Case Law Update
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Supreme Court of Florida

Cannon v. State, SC19-84, SC19-727 (Feb. 13, 2020)

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

Trial counsel was not ineffective for failing to object when an officer identified Cannon in a surveillance video. The officer participated in the search for Cannon after the murder being prosecuted. That officer "testified that he went to a gas station, where an attendant showed him a surveillance video." When the video was played for the jury, the "officer identified Cannon in the video, testifying, 'That's Marvin Cannon. I recognize him. He has been personally familiar to me for a number of years.'"

At an evidentiary hearing, trial counsel testified that he did not object because the officer said that he knew Cannon "personally," and that this occurred in a small community, where "people knew each other. He did not interpret the statement to mean that the officer knew Cannon from prior criminal incidents." The Supreme Court found that counsel was not deficient for failing to object because, "[o]n its face and in context, the officer's testimony did not imply that Cannon had a criminal background."

Trial counsel was not ineffective for failing to object to an alleged burden shifting argument by the prosecutor in closing argument. The State's theory of the case was that the defendant lured the victims to a remote property to sell them deer corn, and the State argued that the absence of corn on the property was evidence of Cannon's intent. Defense counsel argued, in closing, that the deer corn could have been on the property at the time of the incident and could have been missed during the investigation because it was dark at the time. On rebuttal, the prosecutor noted that the first officer to search did so during daylight hours. The prosecutor then continued to address the significance of the defense's presentation of the defendant's father as a witness: "Did you hear [him] testify, oh yeah, there was corn out there; they just didn't see it. That's where I put corn. Did [he] say anything like that, that

I store corn at this location." "This argument simply pointed out the lack of evidence to support the alternative theory put forth by the defense, which is permissible."

Cannon argued that counsel was ineffective for allowing "pervasive themes of religious retribution throughout the trial," in voir dire, during the presentation of a defense witness, and in closing argument. A comment made during the penalty phase closing argument was moot because the trial court had vacated the death sentence and Cannon could not establish prejudice.

Several venire members engaged in discussions of the "biblical concept of 'an eye for an eye.'" Some of the jurors said they could not put their religious views aside and follow the law; they were stricken. "It was not improper for counsel during voir dire to probe whether any potential jurors held religious beliefs that would preclude them from following the trial court's instructions on the law. . . . And there is no reasonable probability that the prosecution's fleeting biblical allusion at closing affected the jury's verdict. Specifically, we see no danger that any religious-oriented comments diminished the jury's sense of responsibility for its verdict or caused the jury to base its decisions on religious authority rather than on the trial court's instructions."

Prior appellate counsel was not ineffective for failing to raise a Melbourne argument regarding a discriminatory peremptory challenge on direct appeal. After the initial objection, there was no renewal of the objection before the jury was sworn. The claim was therefor unpreserved and would have been procedurally barred on appeal. The Court rejected the argument that trial counsel renewed the objection when counsel asked the court to reopen voir dire. That was not sufficient to alert the trial court judge that counsel wanted to renew an objection as to the prior granting of a peremptory challenge.

Doty v. State, SC18-973 (Feb. 13, 2020)

The Supreme Court affirmed the sentence of death imposed at a resentencing proceeding.

The Court reiterated its recent holdings that determinations "that the aggravating factors were sufficient to warrant a death sentence and that they outweighed the mitigating factors," were not subject to the beyond a reasonable doubt standard of proof.

The Court further found that the sentence was proportionate in comparison to other capital cases, reiterating its conclusions regarding the same issue from the original direct appeal after the first imposition of the death sentence. The trial court found the existence of three aggravating factors: 1) serving a life sentence for a prior murder at the time of the murder of a cellmate, the victim in the this case; 2) previously convicted of another capital felony, the prior murder; 3) the killing was cold, calculated and premeditated. There was "significant mitigation, including an uncontested mental illness he had since childhood."

Mungin v. State, SC18-635 (Feb. 13, 2020)

The Supreme Court affirmed the denial of a third successive Rule 3.851 motion. The claims were untimely, filed more than 20 years after the finality of the judgment and sentence, and they were discoverable through due diligence more than a year before the Rule 3.851 motion was filed.

The source of the claim of new evidence was a deputy who "was a known witness who was available to the defense since Mungin's 1997 trial." That deputy was also "Mungin's close friend and former wrestling partner. He visited Mungin in prison and wrote him letters. . . . [H]e had been in contact with the defense team 'over the last twenty years on and off' . . . ."

