

Case Law Update
May 18, 2020
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Supreme Court of Florida

[Smiley v. State](#), SC18-385 (May 14, 2020)

Smiley appealed his sentence of death for first-degree murder. The Supreme Court affirmed and addressed multiple issues.

Smiley argued that there was a discovery violation as to a photo that the State used at the penalty phase proceedings. A detective had seen two photos on Smiley's Facebook page, in which Smiley was shown together with Bisbee, who may have been involved in the robbery and murder. The first photo was downloaded, provided during discovery and used at the trial. The second was not downloaded. After a witness testified for the defense, the defense witness gave a copy of the same photo to the State's investigator. The photo allegedly highlighted the physical distinctions between Smiley and Bisbee better than the original. The State used the second photo after the defense witness testified.

The Supreme Court found that the State had no intention of using the second photo until after the defense witness testified. Additionally, one argument by the defense was unpreserved as it was raised only in Smiley's reply brief: the argument that Rule 3.220(b)(1)(F) required production of the photo as a tangible object obtained from or belonging to the defendant. The Court did not address the issue of whether a Facebook photo of the defendant was covered by this rule. Regardless of whether there was dilatory disclosure under the rule, prejudice was not established. To whatever extent the physical differences between Smiley and Bisbee had any relevance, it was a matter that was foreseeable by both parties; one other photo was already provided to the defense showing the two together; and the defense could have anticipated that the State would try to highlight the distinctions between the two in other ways.

In a related argument, Smiley asserted that the photo in dispute was not properly authenticated, because the detective did not download that photo from Smiley's Facebook page himself, and did not know by whom or when it was taken. Based on the detective's familiarity with Smiley, and his testimony that he had seen, but not downloaded, the photo in question from Facebook, the photo was properly

authenticated. The Court further rejected the argument that the probative value of the photo was outweighed by the prejudice from it.

On direct examination, the State elicited from a witness, a coperpetrator, that Smiley had gloves with him at the time of the murder. On cross-examination, defense counsel asked why the witness believed that, and the witness responded that “when we normally operate like that, we normally use gloves.” The defense objected and moved for a mistrial, asserting that this constituted an improper reference to prior bad acts or offenses. The Supreme Court found that the statement by the witness was too vague and did not meet the high standard required for a mistrial. Additionally, defense counsel’s question, “Why?,” opened the door for the response.

During voir dire, the prosecutor questioned the jurors about their views on the death penalty and engaged in explanations about what the State had to prove; that not all cases warranted the death penalty. Defense counsel objected that the prosecutor’s questions suggested to the jury that the State was vouching for the validity of the death penalty by virtue of the State having sought the death penalty, which it does not do in all cases. At one point, the prosecutor stated: “we have lots of cases but we don’t – there are only cases that meet that.” Although the Court stated that it did not “condone” the prosecutor’s comments, the Court found that the prosecutor did not make a proscribed “‘direct, unambiguous appeal’ for the potential jurors to give weight to the State’s decision to seek the death penalty.”

The Court addressed multiple comments made by the prosecutor in closing argument. One of the comments was found not to constitute a golden rule argument. The prosecutor stated that Smiley “had an utter disregard for not only . . . the security of your home, of Drake’s home, of Ms. Riley’s home, but also he has an utter disregard for the sanctity of human life.” This did not ask the jurors to put themselves in the victim’s place and feel the victim’s pain.

Comments in which the prosecutor minimized the significance of the defendant’s brain aneurysm did not misstate the law regarding mitigation or denigrate the defense. The prosecutor argued that the aneurysm was not a reason for not imposing the sentence of death. The prosecutor noted that the defendant had engaged in various forms of bad behavior prior to the aneurysm. The Court viewed this as proper argument going to the weight to be assigned to mitigating factors.

[Bush v. State](#), SC18-227 (May 14, 2020)

The Court affirmed convictions for first-degree murder and armed burglary, and affirmed the sentence of death for the murder. The convictions were based entirely on circumstantial evidence. The Court receded from the longstanding special standard of appellate review for cases based solely on circumstantial evidence.

Under the special standard of appellate review, when a conviction is based solely on circumstantial evidence, the conviction could not stand unless the evidence was “inconsistent with any reasonable hypothesis of innocence.” The correct standard to be applied in circumstantial evidence cases is now the same as that applied in all other cases: “whether the State presented substantial, competent evidence to support the verdict.” “To apply this standard to a criminal case, an appellate court must ‘view[] the evidence in the light most favorable to the State’ and, maintaining this perspective, ask whether ‘a rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt.’”

