Case Law Update
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Supreme Court of Florida

In Re: Standard Jury Instructions in Criminal Cases – Report 2019-03, SC19-470 (Feb. 6, 2020)

The Supreme Court approved for publication and use two new instructions – 25.13(g) and 25.13(h), which define new offenses codified in section 893.1351(1) and (2), Florida Statutes (2019). The new offenses are for 1) possession of a place for trafficking in, selling, or manufacturing a controlled substance; and 2) possession of a place for the same purposes when a minor is present.

Instruction 25.13(f), for owning, leasing or renting a place for trafficking in, selling or manufacturing a controlled substance, modified the comment for lesser included offenses, and added a list of lesser included offenses. A comment was also added, alerting to the possible need of a special instruction regarding the nexus between a conveyance, place, or structure and the drug activity.

Eleventh Circuit Court of Appeals

Martin v. United States, 18-12643 (Feb. 4, 2020)

Martin appealed the denial of a habeas corpus petition in which he alleged that he would not have pled guilty but for counsel's erroneous advice concerning the deportation consequences of his plea. The petition alleged that counsel failed to advise Martin that deportation was mandatory for an aggravated felony conviction.

The plea agreement contained the affirmation that Martin wished to plead guilty "regardless of any immigration consequences," including "automatic removal from the United States." In the plea colloquy, Martin indicated that he understood that a guilty plea "may subject" him to "deportation, exclusion, or voluntary departure."

The district court, for purposes of the claim of ineffective assistance of counsel, assumed that counsel was deficient with respect to the advice given, but found that there was no prejudice. The Eleventh Circuit disagreed with Martin's

argument because the offenses for which he pled guilty – access device fraud and aggravated identity theft, were not "aggravated felonies" and did not make deportation "presumptively mandatory." Because there was uncertainty regarding deportation consequences, "Martin's counsel was required to advise him only that his pending criminal charges may carry a risk of adverse immigration consequences." The offenses at issue may or may not be predicate offenses for aggravated felonies "depending on the amount of fraud loss and the underlying factual circumstances."

Johnston v. Secretary, Florida Department of Corrections, 14-14054 (Feb. 3, 2020)

The Eleventh Circuit affirmed the denial of a petition for writ of habeas corpus and addressed two claims of ineffective assistance of trial counsel.

Johnston first alleged that counsel was ineffective for failing to call a witness, Diane Busch. In this case, Johnston testified at the sentencing hearing and admitted, under penalty of perjury, that he committed the murder. The Eleventh Circuit noted the issue of whether such a confession during sentencing can serve to negate a claim that the guilty verdict was unreliable and fundamentally unfair, but the Court did not reach that question. Based on the facts of the case, which are detailed in the opinion, there was no "reasonable probability that the jury would not have convicted him of murdering Coryell."

The State's theory of the case was that Johnston murdered Coryell to get her ATM card and PIN in order to get money. At a post-conviction evidentiary hearing, Busch testified that Johnston helped her get $10,000 from her house while she was bedridden in the hospital. Johnston argued that this testimony would have negated his motive for the killing: as he had not been desperate for money, he would not have killed someone for money.

At the time of the events with Busch, Johnston was trying to establish a romantic relationship with her; Coryell was a stranger. And, he would have known that he would not have been able to get away with stealing the $10,000 from Busch based on the nature of that $10,000 transaction. Other evidence at trial corroborated that Johnston "did badly need money." This included 53 checks written for insufficient funds during the year of the murder, and Johnston's checkered employment history at that time.

The Court also rejected the argument that counsel was ineffective for failing to call Busch as a witness at the penalty phase for mitigation evidence based on the

help Johnston provided her while she was hospitalized. This evidence paled in comparison to the brutal facts of the murder in this case and the relevant aggravating factors, including an extensive history of violent crimes. Beyond that, the presentation of testimony from Busch would have enabled the prosecution to elicit even more damaging testimony. Busch would have been cross-examined as to extremely unfavorable statements she made to detectives, thereby contradicting the favorable things she would have said about Johnston's good character and nature. The State would also have been able to elicit "why Busch's family had made her cut all of her ties to Johnston." This related to Johnston's "violent past."