First District Court of Appeal

Earley v. State, 1D19-168 (Feb. 10, 2020)
Rogers v. State, 1D19-878 (Feb. 13, 2020)
Melton v. State, 1D19-1286 (Feb. 13, 2020)

The trial court lacked jurisdiction to "rescind an order granting resentencing once it became a final, appealable order, and neither party timely moved for rehearing of the order."

State v. Jackson, 1D19-2570 (Feb. 12, 2020)

The First District denied a petition for writ of certiorari to review "an order of the trial court denying the State's motion for production." The State "sought swabs of a fire extinguisher made by a DNA analyst hired by the defense as well as the identity of the analyst." The State failed to demonstrate a departure from the essential requirements of law, as the trial court's order was "consistent with rule 3.220(d)(1)(B) and 3.220(g), . . . regarding a defendant's discovery obligations for

'material that is in the defendant's possession or control' and establishing a work product privilege."

Bracht v. State, 1D19-2464 (Feb. 12, 2020)

In a Rule 3.800(a) motion to correct illegal sentence, Bracht argued that his three-year mandatory minimum term was illegal because he constructively, rather than actually, possessed the firearm." A challenge to the factual basis – possession of a firearm – of the mandatory minimum sentence is not cognizable in a Rule 3.800(a) motion.

Scott v. State, 1D19-1987 (Feb. 13, 2020)

"[H]abeas corpus is not a means to litigate issues that could have been or were raised in a direct appeal or postconviction motion."

Williams v. State, 1D19-1334 (Feb. 12, 2020)

The First District affirmed the summary denial of multiple claims in a Rule 3.850 motion.

In one claim, Williams argued that counsel was ineffective for not calling a firearms expert to challenge the State's theory about the location of the shooter and the identity of the shooter. This claim failed because Williams was charged as a principal and the evidence was still sufficient to convict him as a principal regardless of the location and identity of the shooter.

Cameron v. State, 1D18-1368 (Feb. 12, 2020)

The State presented sufficient evidence to establish the "putting-in-fear element of robbery."

The victim noticed the defendant exiting a store without paying and asked for a receipt. The defendant "responded by saying either 'all right, young man, don't get shot,' or 'don't walk up on me"' At the same time Appellant said this, he looked down at his hip." The victim never saw a firearm. "Appellant's statement to the victim along with his gesture to his hip, are circumstances that would induce fear in the mind of a reasonable person."

Second District Court of Appeal

Way v. State, 2D17-4369 (Feb. 12, 2020)

The Second District reversed and remanded for a new Stand Your Ground immunity hearing based on Love v. State, in which the Florida Supreme Court recently held that the statutory amendment, in 2017, to the burden of proof for the immunity hearings, applied to all hearings conducted on or after the statute's effective date.

Montgomery v. State, 2D18-1119 (Feb. 12, 2020)

On appeal from a conviction and sentence for aggravated battery, Montgomery challenged the jury instructions and argued that "the trial court erred in permitting the victim to testify regarding injuries caused" by his codefendant. The Second District reversed the conviction for aggravated battery.

The trial court erred in giving the principals instruction, as it was not supported by the evidence:

> The uncontroverted evidence established that Montgomery held a box cutter in his hand at the time of the trespass, that he initiated contact with the victim by approaching him and waiving [sic] the box cutter around, and that he still held the box cutter at the time of the first physical altercation in the median. The first physical altercation ended after Montgomery had cut the victim's side, the victim had strong armed Montgomery into releasing his grip on the box cutter, the nephew had removed the box cutter, and Godwin had assisted in breaking Montgomery and the victim apart. Godwin and Montgomery then walked to a different location but within the immediate area of the convenience store (the intersection). The uncontroverted evidence also established that upon discovering that he had been "sliced," the victim sought revenge and he "charged" at Montgomery. The two engaged in a physical altercation, but no weapons were involved. The victim was on top of Montgomery when he felt pain in his back; Montgomery then took control of the fight. It was not until after the two

> had been separated again and the victim had reviewed the video footage from the convenience store that the victim realized he had been stabbed in the ack by Godwin. The victim testified that he did not recall Montgomery asking Godwin for help.

