Case Law Update
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Supreme Court of Florida

State v. Johnson, SC19-96 (May 21, 2020)

The Supreme Court resolved a conflict between decisions of several district courts of appeal regarding "the procedure for preserving a challenge to the trial court's determination that the facially race-neutral reason proffered by the proponent of a peremptory strike was genuine under step 3 of *Melbourne v. State*, 679 So. 2d 759, 764 (Fla. 1996)." The Court held that "the party opposing a peremptory strike must make a specific objection to the proponent's proffered race-neutral reason for the strike, if contested, to preserve the claim that the trial court erred in concluding that the proffered reason was genuine."

In this case, after the defense requested a race-neutral reason, the State referenced the prospective juror's preference for "CSI evidence." The trial court appeared to have cut off the prosecutor's explanation and found the reason to be race-neutral, and there was no further objection by defense counsel. At the conclusion of voir dire, and prior to the swearing of the jury, defense counsel renewed the original objection, but did not argue that the State's proffered reason lacked record support.

Absent a specific objection to the State's facially race-neutral reason, the defense failed to preserve a challenge to the trial court's determination that the asserted reason was genuine.

Phillips v. State, SC18-1149 (May 21, 2020)

Phillips, convicted of first-degree murder and sentenced to death, filed a successive postconviction motion asserting intellectual disability after a prior claim of intellectual disability had been litigated in both the trial court and Florida Supreme Court. Phillips' most recent motion relied on Walls v. State, 213 So. 3d 340 (Fla. 2016), in which the Florida Supreme Court held that the decision of the United States Supreme Court in Hall v. Florida, 572 U.S. 701 (2014), applied retroactively to cases in which there had previously been a finding that the defendant is not intellectually disabled. The Florida Supreme Court receded from its own decision in Walls.

Prior to Hall, Florida required a defendant to have an IQ of 70 or below to satisfy the first prong of the intellectual disability test. Hall rejected that rigid rule and required that courts "take into account the standard error of measurement of IQ tests, which is five points." Walls applied Hall retroactively, as noted above.

The Court's current opinion analyzed the retroactive application of Hall under both Florida judicial decisions – Witt v. State – and federal decisions on retroactivity – Teague v. Lane. The Court addressed the doctrine of stare decisis and concluded that the decision in Walls should not stand.

One Justice dissented.

First District Court of Appeal

Joseph v. State, 1D19-1705 (May 20, 2020)

Joseph appealed a conviction for possession of more than 20 grams of cannabis. The First District affirmed and found that the trial court did not abuse its discretion in refusing to strike the jury panel in the aftermath of comments by one of the prospective jurors.

The prospective juror worked in jails and prisons as an x-ray technician, and she stated that the defendant looked familiar to her; that she may have done an x-ray on him. The First District emphasized that the juror did not positively identify the defendant and there was no follow-up questioning regarding this with the juror.

Roshell v. State, 1D19-2304 (May 20, 2020)

The trial court made an oral determination that the defendant was competent but failed to reduce that to a written order. The trial court was directed to enter the written order nunc pro tunc on remand.

Washington v. State, 1D17-1798 (May 20, 2020)

On remand from the Florida Supreme Court in the aftermath of the Supreme Court's decision in Love v. State, the First District held that Washington was not entitled to a new stand-your-ground immunity hearing under the amendment to the statutory burden of proof in 2017 because Washington's immunity hearing was held prior to the effective date of the 2017 statutory amendment.

In re: Grand Jury, 1D18-4877 (May 20, 2020)

Odom, who was mentioned in a grand jury report, moved, under section 905.28, Florida Statutes, to repress or expunge portions of the report. He appealed the lower court's order and argued that additional portions should have been repressed. The State Attorney cross-appealed the repression of portions of the report.

Odom challenged the authority of the State Attorney or Attorney General to respond to the motion to repress, arguing that their roles ended once the grand jury drafted its report. The First District, construing section 905.28, disagreed.

Odom also argued that the lower court did not consider breaches in confidentiality when it ruled. The First District reiterated its prior holding that "where a presentment was made public, but the state has denied any wrongdoing and the record is unclear concerning who was responsible for the disclosure, expungement is not required." Here, the report had not been released to the public and there were just two "cursory" statements which did not equate to the release of the report and did not require that the report be repressed or expunged in its entirety.

Additionally, a grand jury's findings of fact are not subject to reversal.

On the State's cross-appeal, the First District agreed that the trial court erred in repressing five items in the report as the statements at issue were "both lawful and proper." This included, inter alia, a statement that the grand jury found Odom, in his grand jury testimony, "to be both unprofessional and unprepared."