First District Court of Appeal

Jarvis v. State, 1D17-4186 (Feb. 6, 2020) (on motion for rehearing)

The Court withdrew its prior opinion and issued a new one. The Court reversed the summary denial of a motion to correct illegal sentence as to one claim, in which Jarvis "argued that all charges arose from a single criminal episode, during which he placed a single bomb that killed one person and injured two others. He asserted that because he committed a single act resulting in the single discharge of a bomb, his consecutive mandatory minimum sentences are illegal." Based on McGouirk v. State, 493 So. 2d 1016 (Fla. 1986), this argument was correct.

Marshall v. State, 1D18-1276 (Feb. 6, 2020)

On direct appeal of convictions and sentences, the defendant attempted to argue that counsel was ineffective on the face of the record as to the failure to object to a lesser-included offense instruction, and to the sufficiency of evidence. While these two underlying claims were also raised in the direct appeal, they were unpreserved, and Marshall did not argue that fundamental error existed as to either of these claims.

On the basis of an earlier concurring opinion of one judge of the First District, the Court now held:

> This argument reveals an issue identified by the concurring opinion in *Latson v. State*, 193 So. 3d 1070 (Fla. 1st DCA 2016) (Winokur, J., concurring). The *Latson* concurring opinion notes that "if the defendant does not properly preserve a claimed error, the only statutorily-authorized basis for appellate relief is a showing that the

> error is fundamental." *Id*. at 1072. "The appellant should not be permitted to circumvent this standard by claiming that the failure to raise issues constitutes ineffective assistance, which entails a different standard that could provide an easier path to reversal, and which deprives trial counsel of the opportunity to defend themselves against allegations of unprofessional conduct." *Id*. at 1074. We agree. Ineffective assistance cannot be claimed as a means to avoid application of the fundamental error standard on direct appeal.

Wingate v. State, 1D18-4157 (Feb. 6, 2020)

The First District affirmed the denial of a suppression motion. Wingate argued that an affidavit on which a search warrant was based lacked sufficient probable cause to support the search.

The Court applied United States v. Leon, 468 U.S. 897 (1984), and found that there was good faith reliance on the warrant and that the exclusionary rule did not apply even though probable cause was lacking. Under Leon, the exclusionary rule does not apply unless the "warrant is so lacking in indicia of probable cause as to render an objective officer's belief in its existence entirely unreasonable." The "so lacking in indicia of probable cause" exception does not focus on the mere insufficiency of the affidavit to support probable cause. This exception applies "only where the 'affidavit is "bare bones," i.e., "it fails to provide a colorable argument for probable cause."'"

The affidavit in the instant case included information "that Wingate was associated with the residence at issue and that Wingate had sold drugs to a confidential informant in a controlled buy at that residence. Considering all of the affidavit's contents, and applying the standards above, we find no basis to conclude that the warrant was so lacking in indicia of probable cause as to render an officer's belief in its existence entirely unreasonable."

The Court disapproved of language in Garcia v. State, 872 So. 2d 326 (Fla. 2d DCA 2004), which appeared to hold, more broadly, that the absence of probable cause to support the affidavit, in and of itself, precludes reliance on the good-faith exception of Leon.

One judge concurred in result only and found that the affidavit did demonstrate probable cause.

Johnson v. State, 1D19-161 (Feb. 3, 2020)

The trial court erred by proceeding to trial with a six-person jury over the defendant's objection. The defendant was charged with first-degree felony murder predicated on aggravated child abuse. Felony murder is a capital felony, for which a 12-person jury is mandated by state statute. The fact that the prosecution waived the death penalty prior to trial did not alter the entitlement to a 12-person jury.