After sorting out the distinct aspects of the altercations, the Court went on to conclude that the "evidence does not establish that Montgomery knew Godwin was armed, and there is no evidence that Montgomery intended for Godwin to commit the offense and did some act that assisted Godwin in actually committing it." And, as to the battery leading up to the stabbing, "even if the State's evidence could be viewed as establishing that Montgomery intended for the aggravated battery to occur subsequent to his loss of the box cutter, the physical altercation that occurred virtually simultaneously with the stabbing does not meet the requirements for giving the principals instruction. There is no evidence that Montgomery and Godwin were 'act[ing] in concert to commit' the battery." Additionally, the giving of the principals instruction could not be based on acts committed by Montgomery after the stabbing by Godwin.

Additionally, because the principals instruction regarding Godwin's stabbing of the victim was erroneous, it followed that the trial court erred in permitting the victim testify about the injuries sustained from that stabbing.

The court also erred as to the giving of the forcible felony instruction following the justifiable use of nondeadly force instruction. That instruction provides that the use of such force is not justified if the defendant "was attempting to commit, committing, or escaping after the commission of a[n] [applicable forcible felony)." The applicable forcible felony must be one that is independent of the charged offense. Trespass is not a felony and armed trespass is not a forcible felony. And, Montgomery was not claiming the justifiable use of force based on a trespass, but on a battery, and at the time of the battery, neither he nor the victim were on store property.

Alford v. State, 2D18-1324 (Feb. 12, 2020)

A conviction for attempted first-degree murder was reversed because the State presented inadmissible evidence "of Alford's move to Pennsylvania as consciousness of guilt without establishing a nexus between the move and the specific crime charged." Alford continued living in Florida for about two months after the offense before moving to his aunt's house in Pennsylvania. He did not

know there was a warrant for his arrest until about eight months later, at which time he turned himself in to the police.

Third District Court of Appeal

Martin v. State, 3D16-1539, et al. (Feb. 12, 2020)

Martin appealed his revocation of probation. The Third District affirmed and found that the evidence was sufficient to prove that Martin had knowledge, dominion and control over a firearm, sword and marijuana and the room where those prohibited items were found. "He wore a key around his neck that unlocked the door to that room; and his wallet and his shirt, with the label 'Creepa' identical to the tattoo on his chest, were found in that room. The testimony regarding joint occupancy of that room came from Martin's mother and her daughter, with no corroboration via their clothing or other personal items in the room."

In 2013, the court had orally pronounced a probation term resulting from a plea colloquy, but the probation term was omitted from one count. That omission was repeated, in 2014, when Martin pled to a violation of probation. The trial court issued a clarification order in 2015 to conform the written judgment and sentence to the plea agreement. As a result of these acts, Martin argued, as to this count, that the court lacked jurisdiction to revoke probation and impose a new sentence; and that the new sentence, a harsher sentence, resulted in a double jeopardy violation. The Third District disagreed. The trial court's 2015 order correcting the sentence was clerical in nature, conforming the written sentence to the oral pronouncement.

Pena v. State, 3D18-1504 (Feb. 12, 2020)

Pena appealed convictions for first-degree felony murder and other offenses. The Third District affirmed, finding that the State presented sufficient direct evidence to withstand a motion for judgment of acquittal and that a text message between the defendant and a codefendant, one day before the offenses, was admissible.

Pena argued that the evidence was entirely circumstantial and that the State failed to rebut "his reasonable hypothesis of innocence that Jones [the codefendant] acted independently in robbing and stabbing Lopez-Garcia." The Third District found that the circumstantial evidence standard of review was inapplicable because the State presented a combination of circumstantial and direct evidence:

> Pena and Jones rented a silver Chevrolet Impala on the morning of Lopez-Garcia-s murder – the vehicle that police later identified as a vehicle parked in Lopez-Garcia's driveway around the time of his murder. Pena admitted that he set up the drug deal with Lopez-Garcia and that he personally drove himself and Jones to Lopez-Garcia's house in the rented car. Video surveillance shows the driver and passenger of the silver Impala exiting the vehicle and entering Lopez-Garcia's house several times. In Lopez-Garcia's final phone calls to his girlfriend and 911, he clearly states "they" beat him up and had taken everything. Furthermore, the text messages between Pena and Jones in the days preceding the robbery and murder evince an intent to rob him. Specifically, Pena told Jones that he "found how to post without having to pay" and they discussed obtaining a taser.

There was no abuse of discretion in admitting the text message exchange "with Jones regarding obtaining a taser for the drug deal. The messages were not, as Pena alleges, character evidence. The text message from Jones and Pena's affirmative response were relevant and highly probative to demonstrate their intent to rob Lopez-Garcia at the time of the arranged drug deal."

