Case Law Update
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Supreme Court of Florida

Bright v. State, SC17-2244 (Apr. 2, 2020)

Bright appealed from the imposition of two sentences of death after a resentencing hearing at which the jury unanimously recommended the death sentences; the Supreme Court affirmed the sentences.

As to one of the two murders, the jury unanimously found the existence of two aggravating factors – previous conviction for a prior capital felony or felony involving the use or threat of violence; and heinous, atrocious and cruel. As to the second, the jury found a single aggravating factor – previous conviction for a prior capital felony or felony involving the use or threat of violence. The trial court's order similarly found the existence of the same aggravating circumstances.

Pursuant to the Court's recent decisions in Poole v. State and Rogers v. State, the Court found that the trial court did not err "by failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravating factors were sufficient to impose a sentence of death and whether those factors outweighed the mitigating circumstances."

The Court rejected multiple challenges to comments made by the prosecutor during closing argument as to which no objections had been made. The prosecutor did not tell the jury to ignore mitigating evidence of the defendant's childhood abuse. Rather, the prosecutor told the jury that such evidence is properly considered as mitigation, but that the jury's decision should not be based on sympathy: "Your decision should not be influenced by feelings of prejudice or by racial or ethnic bias or sympathy. That's not a basis for your decision, that he was abused, et cetera. No. you cannot have sympathy for that in terms of – it's mitigation or aggravation."

It is "improper for a prosecutor to assert in closing argument that it is a juror's duty under the law to vote for a sentence of death rather than life." In this case, the prosecutor argued: "And by the way, as we stressed about in jury selection, you're never compelled to actually vote for death. But I would submit to you that this is the case that you should in terms of following the law." This comment, as to what

the juror's "should" do, "did not imply that they were required by law" to vote for death. "Indeed, immediately before the comment, the prosecutor correctly told the jurors that they are never compelled to vote for death."

The prosecutor misstated the burden of proof when stating that mitigation had to be proven by a "reasonable certainty." The correct standard is that a mitigating factor exists when it is established by the greater weight of the evidence. This error was not fundamental, as it was not repeated and the court properly instructed the jury on the burden of proof.

The prosecutor also referred to some evidence of mitigation as something that the defendant "should get credit" for. The Supreme Court viewed the defendant's challenge to this comment as saying that the jury was told that "the process of weighing aggravating factors and mitigating circumstances is a quantitative analysis." The Court rejected the challenge. The prosecutor's comment was viewed as an acknowledgment that the matter being referenced constituted a mitigating circumstance.

The Court found that there was sufficient evidence as to victim King that the murder was heinous, atrocious and cruel. The Appellant argued that there was no evidence that the victim was conscious and aware of his impending death. The existence of defensive wounds, however, indicated that such consciousness and awareness existed, even though the medical examiner could not establish the sequence of the multiple wounds inflicted.

Bright also challenged the trial court's rejection of two mitigating circumstances – "under the influence of extreme mental or emotional disturbance" and "capacity . . . to appreciate the criminality of his conduct . . . or to conform his . . . conduct to the requirements of law was substantially impaired." Although a defense expert found that PTSD played a role in the murders based on the abuse the defendant suffered in childhood, an expert for the State rejected the PTSD diagnosis. And, that doctor reported that the defendant told him that he had a normal childhood, free of trauma and abuse. Thus, the trial court did not abuse its discretion in rejecting the factor based on mental or emotional disturbance.

The second factor was rejected on the basis of evidence showing that the defendant did understand that his actions were wrong. This included the use of gloves to conceal fingerprints, the hiding of the murder weapon, and flight.

The Supreme Court also conducted proportionality analysis as to the murders of both victims. The death sentence for one murder was based on a single aggravating factor – prior conviction for a capital felony (the murder of the second victim in this case, and a prior robbery). The trial court had also found the existence of 38 nonstatutory mitigating circumstances, which were given little or no weight. The death sentence was deemed valid, notwithstanding the single aggravating factor. The Court emphasized that the single factor was based on two qualifying predicate offenses – the murder of the second victim and a prior armed robbery. The aggravator itself is also deemed to be one of the weightier aggravators.