Second District Court of Appeal

State v. Diaz, 2D19-359 (Feb. 5, 2020)

The Second District reversed a downward departure sentence because the statutory reason relied upon was not supported by the evidence.

Diaz was charged with failing to report and reregister as a sex offender and failing to report in person as a sex offender. He entered into a plea agreement which called for a sentencing cap of 107 months, the lowest permissible sentence under the scoresheet. At sentencing, defense counsel requested a downward departure, without specifying any individual statutory factor. The court suggested cooperation with the State because the defendant had made admissions to the charged offenses and did not cause delays through discovery or other extensive litigation. Merely admitting to offenses does not suffice to support the reason.

The trial court had also referred to the reason that the offense "was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse," but the court did not make findings as to this factor. The case was remanded for de novo resentencing.

Baptiste v. State, 2D18-3750 (Feb. 5, 2020)

The Second District reversed the summary denial of one of 15 claims in a 3.850 motion for further proceedings, including leave to amend the 3.850 motion as to the claim at issue.

In that claim, Baptiste alleged "that his trial counsel was ineffective for misinforming him about the terms of the State's plea offer for a total of forty years'

prison time with a fifteen-year mandatory minimum sentence. He claimed that counsel told him that the offer included a forty-year mandatory minimum sentence instead of a fifteen-year mandatory minimum sentence."

The trial court erred in finding that the court record conclusively refuted the claim. "Its consideration of the State's after-the-fact withdrawal of the offer on the morning of trial had no bearing on whether the State would have withdrawn its offer before Mr. Baptiste rejected it at the pretrial hearing."

William v. State, 2D18-2813 (Feb. 5, 2020)

A conviction for theft was reversed because the evidence was insufficient to prove intent to either deprive the victim of the property or to appropriate the property to the defendant's own use. The facts of the case are not set forth in the opinion.

Eylward v. State, 2D18-2169 (Feb. 5, 2020)

The Second District affirmed a conviction for exploitation of the elderly, but reversed, on the State's cross-appeal, as to the trial court's failure to require payment of any restitution. The trial court had refused to require restitution because the jury's verdict was for the range of anywhere between $20,000 and $100,000, and the judge concluded that the jury therefore did not find any specific amount.

The trial court misunderstood its role in the restitution process. Absent compelling reasons not to impose restitution, the trial court is "required to resolve any dispute about the amount of restitution to be paid."

Bauman v. State, 2D18-1594 (Feb. 5, 2020)

The trial court erred in denying a motion to suppress evidence because law enforcement lacked a lawful justification for stopping the car in which Bauman was riding.

Law enforcement responded to a dispatch to investigate an incident at a McDonald's parking lot, in pre-dawn hours, as to a woman in a dark SUV yelling for someone to "call the police." Officers responded within three to five minutes. Only one car in the lot might have matched the description of a dark SUV, and it was leaving the lot. An officer activated emergency lights and stopped the vehicle, solely on the basis of the anonymous tip preceding the dispatch call. While speaking to Bauman, who was in the front passenger seat, through the front passenger

window, the officer saw a needle and spoon in plain view in a purse next to Bauman's leg. In a subsequent search of the car, a container with methamphetamine was also found.

The anonymous tip, standing alone, was an insufficient basis for stopping the vehicle; it required corroboration through the officer's own observations. Additionally, there was no basis for a "welfare check" by the officer based solely on an ambiguous request conveyed in the anonymous tip.

Jackson v. State, 2D17-4283 (Feb. 5, 2020)

An order revoking probation was affirmed, but remanded for corrections to the order. The trial court found that the defendant violated probation by committing a new offense, an assault. However, the affidavit of violation of probation did not allege that Jackson committed an assault. Revocation of probation cannot be based on conduct not charged in the affidavit alleging the violation.

The trial court also found that Jackson violated probation for "failing to comply with his probation officer's order that he not have contact with two individuals." "While 'a probation officer may give a probationer routine supervisory directions that are necessary to carry out the conditions imposed by the trial court . . . an instruction that essentially imposes a new condition of probation is not a routine supervisory direction and cannot support a finding that the probationer is in violation.' . . . The officer's 'no contact' order essentially imposed a new condition of probation that went beyond a routine supervisory instruction."