H.R. v. State, 3D18-2248 (Feb. 12, 2020)

H.R. appealed an adjudication of delinquency for committing the delinquent acts of activating a fire alarm without reasonable cause and resisting an officer without violence. H.R. challenged the sufficiency of evidence only as to the charge of resisting without violence. "He asserts, for the first time, that Officer Lopez could arrest H.R. for the fire alarm charge only if it was committed in the presence of Officer Lopez [because it was a misdemeanor]; and because it was not committed in the officer's presence, the officer's arrest of H.R. was unlawful and H.R. could lawfully resist such an arrest without violence."

The Court found that the claim was not preserved for appellate review and did not constitute fundamental error. In F.B. v. State, 852 So. 2d 226 (Fla. 2003), the Supreme Court held that an unpreserved claim that a motion for judgment of acquittal should have been granted generally did not constitute fundamental error and therefore could not be raised on appeal. One of the two exceptions to that

general rule occurs "when the evidence is insufficient to show that a crime was committed at all."

The Third District noted that there had been some uncertainty in Florida case law regarding the meaning of this exception – i.e., whether it applied where the State failed to establish the charged offense; or whether it applied where the State failed to establish that any crime was committed. That question was resolved in Monroe v. State, 191 So. 3d 395 (Fla. 2016), where the Supreme Court held that this exception "applies only where the evidence fails to establish any crime was committed."

Applying that standard, H.R. could not rely on the doctrine of fundamental error to present the unpreserved claim because the evidence did demonstrate the delinquent act of assault. The affirmance of the adjudication of delinquency was without prejudice to asserting a claim of ineffective assistance of trial counsel on collateral review.

Moore v. State, 3D19-1466 (Feb. 12, 2020)

During a misdemeanor trial in county court, the judge ordered the defendant's husband to exit the courtroom because he was going to be tried separately for his alleged involvement in the same offense. Moore argued that the removal of her husband violated her right to a public trial under the Sixth Amendment. She appealed to the circuit court, which affirmed her convictions. She then sought certiorari review in the Third District, which denied the petition.

The standard for closure of a courtroom differs, depending on whether the closure is partial or total. If total, the party seeking closure must advance an "overriding interest that is likely to be prejudiced." If partial, a more relaxed standard, a "substantial reason," is applicable. The Third District concurred with the circuit court's analysis and rejected Moore's argument that the Supreme Court of Florida, in Kovaleski v. State, 103 So. 3d 859 (Fla. 2012), had mandated the use of the more stringent standard for a partial closure. In that case, the Supreme Court was addressing an issue that arose under section 918.16(2), Florida Statutes, when the trial court is hearing testimony from a sexual abuse victim. The instant case did not involve testimony from such a victim, that statute did not apply to the instant case, and the Supreme Court's decision in Kovaleski was limited to cases arising under that statute and did not alter the Sixth Amendment constitutional analysis applicable to other cases.

Fourth District Court of Appeal

Radler v. State, 4D18-1737 (Feb. 12, 2020)

The Fourth District reversed a conviction for misdemeanor battery because the trial court refused to "(1) instruct the jury on the justifiable use of non-deadly force; and (2) permit a proffer of evidence."

The Court found that there was some evidence to support the giving of the requested instruction. The defendant's version of events was that he was trying to intervene when he saw two women (his girlfriend and the victim's sister) engaged in acts that were hurting a dog. An argument then ensued between him and the victim's sister. She said she was going to call her brother. The defendant left, saying that he wanted to avoid a conflict. He then saw the woman using her cellphone. While the defendant was walking away through a parking lot, he saw the victim approach. He told the victim to stay away, assuming he was the brother of the woman. The victim, who was about 5'11" and weighed about 270 pounds, continued approaching. When the victim was an arm's length away and the defendant was "cornered," the defendant insisted that the victim leave him alone. The victim then "took a stance like he was squaring off." The defendant further described the victim's gestures and motions and gave an in-court demonstration. The defendant admitted that he never saw the victim raise a hand or arm as if to strike him and a weapon was never observed. The Fourth District found that this version of the "combination of activity leading up to and occurring immediately before Defendant punched Victim . . . presented sufficient evidence to reasonably suggest that non-deadly force was needed for self-defense" and it "was for the jury to decide if Defendant's fear of harm was reasonable."

The trial court also refused to entertain a proffer as to what he observed when he was leaving his girlfriend's hotel room, when he saw her with the victim's sister. The "trial court improperly assumed any further evidence of what Defendant saw and heard as he was leaving his girlfriend's room was irrelevant."