Eleventh Circuit Court of Appeals

United States v. Moore, 17-14370 (Mar. 31, 2020)

Moore and a codefendant, Miller, appealed convictions and sentences for trafficking in narcotics and firearms possession. The Eleventh Circuit affirmed.

Both defendants were shackled during the trial. There was no discussion of the shackling issue in the record before the appellate court and there was just one passing reference to one defendant having been shackled at trial, when a logistical issue arose as to how that defendant might be able to question a witness by himself. Absent any objection, the shackling issue was reviewed under the plain error standard.

"To survive plain error review, 'the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings.'" The appellants could not make such a demonstration here. There was "no indication in the record that the jury were aware of the shackles. Moreover, the jury reached a split verdict, acquitting each of the Appellants of at least one charge – an unlikely outcome had the presumption of innocence been undermined before the verdict." Additionally, there was no demonstration that the shackling affected the ability of the defendants to participate during the trial, especially where one defendant requested to question a witness, and was permitted to do so from the defense table, while remaining seated.

Two jurors submitted notes to the court expressing safety concerns for when they left the court at the end of the case. The judge addressed each of the jurors, individually, in camera, and then advised counsel and the parties of the concerns. Both had generalized concerns; there were no specific incidents related to their concerns. One noted a concern about leaving the courtroom at the same time as the

families of the defendants. The judge denied a defense motion to strike the jurors. With agreement of counsel, the judge instructed the jury that there was no cause for concern about safety, that the jurors should continue their deliberations, and that they should not let any such concerns affect their deliberations.

The Appellants challenged the manner in which the court handled the inquiry and response. The Eleventh Circuit first found that the judge did not improperly cut off one juror. The Court's review of the transcript suggested that it was most likely the parties talking over one another, causing problems for the court reporter. And, based on the above-noted split verdicts, there was no showing of any effect on the impartiality of the jurors.

The Appellants further argued that the district judge's summary of the ex parte interviews was not complete, and that with additional information from it, counsel would have requested that the court question every juror, not just the two who had come forward. It was speculative as to whether counsel would have made any such request, as it could have backfired, causing concerns in the minds of the remaining jurors when they did not exist in the first place.

Due to the unusual nature of the issue, and the district judge's note that it was an issue that had not occurred before, the Eleventh Circuit wrote to provide guidance to the district courts.

> . . .The best course of action largely follows the procedure the district court employed here. When learning that one or more jurors in a criminal trial have security concerns, the district court should confer with counsel to discuss the contours of an *in camera* interview. After the district court speaks with a juror *in camera*, it is entirely appropriate to summarize its assessment of the interview on the record for the benefit of the parties. Such a summary can often tell the parties more than a transcript because the judge can describe the affect on the juror, as the district court did here when he noted that the situation "about as close as being a nonevent as one would hope to be the case." However, to avoid the kind of skirmish presented on this appeal, the district court can also share the transcript of the *in camera* interview with the parties. This can be done by having the court reporter read it back to counsel. . . .

> Finally, the district court can confer with counsel and deal with any additional applications they wish to make.

The Court also addressed issues arising out of the recent Supreme Court decision in Rehaif v. United States, 139 S.Ct. 2191 (2019). The Supreme Court held that in prosecutions under 18 U.S.C. ss. 922(g) and 924(a)(2), "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." The Appellants attempted to avoid the lack of preservation of this issue by arguing that the failure of the indictment to allege that the defendants had knowledge of their status as felons deprived the district court of jurisdiction. The Eleventh Circuit disagreed. Subject matter jurisdiction is distinct from the failure of an indictment to allege an offense. An indictment which tracks the statutory language and adds the time and date is sufficient. Just as the Supreme Court read a requirement of knowledge of status into the statutes, when the statutes did not expressly articulate such knowledge, so, too, language of an indictment which tracks the statutory language does the same.

