment or make the person likely to suffer from neglect without care or treatment.

After going through discrepancies between the testimony of the deputy and that of the technicians, the Court found that they ultimately did not matter. The Court viewed this as "a situation in which both the EMT and Deputy Rivera were simply trying to figure out what to do with Lobb. Ultimately, Deputy Rivera concluded that the Marchman Act was appropriate because she 'didn't want anything to happen to her.' While this might be a commendable consideration, it does not support a legal finding that the deputy had an objective good faith belief that Lobb was (1) 'substance abuse impaired,' (2) had 'lost the power of self-control with respect to substance use,' and (3) was in need of substance abuse services or likely to come to harm without care or treatment, all of which are prerequisites to law enforcement using the Marchman Act to take a person into protective custody."

Thus, the deputy was not executing a legal duty when she grabbed Lobb's wrist, and Lobb was entitled to resist without violence.

[Routenberg v. State](#), 2D19-1632 (Jan. 31, 2020)

The Second District granted a petition alleging ineffective assistance of appellate counsel as to one claim: the failure on direct appeal to challenge the giving of an erroneous jury instruction on self-defense.

The defense at trial was that the defendant killed the victim in self-defense, when the victim was in the process of stealing drugs – oxycontin – from the defendant, and the victim brandished a knife and cut the defendant before the defendant pushed back and the knife struck the victim during that encounter.

"[A]t the point where the then-standard jury instruction directed the court to '[i]nset and define applicable felony that defendant alleges victim attempted to commit' the trial court erroneously stated that the State must prove beyond a reasonable doubt that the victim committed the elements of robbery and aggravated battery against Routenberg. To the contrary, it was the State's burden to overcome Routenberg's claim of self-defense by proving beyond a reasonable doubt that the victim was not attempting to rob or batter Routenberg when he used deadly force – a position the State adamantly argued during its closing."

Although there was no objection to the erroneous instruction, the Court found that the error was fundamental and reversed for a new trial. Self-defense was the sole defense in this case. And, “although Routenberg’s defense may not have been strong, a properly-instructed reasonable juror could have concluded that the State did not meet its burden to prove beyond a reasonable doubt that Routenberg’s use of deadly force was not justified.”

Third District Court of Appeal

[C.S. v. State](#), 3D18-2491 (Jan. 29, 2020)

On appeal from a withheld adjudication for grand theft, the Third District affirmed and found that the evidence was sufficient to demonstrate the value of the stolen items.

C.S. took the victim’s cellphone. Although the victim retrieved it, the victim did not get the SIM card back. The phone was described “as a pristine, newly purchased, black Apple iPhone 7 Plus,” which was purchased, one month prior to the theft, for \$700. The SIM card and stolen case, cost \$25 and \$50, respectively, and the phone was “unmarred and functioned perfectly.”

For the grand theft charge, the State had to prove that the value exceeded \$300. Based on the very recent purchase and the description of the phone as being in its “unsullied, fully operating,” and “originally-purchased condition,” the evidence was deemed sufficient.

[Silver v. State](#), 3D18-478 (Jan. 29, 2020)

Pursuant to section 921.0024(2), Florida Statutes, and Fla.R.Crim.P. 3.704(d)(26), “[i]f the total sentence points are greater than or equal to 363, the court may sentence the offender to life imprisonment.”

[Berki v. State](#), 3D19-2151 (Jan. 29, 2020)

A Rule 3.800(c) motion to mitigate sentence is not an appealable order.

Fourth District Court of Appeal

[Alexander v. State](#), 4D19-529, 4D19-530

Alexander appealed convictions and sentences for transmission of material harmful to minors, as well as a revocation of probation from prior felony convictions. He challenged the giving of the “standard jury instruction for transmission of material harmful to minors, because the instruction does not instruct the jury to consider whether the allegedly obscene material violates a community standard regarding prurient interest.” The standard instruction defines materials that are “harmful to a minor” as including depictions of “nudity, sexual conduct, or sexual excitement when” they “predominantly appeal[] to a prurient, shameful, or morbid interest.” The materials must also be “patently offense to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors,” and must, when “taken as a whole,” be “without serious literary, artistic, political, or scientific value for minors.”