Walker v. State, 1D19-0483 (May 20, 2020)

Pursuant to Lee v. State, 258 So. 3d 1297 (Fla. 2018), dual convictions for traveling after solicitation for sex with a minor and unlawful use of a two-way communications device violated double jeopardy principles, based upon review limited to the language in the charging document.

Second District Court of Appeal

Sullivan v. State, 2D16-5065 (May 22, 2020)

On remand from the Florida Supreme Court, for reconsideration in light of the Supreme Court's decision in Love v. State, the Second District held that Sullivan was not entitled to a new stand-your-ground immunity hearing based on the 2017 statutory amendment to the burden of proof because his immunity hearing was held prior to the effective date of the statutory amendment.

Gokay v. State, 2D18-4530 (May 20, 2020)

The trial court erred in imposing, as a condition of probation, the requirement that the defendant submit to a test for sexually transmitted diseases. The defendant was convicted of drug offenses and the condition of probation was not reasonably related to rehabilitation.

Third District Court of Appeal

State v. Quero, 3D18-1820 (May 20, 2020)

The State appealed a downward departure sentence that was imposed for a conviction for felony battery with great bodily harm and the Third District affirmed. The departure was supported by substantial, competent evidence. The "court took into consideration the history of hostility between the parties and the totality of the circumstances surrounding the offense. After questioning the parties at length, the trial court concluded that there was some evidence of provocation by the victim and thus there existed a legal ground to depart from the recommended sentencing guidelines."

State v. Garcia, 3D18-1984 (May 20, 2020)

The Third District granted the State's petition for writ of certiorari. The trial court granted a motion to mitigate a sentence which was filed more than 60 days after sentencing to a negotiated term. As such motions must be filed within 60 days under Rule 3.800(c), the trial court lost jurisdiction and could not entertain the motion. The failure of the State to notify the trial court of the expiration of the 60-day period could not confer jurisdiction on the trial court where it did not otherwise exist.

Robinson v. State, 3D18-2336 (May 20, 2020)

Although the trial court failed to address one claim in a Rule 3.800 motion, the Third District, rather than remanding the case for further consideration, found that the claim at issue was not cognizable in a 3.800(a) motion, as it attacked the conviction, not the legality of the sentence; and the claim was otherwise untimely if treated as a Rule 3.850 motion.

Mordica v. State, 3D19-51 (May 20, 2020)

The Third District affirmed convictions for attempted second-degree murder and leaving the scene of an accident.

Mordica and her friend Witherspoon were both involved in a dating relationship with Mack, and that relationship led to difficulties between the three of them. Mordica was driving, and stopped when she saw Witherspoon and Mack outside, talking. Mordica and Mack began arguing, while Mordica was sitting in her car. Mack started walking away, towards his car, when Mordica "lightly hit him with the car, causing him to fall three or more times," and subsequently pinning him between her car and Mack's. Witherspoon then approached to try to talk to Mordica, who was hysterical, and after Witherspoon opened the car door, Mordica put the car in reverse and accelerated, resulting in Witherspoon being partly inside the passenger door and partly out, holding onto the car while Mordica was backing away, until Mordica crashed into a tree.

Mordica sought to amend the standard jury instruction on justifiable use of force by adding two words, "or conveyance": "while resisting an attempt . . . to commit a felony in any dwelling house [or conveyance] . . . ." Mordica was arguing that she left the scene of an accident because she was in fear from a burglary that she claimed Witherspoon was committing when Witherspoon opened the door of the car. The court did not abuse its discretion when it concluded that Mordica's theory of defense was adequately covered by the instruction which stated: "The [attempted] killing of a human being is justifiable [attempted] homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendant."

The trial court also precluded Mordica from arguing that Witherspoon was committing a burglary with the intent to commit a battery because there was no evidence to support that. The trial court recognized that there was testimony that the two women were "tussling," and permitted Mordica to argue that under the circumstances, a reasonable person would have fled, run away, or been afraid. The

Third District agreed that there was no testimony to support an argument that Witherspoon was committing a felony.

On direct examination, the State elicited general testimony from Witherspoon regarding threats made in text messages between Witherspoon and Mordica, and Witherspoon noted that both women had made such threats. On cross-examination, defense counsel elicited further details about the threats. On redirect examination, the State was permitted to ask one further question, establishing that the threats preceded the charged offenses by two years. The Third District found that defense counsel's questioning on cross-examination opened the door to the final question on redirect examination.

The Third District also found that the trial court did not abuse its discretion in precluding the defense from impeaching Witherspoon with a prior inconsistent statement from a deposition. The prior statement and trial testimony both related to whether Witherspoon was screaming. However, the trial testimony and pretrial statement related to different points in time, and thus the statements were not inconsistent with one another.