The Court also reviewed the deficiency of the indictment as to knowledge of status under the plain error standard. Although the government did not prove such knowledge at trial, as it had not been required to do so at the time and as a stipulation to the fact that the defendants were convicted felons barred the government from presenting evidence about the prior convictions, the Appellants could not demonstrate that but for that error the outcome of the case would have been different. Based on a review of the record, it was clear to the Court that the Appellants were aware that they were felons. The Appellants therefore could not demonstrate any affect on their substantial rights or the fairness, integrity or public reputation of the trial.

Sealey v. Warden, Georgia Diagnostic Prison, 18-10565 (Mar. 31, 2020)

Sealey challenged his conviction for murder and sentence of death in a federal habeas corpus proceeding. The Eleventh Circuit affirmed the denial of the petition, addressed one claim of ineffective assistance of counsel for failing to present additional mitigating evidence at the penalty phase of the trial, and found that other claims were procedurally barred.

The Eleventh Circuit found trial counsel's failure to further investigate Sealey's mental health issues "deeply troubling." However, the Court did not decide whether counsel was deficient because Sealey could not demonstrate prejudice. Had

Sealey presented mitigating evidence from experts regarding "organic brain syndrome and borderline mental retardation or intellectual functions," and that "Sealey had a 'highly impaired paradigm' and 'could easily be swayed,'" it was clear to the Court that the State would have rebutted such evidence with an expert of its own, challenging the administration of the IQ test by the defense expert and opining that test results reflected "normal functioning." Furthermore, while mental health evidence would have been "debatable," the evidence of aggravating circumstances for the death sentence was "powerful."

The Eleventh Circuit's decision was based on the highly deferential standard that federal courts apply in habeas corpus proceedings when the state court's adjudication of the issue was on the merits.

The same analysis and conclusion applied to a related claim that counsel was ineffective for failing to present as mitigating evidence a family member, Sealey's nephew, where the nephew's testimony would have been to the effect that Sealey had been a good uncle, who was kind to him. Such "relatively thin testimony" paled in comparison to the strength of the aggravating circumstances before the jury.

Counsel was not ineffective for failing to present polygraph evidence where a fair reading of state case law at the time of the trial was that such evidence would not have been admissible. Beyond that, even if the polygraph evidence had been presented, it would have been subject to attack based on its lack of reliability.

As to three other claims – the denial of a continuance for the sentencing proceeding, a constitutional challenge to the arbitrariness of the death sentencing scheme, and the denial of Sealey's right to self-representation under Faretta – those claims were procedurally barred and Sealey could not overcome the bar as he did not demonstrate cause for the procedural bars and prejudice as a result of them.

First District Court of Appeal

Young v. State, 1D18-4483, et al. (Apr. 3, 2020)

The First District affirmed convictions for lewd and lascivious molestation of a child. Young challenged the admission of child hearsay evidence that was adduced through a case worker with the Child Protection team and the child's grandmother.

There was no error on the part of the trial court in failing to issue written findings regarding the reliability of the child hearsay. The court made oral findings.

Although the court said that it would issue a written order, but failed to do so, none was required. And, the defense did not object to any of the oral findings of the court.

Young further argued that the probative value of the child hearsay was outweighed by its prejudice. The First District reviewed this claim for an abuse of discretion on the part of the trial court. The evidence was deemed highly probative given the "dearth of physical evidence." This was especially true given the proximity of time between the statements and the incidents at issue.

Key v. State, 1D19-2267 (Apr. 3, 2020)

"'[T]he proper remedy for a prisoner to pursue in challenging a sentence-reducing credit determination by the Department, where the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release, continues to be a mandamus petition filed in circuit court.'"