Kitchings v. State, 4D18-1929 (Feb. 12, 2020)

The Fourth District reversed convictions for sexual battery, burglary and false imprisonment because "the trial court improperly refused to allow the defense to introduce Kitchings' initial statement to the police to rebut an implied charge of recent fabrication" and "the court improperly admitted the entirety of one of M.R.'s previous statements into evidence."

During cross-examination of the defendant, the prosecutor focused on inconsistencies between his police interview and trial testimony. This included multiple questions which the Fourth District described as misleading the jury, by taking words out of context, mischaracterizing what was said in the pretrial statement, suggesting facts not in evidence, and impeaching as to matters in trial testimony that were omitted from the pretrial statement. On redirect examination, defense counsel sought to introduce the entire pretrial statement to the police based on the rule of completeness. After that was denied, counsel sought to admit it to "rebut the State's implication of recent fabrication based on Kitchings 'ha[ving] the opportunity to see all of the things in court.'" That, too, was denied.

Although the statement was not admissible under the rule of completeness, because the State did not introduce any of his statement to the police into evidence, it was admissible to rebut an express or implied charge of recent fabrication. The prosecutor had questioned the defendant, emphasizing his ability to sit through, see and hear every witness in the case. That "line of questioning amounts to an implied charge of recent fabrication."

The trial court did not err in excluding defense-proffered evidence of a New York incident in which the victim alleged a rape. As a result of "gaps in the New York story, the proffered evidence of the New York incident did not have a logical tendency to prove that M.R. had a financial motive to lie about her contact with Kitchings in this case." Significant differences were noted: "The New York case involved excessive physical violence; this case did not. The New York case targeted a man of some means; the defendant in this case was an Uber driver. In the New York case, M.R. met the defendant through a dating website for 'sugar daddies' and 'sugar babies;' after texting each other for a week, the two connected for a dinner date. Here, there was no such targeting. M.R. hired an Uber to take her home, and the defendant just happened to be her Uber driver."

The trial court also erred in admitting an entire recorded statement of the victim, M.R., to rehabilitate her testimony. There was no basis for its admission to rebut an express or implied charge of improper influence, motive or recent fabrication. "The entire defense in this case was that M.R.'s fabrication was *not* recent, that it began when she first contacted the 911 operator, so section 90.801(2)(b) would not apply to admit the prior statement as substantive evidence."

While a prior consistent statement may be admissible as non-hearsay "'if it has some value as rebutting [a] prior inconsistent statement used for impeachment,'"

this evidentiary rule is very narrow. Cases interpreting it have held that the "particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" And, it is only the "particular" consistent statement that is admissible, not the entire statement.

Key v. State, 4D19-1233 (Feb. 12, 2020)

Section 921.0016(3)(r), Florida Statutes, "permits an upward departure from the sentencing guidelines when the 'primary offense is scored at offense level 7 or higher and the defendant *has been convicted* of one more offense that scored, or would have scored, at an offense level 8 or higher." In this case, the Fourth District agreed with Key that the highlighted language, "has been convicted" of, refers to prior convictions. In this case, the trial court found that in addition to the primary offense for which Key was being sentenced, the scoresheet included two "additional offenses" that were before the court for sentencing, and that they were level 8 or higher. As those "additional offenses" were not "prior convictions," the lower court could not rely on them to support the upward departure reason.

Saye v. State, 4D19-2932 (Feb. 12, 2020)

The intent of a plea agreement was frustrated when the defendant "was not transported to federal custody after sentencing." As a result, he would be required "to complete his sate sentences before being transferred to begin serving his federal sentences." The negotiated plea contemplated that the state sentences would be concurrent with a lengthier federal sentence.

Under such circumstances, the defendant was entitled to postconviction relief. The trial court was ordered to "'vacate the sentence already imposed and provide instead either that the sentence be suspended under the rule that this may be permitted in extraordinary circumstances like these, or, at the appellant's opinion, to enter a sentence of 'time served' or simply permit him to withdraw his plea."

Fifth District Court of Appeal

State v. Bush, 5D18-3987 (Feb. 14, 2020)

The trial court, after an evidentiary hearing on a rule 3.850 motion, granted a new trial on the basis of two claims. The State appealed and the Fifth District

reversed the lower court's order. Bush appealed as to the denial of other claims in his motion. The Fifth District affirmed the lower court's denial of those claims.