Powers v. State, 2D17-4237 (Feb. 5, 2020)

Powers was convicted of four counts of exploiting his elderly parents. Two of the convictions resulted in a double jeopardy violation.

"In determining whether multiple convictions based on the same conduct constitute a violation of double jeopardy, an appellate court may consider only the charging document, not the entire record. . . . Here, count one . . . charged Powers with exploitation of the elderly under section 825.103(1)(a), which requires proof of obtaining property from an elderly person with the intent to deprive the person of the asset. Count two charged exploitation of the elderly under section 825.103(1)(c), which requires proof that a person breached a fiduciary duty to an elderly person by making an unauthorized appropriation, sale, or transfer of property. Both counts involve the same time period and concern the same bank accounts. Because the

information does not reflect that count one is based on conduct separate and distinct from count two, convictions for both offenses violate double jeopardy." Two other counts related to the "conveyance of the same real property" and likewise did not constitute separate crimes and the dual convictions resulted in a double jeopardy violation.

Larocca v. State, 2D19-3028 (Feb. 7, 2020)

The trial court failed to conduct a required inquiry pursuant to Faretta v. California, "before ruling on [the defendant's] motion to withdraw pleas." After sentencing upon negotiated pleas, the defendant "filed a pro se motion to dismiss his counsel and a pro se motion to withdraw his guilty pleas in which he alleged that he entered the plea under duress and that his counsel did not explain the terms of the plea agreement, including the sentences." Trial counsel was permitted to withdraw and Larocca "declined the court's offer to appoint counsel to represent him on the motion to withdraw his pleas."

At a subsequent hearing, Larocca decided to accept the offer of appointed counsel. Larocca was not in court due to a transportation issue. An unidentified person told the court that Larocca refused the appointment of counsel. A different judge from the prior hearing stated that the court could determine whether to appoint conflict counsel. At the next hearing on the motion to withdraw pleas, there was no inquiry about the defendant's pro se status and no Faretta inquiry regarding the desire to proceed pro se. The defendant represented himself and the court denied the motion.

"'A motion to withdraw a plea is a critical stage of the proceedings at which a defendant is entitled to be present and to have counsel represent him.'"

Third District Court of Appeal

Martinez v. State, 3D18-1863 (Feb. 5, 2020)

Martinez challenged his sentence for vehicular homicide and driving without a license resulting in death. The Third District reversed because the trial court "imposed a second increased sentence after [Martinez] commenced serving a previous sentence, in violation of the double jeopardy clauses of the Constitutions of the United States and the State of Florida."

Martinez pled guilty to the charges and was sentenced as a youthful offender to 364 days of incarceration, to be mitigated upon completion of a boot camp program. The jail term would then be followed by extended supervision. Martinez enrolled in boot camp, but was deemed unsuitable for it, purportedly as a result of injuries he sustained in the prior accident. He then filed a motion seeking to proceed to the 364 days in jail. The trial court vacated the original sentence and sentenced Martinez to three years' incarceration plus three years on probation.

"'Once a sentence has been imposed and the person begins to serve the sentence," "the later imposition of more onerous terms 'violations the double jeopardy clause . . . when it disrupts the defendant's legitimate expectations of finality.'" The primary exception to this general rule is that harsher resentencing is not barred when the defendant does not have a reasonable expectation of finality in the original sentence. Another exception exists when the original sentence is procured by fraud or deceit.

None of the exceptions to the general principles were applicable. The State argued that there was fraud or deceit as to the original sentence, but the Third District found that there was no evidence to support that.

Kitchen v. State, 3D19-1722 (Feb. 5, 2020)

The Eleventh Judicial Circuit lacked authority to entertain a habeas corpus petition seeking post-conviction relief as to convictions and sentences from cases in the Eighteenth Judicial Circuit. Only the Eighteenth Judicial Circuit could consider such post-conviction challenges to its convictions and sentences.