Earnest v. State, 1D18-5244 (Apr. 1, 2020)

The First District affirmed convictions for sexual battery and other offenses. There was no error in denying a motion for mistrial based on a discovery violation. "Although the victim testified at trial about additional circumstances concerning her post-incident meeting with Appellant, there was not a material change in her testimony from the testimony she gave in her deposition when asked specific and narrow questions by defense counsel."

There was no error in instructing the jury on the offense of battery as a permissive lesser-included offense of false imprisonment. A permissive lesser-included offense instruction may be given only when the charging document alleges the elements of that lesser-included offense and there is some evidence adduced to support the lesser offense. In this case, when the information alleged the offense of false imprisonment, it did not include allegations as to the elements of battery – i.e., actually touching the victim against the victim's will or intentionally causing bodily harm to the victim.

Barr v. State, 1D19-398 (Apr. 1, 2020)

Barr argued that the trial court erred in denying a motion for new trial. The motion set forth multiple claims, including one that the verdict was contrary to the weight of the evidence. Some of the claims addressed specific evidentiary issues at

trial. The trial court denied the motion, stating that it would rely on its rulings at trial and that upon review of the motion, it was denied.

A claim that the verdict is contrary to the weight of the evidence cannot be based on the denial of a motion for judgment of acquittal at trial, because different standards apply to the review of the two claims. A motion for judgment of acquittal looks to the legal sufficiency of the evidence; the claim that the verdict is contrary to the weight of the evidence enables the judge to weigh the evidence and make credibility determinations. Where the judge did not specify what standards were being applied, and Barr did not seek clarification when the judge denied the motion, the issue was not preserved for appellate review. Alternatively, the First District found that nothing in the trial court's oral ruling suggested the application of an erroneous standard.

Second District Court of Appeal

Sutton v. State, 2D17-4073 (Apr. 3, 2020)

After the Second District relinquished jurisdiction to the trial court to conduct a nunc pro tunc determination of the defendant's competency at the time of entry of a plea, the trial court was unable to make a retroactive determination. The Second District therefore reversed the judgment and sentence and remanded for withdrawal of the plea if Sutton was competent at this time. Sutton was cautioned that upon withdrawal of the plea the State could proceed on the original charges.

Morgan v. State, 2D18-4940 (Apr. 3, 2020)

Morgan challenged his sentence under Miller v. Alabama through a Rule 3.800(a) motion to correct sentence. After the trial court ordered resentencing, the Florida Supreme Court issued new opinions which would not have required resentencing. The trial court therefore vacated the order scheduling the resentencing. Although there are cases which hold that once a trial court orders a resentencing in loses jurisdiction to vacate that order, under the facts of this case, the Second District concluded that the trial court did have jurisdiction to set aside the order for resentencing.

The significant fact was that this case proceeded through a Rule 3.800(a) motion to correct sentence, whereas other cases had sought and obtained relief through motions under Rule 3.850. A Rule 3.800(a) motion "does not create a new, separate proceeding. Instead, it is a motion filed in continuation of the original

proceeding." That means that with a Rule 3.800(a) motion, the judicial labor is not complete until the resentencing is conducted.

Stephens v. State, 2D18-810 (Apr. 1, 2020)

Stephens was tried on offenses occurring in several counties, including Polk and Alachua. She elected the Eighth Judicial Circuit, Alachua County, for her venue. The court in Polk County transferred the case to Alachua County. Stephens then entered a plea to the charges and was sentenced in Alachua County. The case was not transferred back to Polk County, but Stephens then filed a notice of appeal in Polk County. The Second District concluded that the First District was the proper court to entertain the appeal, and transferred the case to the First District.

Franks v. State, 2D19-811 (Apr. 1, 2020)

At the time of a scheduled sentencing hearing, Franks moved to withdraw his plea, saying that he wanted to get private counsel, as current counsel had not done all the things he could have done to win the case. The judge concluded that Franks did not set forth any deficiency on the part of counsel and denied the motion and proceeded to sentencing. The trial court erred in denying the motion to withdraw plea without having appointed conflict-free counsel. Current counsel had stated on the record that he did not believe he could say anything in support of Franks' motion.