The trial court granted a new trial on the basis of a claim that counsel was ineffective for failing to object to prejudicial evidence "regarding Bush's prior career as a pharmaceutical salesman" and letting that evidence become a feature of the trial. Bush was being prosecuted for capital sexual battery, lewd or lascivious molestation, and battery. The victims involved his daughters. The State presented evidence that Bush laced one victim's ice cream with a paralytic before committing a sexual battery. Bush did not demonstrate prejudice as to this claim. This evidence pertained to a count for which the jury rejected the sexual battery charge and returned a verdict for the lesser offense of simple battery. "The jury clearly rejected D.B.'s contention that Bush drugged and sexually battered her."

The trial court also found that "counsel was ineffective for failing to present evidence from D.B. that would have called into question the reliability of the testimony of N.B., the other victim, and C.B., Bush's oldest daughter. During a recorded interview with law enforcement, D.B. said that her sisters had confided in her that they could not remember Bush abusing them." These statements might have been admissible as impeachment evidence, as prior inconsistent statements. However, trial counsel explained that he did not use D.B.'s interview because "he believed D.B.'s statements suggested N.B. and C.B. did not *want* to remember the abuse, not that they *could not* remember it." This was deemed to be a reasonable tactical strategy on the part of trial counsel and counsel was therefore not ineffective.

The appellate court's opinion did not address Bush's other claims, which the trial court had rejected.

State v. Cowart, 5D19-681 (Feb. 14, 2020)

The Fifth District reversed an order dismissing an information charging the defendant with sending a written threat to kill or do bodily injury to a child.

"Cowart, a former student at North Marion High School ("NMHS"), sent a Snapchat photograph ('the Snap') to Z.M., a current student a NMHS, which depicted a scoped AR-15 rifle with an extended, large capacity magazine and had the caption, 'Show and Tell @NM on Monday.' Z.M. saved the Snap and reposted it on his own Snapchat account." Cowart argued that the Snap "did not specifically threaten to kill or do bodily harm to Z.M. or any member of his family."

The State filed a traverse, adding that "Z.M. testified under oath that he was a student at NMHS, he did not take the Snap as a joke, he felt on edge and concerned after receiving the Snap, and the recent school shootings across the United States made him feel more on edge. . . ."

The primary issue on appeal was whether the most favorable construction of the facts established a prima facie case of guilt, including the required element of the existence of a threat. The facts described above did enable a reasonable jury to "find that Cowart threatened Z.M. because the State made a prima facie showing that the Snap was 'sufficient to cause alarm in reasonable persons.'"

Hodges v. State, 5D19-2089 (Feb. 14, 2020)

The trial court erred in denying a motion to withdraw without an evidentiary hearing. The motion alleged that prior to sentencing, Hodges' attorney said that he would receive time served. He was then sentenced to 3 ½ years in prison.

The Fifth District's opinion does not provide details as to what was stated during the plea colloquy, but characterizes it as being "sufficient to state that defense counsel's recitation of the sentence to be imposed . . . was not a model of clarity." And, the written plea agreement was found to support Hodges' claim. When "a plea agreement calls for a specified sentence and the trial court determines to impose a greater sentence, the defendant has the right to withdraw." The case was remanded for an evidentiary hearing.

McGhee v. State, 5D19-2265 (Feb. 14, 2020)

The trial court denied multiple claims of a Rule 3.850 motion without an evidentiary hearing. The Fifth District reversed and remanded as to two of those claims, with instructions to hold an evidentiary hearing.

In one of those claims, McGhee argued that counsel was ineffective for failing to request a limiting instruction that his girlfriend's prior written statement, which was admitted as a prior inconsistent statement, could be considered only as impeachment evidence, not as substantive evidence of guilt. The lower court found that McGhee had not demonstrated prejudice. The Fifth District found that the record attachments did not conclusively refute the claim.

One of the charges for which McGhee was convicted was burglary. McGhee argued that he was residing with his girlfriend at the time. The prior inconsistent

statement, without the jury instruction, enabled the State to argue, as substantive evidence, that McGhee was not residing there at the time.

In another claim, McGhee argued that counsel was ineffective "for failing to request that the court instruct the jury with the optional portion of standard Jury Instruction 13.1 which, pertinent here, provides that in order to find a defendant guilty of burglary, the jury must find that the defendant was not licensed or invited to enter the structure." Again, his defense was that he was so licensed to enter because he lived there with his girlfriend. As there was conflicting evidence as to whether the defendant resided with his girlfriend at the time, the record attachments did not refute this claim; nor did they establish a strategic reason for not requesting the instruction.