Watkins v. State, 3D19-1729 (Feb. 5, 2020)

"[I]f the trial court chooses to impose a sentence beyond the selected mandatory minimum sentence pursuant to the 10-20-Life statute, additional statutory authority is required."

Fourth District Court of Appeal

Moore v. State, 4D18-1083 (Feb. 5, 2020)

A conviction for burglary was reversed because the defendant's confession was involuntary and should have been suppressed.

"The officers gave constant offers of unspecified help when they were requesting information from appellant, told appellant that the interview was his 'only chance' to come clean so that they could tell the judge about his cooperation, warned appellant that the guys who say things like 'I don't know what you're talking about' do worse in court, and even implied significant authority to amend the charges." The officers implied "that it would benefit him to 'come clean' or that it would be worse for him if he denied culpability." "One detective told appellant that 'this is the one and only chance you get' if appellant wanted the detective to tell the judge about his cooperation."

Almodovar v. State, 4D19-620 (Feb. 5, 2020)

The trial court erred in denying a motion for discharge under the speedy trial rule. "Between the time of filing of the notice of expiration and the filing of the motion to discharge, the circuit court did not set a hearing in response to the notice. The state did not alert the judge to the existence of the notice."

After the filing of the notice of expiration, a hearing must be held within five days and the trial within 10 days thereafter. Once the recapture window expired, "the circuit court was precluded from making a finding of defendant's unavailability for trial. . . . Contrary to the ruling of the trial court, appellant's failure to serve a copy of the notice of expiration was not a violation of Rule 3.191 that would support denial of the motion for discharge."

Mathieu v. State, 4D19-1029 (Feb. 5, 2020)

The summary denial of two claims of ineffective assistance of counsel "related to appellant's rejection of a favorable plea offer" was reversed for further proceedings because the records attached to the trial court's order did not conclusively refute the claims.

The defendant was alleged to have violated probation by committing the new offense of domestic battery, and he was charged with that new offense as well. He rejected plea offers to resolve both cases and was ultimately sentenced to terms of 15 and ten years for the two cases. The defendant alleged "that he rejected the plea because counsel assured him that the victim would not appear at the VOP hearing and that the state could not prove its case with hearsay and without her presence." He also alleged that "counsel misadvised him that the trial court could not impose consecutive sentences following the VOP, as it did, because his original sentences were concurrent."

Genovese v. Inch, 4D19-3000 (Feb. 5, 2000)

A habeas corpus petition in the trial court is unauthorized when it is used to challenge a conviction entered by another circuit court.

Fifth District Court of Appeal

Pacheco v. State, 5D19-818 (Feb. 7, 2020)

The trial court abused its discretion in denying a request for appointment of counsel as to one claim in a Rule 3.850 motion. The facts of the case are not provided, but citations to two prior decisions reference a defendant's low level of education, inability to articulate positions, and the need to introduce medical records and expert testimony at an evidentiary hearing.

Young v. State, 5D19-1879 (Feb. 7, 2020)

Young entered a plea to the charge of burglary of a dwelling and grand theft of firearms. At the subsequent restitution hearing, the court heard evidence of the theft of a trailer and ordered restitution for it; the trailer had been used as a tool shed. The restitution order was reversed and remanded for a new hearing because Young was not charged with the theft of the trailer and it was not listed in police reports or noted in any pretrial discovery.

Cherizard v. State, 5D19-3705 (Feb. 7, 2020)

Home-invasion robbery with a firearm is a first-degree felony. It cannot be reclassified on the basis of the firearm because the firearm is an essential element of the offense.

Kendall v. State, 5D20-0270 (Feb. 6, 2020)

A habeas corpus petition was granted because the State did not seek pretrial detention and Kendall was not charged with a capital felony or a felony punishable by life. The State was granted leave to file a motion for pretrial detention on remand.