Third District Court of Appeal

Wright v. State, 3D16-1633 (Apr. 1, 2020)

During deliberations, the court permitted the jury to view cellphone video, without prejudicial audio, in the courtroom, with neither the State nor the defense present. The judge further decided to leave the courtroom to permit the jurors to deliberate freely and privately. On appeal, the defendant argued that the procedure was flawed, since it may have enabled the jurors to "un-mute" the audio portion without anyone being aware.

The judge was not required to be present at that time. It was speculative as to whether the jurors violated the explicit explanation by the judge that the audio was not to be heard. There was also an inference in the record that the jurors did not have access to remote control of the video. The video was set up to play in a continuous loop.

Under Fla.R.Crim.P. 3.400(a)(3), evidence introduced during the trial may be viewed by the jurors during deliberations in the jury room. Some evidence, such as a re-reading of transcribed evidence, must necessarily be done in the courtroom, in the presence of all parties, unless the defendant waives their presence. The evidence which the jurors viewed in the courtroom did not require a waiver by the defendant.

Harmon v. State, 3D18-2410 (Apr. 1, 2020)

A conviction for unlicensed carrying of a concealed firearm was reversed as the State failed to present evidence regarding licensing.

Sawyer v. State, 3D20-356 (Apr. 1, 2020)

The Third District granted a petition for writ of prohibition and barred the trial judge from presiding further over the lower court proceedings.

Immediately prior to a resentencing hearing, defense counsel was preparing to deliver case law to the judge's chambers, and heard the voice of the defense expert coming from the judge's computer. As counsel entered the chambers, the judge closed the browser window and did not advise counsel that he was watching videos of the defense expert. At a subsequent bench conference in court, the judge acknowledged watching the video of the defense expert, and when defense counsel said that she would be filing a motion to disqualify the judge, the judge stated he had started reviewing the expert's biography, which had been provided by counsel, and that led to the expert's website.

In a subsequent proceeding, the court raised the issue of when the motion to disqualify would be filed. Defense counsel responded that the transcript of the prior bench conference had been obtained, that counsel's office's legal division was reviewing it, and that the motion would be filed within the ten days allowed under the applicable rule. The court directed counsel to file the motion by midnight that day, even though the 10-day period was not yet expiring.

"Here, in addition to the extra-record research conducted by the trial court, the unexplained and contradictory imposition of a same-day, less than twelve-hour deadline for filing a written motion to disqualify would cause any reasonably prudent person to fear that he would not receive a fair and impartial resentencing." The Third District added a footnote stating that under fact-specific circumstances, there may be some justifications for a judge to order the expedited filing of a motion for disqualification prior to the full ten-day period allowed under the applicable rule.

Fourth District Court of Appeal

McGraw v. State, 4D17-232 (Apr. 1, 2020)

McGraw's case was pending in the Florida Supreme Court on a certified question of great public importance regarding consent to a blood draw by an unconscious defendant, when the decision of the United States Supreme Court, in Mitchell v. Wisconsin, 139 S.Ct. 2525 (2019), was issued. On the basis of Mitchell, the Florida Supreme Court directed that McGraw's case be remanded to the county court "so that McGraw can be given an opportunity to demonstrate that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." The Fourth District remanded the case to the trial court in accordance with the Supreme Court's directions.

The Fourth District's decision also provides a summary of the Mitchell decision, noting that the primary opinion was a plurality opinion by Justice Alito, joined by three other justices. The Fourth District summarizes the plurality opinion and the various concurring and dissenting opinions.

Roberts v. State, 4D17-3877 (Apr. 1, 2020)

Pursuant to the Florida Supreme Court's recent decision in Knight v. State, 286 So. 3d 147 (Fla. 2019), the Fourth District withdrew its prior decision and affirmed the defendant's conviction. The failure to instruct on a one-step removed necessarily lesser-included offense, as a result of Knight, no longer constitutes fundamental error. Absent objection, the error was not reversible, as long as there is no error in the instruction for the offense for which the defendant was convicted.