The trial court excluded a statement from the victim which the defense sought to admit as a dying declaration. While there was no dispute that the victim was aware of her impending death, the trial court did not abuse its discretion in concluding that the statement did not concern “the physical cause or instrumentalities of what the declarant believed to be impending death or the circumstances surrounding impending death.” The defense sought to elicit that the victim told the first responder that “her children were with their father.” The court viewed the statement to the detective as a response to a logistical inquiry determining whether it was safe for others to enter the residence. This statement preceded a statement that the victim did not know who killed her, which statement was admitted as a dying declaration. The defense argued that the first statement explained the second statement, by showing that the victim was conscious and capable of memory at the time. The Supreme Court found that the two responses were to distinct questions and were not interrelated.

The defense sought a special instruction with respect to the victim’s underpants, which had not been preserved as evidence for testing. The requested instruction sought to advise the jury that evidence that the item was lost or not preserved by the State or its agents, including hospital personnel, “may be considered by a jury as sufficient and exculpatory evidence that would have shown that Sean Bush is not guilty of the crime charged.” The requested instruction was not supported by the evidence; standard instructions were not shown to be

insufficient; and the requested instruction was misleading, as it suggested that the failure to preserve that item prevailed over all other evidence of guilt.

While the Court found that challenged comments of the prosecutor were either not improper or did not rise to the level of fundamental error when there was no objection, the Court did express concern about the prosecutor's request that the jurors "have the courage" to impose the death penalty.

One justice dissented from the decision to abandon the circumstantial evidence standard of appellate review.

First District Court of Appeal

[Jackson v. State](#), 1D17-5087 (May 13, 2020)

In an appeal from a conviction for armed robbery, the First District, in a decision issued prior to the Florida Supreme Court's decision in Bush, discussed above, found that the evidence was sufficient, and conducted its analysis on the basis of the then-existing circumstantial evidence standard of appellate review. The Court also found that the argument based on a reasonable hypothesis of innocence had not been preserved and that under the applicable standard for reviewing cases based on direct evidence, the evidence was sufficient.

The primary evidence in the case was a surveillance video showing the perpetrator wearing very distinctive red baggy pants with black stripes and a white marking near a rear pocket; and a K-9 picking up the defendant's scent, leading to his apprehension.

[Foster v. State](#), 1D19-2453 (May 13, 2020)

Constitutional challenges to sentences of 50 years for offenses committed when Foster was a juvenile were rejected because even if he served the entirety of the sentence, he would still be in his 60's when he was released, and he therefore had a meaningful opportunity for release during his natural life.

Second District Court of Appeal

[State v. Vazquez](#), 2D18-5028 (May 13, 2020)

The trial court erred in suppressing oral and written statements as they were not made during custodial interrogation and they were otherwise voluntary.

The Second District agreed that the questioning constituted interrogation, as it was designed to elicit incriminating responses. As to the first significant oral questioning, the defendant was not yet in custody. The questioning occurred on the defendant's porch, at his suggestion, and he was not handcuffed. The defendant initially denied knowing the victim, but admitted knowing her after about five minutes of questioning. When asked whether he raped the victim or had sex with her, the defendant made an incriminating admission. While the questioning was at times confrontational and accusative, the court attributed this to the defendant's initial decision to deny knowledge of the victim. Although the defendant was confronted with evidence of his guilt, that evidence, the allegations of the victim, "did not so strongly suggest his guilt that this factor weighs against the State; 'although the defendant was confronted with the allegations of his sexual abuse, the defendant was not confronted with evidence so indicative of guilt that a suspect in the defendant's position would feel that he was going to be arrested.'" The defendant was advised that he could end the questioning at any time.

The trial court further found that the defendant had admitted to committing a sexual battery. The Second District disagreed with this as a factual matter and further found that at the time, the questioning was still noncustodial. The circumstances were largely the same as discussed above. During this questioning, which the Court found to be confrontational, the defendant continued denying having had sex with the victim and denied that a test would reveal anything incriminating. The defendant's responses further indicated that he was aware that there was a lack of evidence. After the first admission – masturbating in front of the victim – the defendant provided additional information about the lewd or lascivious exhibition, without prompting by the detectives. The Court was again heavily influenced by the defendant not being in handcuffs and being advised that he would not be arrested that day.

As the foregoing questioning was not custodial, the subsequent written statements at the end of the oral questioning were not the fruit of the poisonous tree.

[Williams v. State](#), 2D19-128 (May 13, 2020)

The summary denial of one claim in a Rule 3.850 motion was reversed and remanded for further proceedings. The claim alleged that counsel was ineffective for failing to move for the disqualification of the judge based on statements the judge made prior to and after denying a motion to suppress.