The Court’s opinion reviews decisions of the United States Supreme Court addressing obscenity, and then concludes that the standard instruction was “an accurate statement of Florida law, including the definition of ‘harmful to minors,’ which has been determined by the Supreme Court to properly allow the state to restrict access to minors of certain sexual material and conduct. . . . More specifically, we hold that until a majority of the United States Supreme Court or the Florida Supreme Court holds otherwise, the jury does not need to be specifically instructed that it is to use a community standard, statewide or countywide in determining if material or conduct is prurient.”

[Nelson v. State](#), 4D-1180 (Jan. 29, 2020)

“After holding a competency hearing, the trial court must enter a *written* order if it finds that the defendant is competent to proceed.” Where the trial court made an oral finding of competency, but did not enter a written order, the appellate court directed the trial court, on remand, to enter the written order finding competency nunc pro tunc.

[Bynes v. State](#), 4D19-1961 (Jan. 29, 2020)

The trial court denied a Rule 3.800(a) motion to correct illegal sentence as being successive, and barred Bynes from filing further pleadings without counsel. The Fourth District, in a prior appeal, found that the successive motion bar was

erroneous where the trial court had not previously ruled on the same issue. In the current appeal, the Court found that the trial court abused its discretion in imposing a sanction as a result of the trial court's erroneous determination regarding the 3.800(a) motion having been successive.

Fifth District Court of Appeal

State v. Miller, 5D19-433 (Jan. 31, 2020)

The trial court granted a Rule 3.850 motion, which set forth multiple claims based on trial counsel's ineffective assistance with respect to DNA evidence – including the failure to preserve physical evidence for testing; the failure to obtain an expert; and the lack of adequate cross-examination of the State's expert. The trial court, rather than finding prejudice on the basis of the individually alleged deficiencies, relied on United States v. Cronic, 466 U.S. 648 (1984), and found that there had been a “complete failure to subject the prosecution's case to meaningful adversarial testing.” The Fifth District found that the trial court's reliance on Cronic was erroneous.

The theory of defense as to the charge of lewd and lascivious molestation of a victim under the age of 12 was that “the victim fabricated the assault to avoid getting in trouble for lying to her mother and returning home at a very late hour.” The Fifth District's opinion details several points that defense counsel successfully elicited in support of that defense. Additionally, counsel objected to the most harmful piece of evidence – a DNA sample from the victim's bra matching the defendant's DNA profile.

“Despite the postconviction court's list of counsel's shortcomings, as detailed, our review of the transcript reveals that counsel did not entirely fail to function as Miller's advocate or completely fail to subject the prosecution's case to meaningful adversarial testing.” The case was therefore remanded to the trial court for reconsideration based on the prejudice standard for claims of ineffective assistance of counsel under Strickland v. Washington.

Downs v. State, 5D19-947 (Jan. 31, 2020)

The Fifth District affirmed the denial of a Rule 3.850 motion alleging ineffective assistance of counsel, although the Court found that trial counsel's performance had been deficient.

In a 1997 case involving a different defendant, the Fifth District had “criticized [attorney] Ciener’s blanket strategy of refusing to present defense witnesses in order to retain the first and last closing argument. Despite court admonishment, Ciener employed that strategy during Downs’s trial four years later.” However, Downs could not establish prejudice. An evidentiary hearing was held in the trial court, and the two witnesses whom Downs claimed counsel should have called, due to the passage of time, were unable to specifically recall the events of the night in question. It is the defendant’s burden to demonstrate prejudice after showing that counsel’s performance was deficient. Given the inability of the witnesses to recall events, Downs could not satisfy that burden.