Sparks v. State, 4D18-307 (Apr. 1, 2020)

On remand from the Florida Supreme Court, in light of that Court's decision in Love v. State, 286 So. 3d 177 (Fla. 2019), the Fourth District held that Sparks was not entitled to a new stand-your-ground immunity hearing. The amendment to the burden of proof in the 2017 statutory amendment was not applicable to Sparks because his immunity hearing had been held prior to the effective date of the statutory amendment.

Jeanbart v. State, 4D18-2726 (Apr. 1, 2020)

The defendant was representing himself at trial and during closing argument, he twice stated that there was no evidence that he intended to participate in the offense. The court sustained the State's objections based on the absence of facts in the record to support the comments. The Fourth District granted Jeanbart's petition alleging ineffective assistance of appellate counsel for counsel's failure to raise this issue on direct appeal.

The lack of intent to participate in the offense was the sole defense at trial. "Evidence to support this theory was based on Defendant's words and deeds. The words, which were the focus of the Defendant's closing, were gleaned from Victim 1 who testified that upon Defendant's return to the scene, Defendant lowered his car window and yelled to the codefendant, 'let's go, let's go, you doing dumb shit right now.'"

Additionally, the trial court erred in admitting a gun with the defendant's DNA on it that was not used during the commission of the offense. The State argued that it was relevant to establish that the defendant was the driver of a Chevrolet. However, no one saw the defendant with the gun before, during or after the offense, and no shots were fired from it. The fact that the defendant was the driver was otherwise established by testimony from one victim. Trial testimony was that the codefendant was the shooter. The gun in question was one of two firearms that were found in the Chevrolet a few hours later, when it was searched after an accident it had been involved in. There was also no evidence to support the State's argument that the gun was evidence of the defendant's intent to participate in the offense. "Defendant's possession of a gun at some point does not prove that he knew the codefendant's intentions or that he intended to participate in the codefendant's criminal acts."

Hollingsworth v. State, 4D18-3705 (Apr. 1, 2020)

After revoking probation, the court sentenced the defendant under section 948.06(8)(c)(15), Florida Statutes, finding that the defendant was a danger to the community. The Fourth District rejected the defendant's argument that the jury was required to make the determination of whether he was a danger to the community.

The "purpose of the finding of dangerousness is to determine whether the court must revoke probation. In other words, the court cannot continue to suspend the sentence and allow the defendant to remain on probation if the court finds that

the defendant is a danger to the community." As a result, this finding is not an element of sentencing. The finding neither increases the statutory maximum or the statutory minimum for the sentence. In therefore need not be determined by the jury.

The Fourth District also found that this claim was one which could be raised in a motion to correct sentence under Rule 3.800(b), during the pendency of the direct appeal.

Fifth District Court of Appeal

Bruzzese v. State, 5D18-3945 (Apr. 3, 2020)

The defendant was convicted of one count of resisting an officer without violence and one count with violence. The two offenses were part of a continuous episode and the dual convictions therefore resulted in a double jeopardy violation.

Police responded to a hotel where the defendant and her wife were being disruptive. The defendant refused to comply with officers' requests that she leave; she refused requests to stand up or be handcuffed. After the officers succeeded in handcuffing her, they tried escorting her to an elevator, while she engaged in efforts to avoid going, while yelling obscenities. In the elevator, she flailed and tried to pull away, and the officers pushed her against the wall. Eventually, when outdoors, the defendant began dragging her feet and the officers had to carry her. She kicked one officer on the shin.

"Both officers were involved in the entire incident, which continued uninterrupted from the time they first encountered Bruzzese outside her hotel room until they placed her in a squad car. Further, no temporal break occurred throughout this incident, and Bruzzese did not have time to reflect and form a new criminal intent."