At the outset of the suppression hearing, while the parties were waiting for the defendant to appear, the judge inquired whether counsel wanted a denial now. The affidavit in support of the postconviction motion further alleged that after the suppression hearing and the denial of the motion, the judge stated: ““What else could I do? His father’s office was next to mine for [thirty] years,’ referring to the father of the judge who signed the warrant.” The claim of ineffective assistance was facially insufficient because it did not contain sufficient allegations of prejudice. It did not include any allegations as to the likelihood that a different judge would have granted the suppression motion. The trial court denied the claim in the Rule 3.850 motion because a different judge presided at the trial. That missed the point of the 3.850 motion – whether a different judge would have granted the suppression motion. The case was remanded, and the defendant was granted leave to file an amended motion addressing prejudice.

Third District Court of Appeal

[Moss v. State](#), 3D18-169 (May 13, 2020)

Moss received a 40-year sentence for a homicide offense committed while he was a juvenile. In light of the Florida Supreme Court’s recent decision in [Pedroza v. State](#), the 40-year sentence did not constitute a de facto life sentence, and Moss was not entitled to resentencing.

[Tamayo v. State](#), 3D20-490 (May 13, 2020)

The Third District denied a petition for writ of prohibition which alleged a speedy trial violation.

Tamayo was arrested on August 13, 2019 and the State no-actioned the case on September 11, 2019. The charges were refiled on December 5, 2019 and notice of the refile was mailed to the defendant and defense counsel the next day, with an arraignment scheduled for December 26, 2019. Defense counsel filed a special notice of appearance to challenge jurisdiction and neither counsel nor the defendant

appeared at the arraignment. The trial was set for February 18, 2020, two weeks after the February 4th expiration of the speedy trial period.

On February 13, 2020, Tamayo filed a motion to dismiss and for discharge under the speedy trial rule. The trial court denied the motion without prejudice to the defendant first filing a notice of expiration of the speedy trial period. Tamayo did not file that notice, filing the prohibition petition in the Third District instead.

Tamayo's argument was that he was not required to file the notice of expiration because he was not re-arrested on the refiled charges in December 2019. The Third District disagreed. "When the State terminates a prosecution during the speedy trial period, however, the State may re-file the same charge prior to the expiration of the speedy trial period and proceed to trial on the reinstated charge, so long as the defendant has notice of the reinstated charge within the speedy trial period." The Court distinguished cases Tamayo was relying on. In those cases, the State did not notify the defendant of the reinstatement of the charges; in this case, the State did. The State was therefore entitled to the benefit of the 15-day recapture period of the speedy trial rule, and the defendant was obligated to file a notice of expiration, triggering that recapture period, before filing a motion for discharge.

Fourth District Court of Appeal

[Gibson v. State](#) 4D20-729 (May 13, 2020)

Awarding gain-time is the function of the Department of Corrections. Gibson appears to have sought an award of gain time through the filing of a Rule 3.801 motion for jail credit in the criminal case.

Fifth District Court of Appeal

[Gaither v. State](#), 5D19-534 (May 15, 2020)

Gaither's sentencing was deferred pending completion of a drug treatment program. After an arrest and no contest plea for another felony drug case, and reinstatement of the deferred sentencing and drug treatment program on this case, Gaither successfully completed the program. He was then arrested for resisting an officer. The State then issued a notice of noncompliance with the agreement for deferred sentencing. Gaither sought an evidentiary hearing, at which the State would have to prove "a substantial and willful violation of his drug court participation agreement before being terminated from drug court and sentenced to prison." The

trial court denied that request, finding a violation and terminating the drug court participation solely on the basis of the history of non-compliance and the new arrest affidavit. Gaither appealed from the ensuing sentence of 4 ½ years.

The Fifth District analogized the proceeding in this case – for violation of a pre-sentence plea agreement – to that of a probation violation, and concluded that due process required that the State prove the violation by a preponderance of the evidence. On remand, Gaither was entitled to an evidentiary hearing, with the opportunity to present evidence and confront witnesses.

[State v. Glenn](#), 5D19-1774 (May 15, 2020)

The State appealed a non-final order compelling it to produce discovery prior to an evidentiary hearing on a Rule 3.850 motion. The Fifth District found that that was not an appealable order, and treated the appeal as a petition for writ of certiorari, which it then denied, because the State could not demonstrate irreparable harm in complying with the trial court's order. The facts pertaining to the order compelling discovery are not set forth in the opinion.