McWilliams v. State, 3D19-293 (May 20, 2020)

In an appeal from convictions for three counts of sexual battery and other offenses, the Third District affirmed the convictions and rejected the argument that the trial court erred by admitting evidence of extrajudicial and in-court identifications, which the defendant asserted were unreliable as a result of unduly suggestive police identification procedures.

The defendant was apprehended, in part, on the basis of a sketch that had been prepared of the perpetrator. The victim was brought to a designated area for a show-up identification. An officer in civilian clothing was standing next to the defendant, who was not handcuffed "or otherwise obviously restrained." An officer advised the victim that "the individual she was about to see 'may or may not be the person involved in this case,'" and that it "'is just as important to clear innocent persons from suspicion as it is to identify guilty parties.'" An officer then drove the defendant past the victim and the victim grabbed the defendant's arm and said, "that's him." This occurred several days after the offenses.

Based on the presence of just a single suspect matching the physical description of the perpetrator, the Third District concluded that the identification procedure was unduly suggestive. The Court then addressed multiple factors to

determine whether the identification retained sufficient reliability to outweigh the corrupting effect of the suggestive procedure. The victim had ample opportunity to observe her assailant. Besides flashes of lighting in the area, the perpetrator did not try to conceal himself, and, the victim at one point activated a flashlight and the two stood face-to-face with one another. The nature of the offense, and the detailed description of it that the victim provided to officers, supported the existence of a heightened degree of attention on the part of the victim. That description was provided immediately after the assault, and it was sufficient to serve as a basis for a sketch from which officers later apprehended the defendant. The victim also had an immediate, visceral and certain reaction to and identification of the defendant when she saw him. And, the three day lapse between the offenses and the identification was not sufficiently long to erode confidence in the victim's memory.

Hechevarria-Figuerro v. State, 3D20-495 (May 20, 2020)

In a habeas corpus petition, Hechevarria-Figuerro argued that he had previously been induced to waive and voluntarily dismiss his prior direct appeal in reliance on a plea agreement that was later dishonored. The Third District denied the habeas corpus petition.

The petitioner was complaining about alleged deception that had occurred eight years earlier. The petition was therefore viewed as, an treated as, "a thinly veiled effort to revive an untimely postconviction claim." In an effort to ensure that there was no "manifest injustice," the Court further addressed the claim and found it to be without merit. The plea agreement called for a 15-year sentence, which the State, in fact, recommended, but the trial court, within its discretion, rejected. There was no prosecutorial misconduct. The defendant was bound by his guilty plea, which was voluntary, and that guilty plea cut off the right to appeal.

Fourth District Court of Appeal

Coto v. State, 4D18-2602 (May 20, 2020)

Coto was convicted of multiple offenses arising out of a motor vehicle accident resulting in the death of one of her own children, a passenger in her vehicle, and serious injuries to her other three children. In a Rule 3.800(b) motion pending direct appeal, she raised double jeopardy challenges to several of the convictions. A Rule 3.800(b) motion was not a proper basis for such a challenge, as Rule 3.800(b) addresses sentencing errors, not challenges to convictions. However, the double

jeopardy challenges could still be raised on direct appeal, as double jeopardy violations constitute fundamental error.

The convictions included four counts of driving without a license and causing serious bodily injury or death. Four such convictions resulted in a double jeopardy violation, regardless of the existence of four victims suffering death or serous injury. The Fourth District's conclusions were based on the Florida Supreme Court's decision in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994). The Court rejected the State's reliance on decisions which permit multiple DUI manslaughter convictions where there are multiple victims. In the case of driving without a license, that act of driving is a single continuous act.

There was no error, however, in including victim injury points for each of the victims on the sentencing scoresheet.

Thomas v. State, 4D19-935 (May 20, 2020)

Thomas appealed multiple convictions, including burglary with an assault. The Fourth District wrote to concur with Pinkney v. State, 74 So. 3d 572 (Fla. 2d DCA 2011), which held that "intent to do violence to the victim is not an element of assault." "All the State had to show was that Thomas did an act that was substantially certain to put the victim in fear of imminent violence."

Lockett v. State, 5D19-1908 (May 20, 2020)

Lockett appealed a conviction for sale of fentanyl within 1,000 feet of a place of worship. The Fourth District reversed for a new trial because "the trial court erred by allowing the jury's request during their deliberations to see Lockett's half-covered face."

The State's case against Lockett was based on testimony from an undercover agent who posed as the buyer, surveillance video, and a demonstration to the jury by the prosecution in which the defendant stood up and walked past the jurors. During deliberations, the jury requested to see the defendant in a different pose – his left profile with his hand covering his cheek, for comparison to still shots from the video.

Although the court has discretion as to how it responds to questions from the jury, the request with which the court complied amounted to the presentation of new evidence after the parties rested and the case was submitted to the jury. Rule 3.430,

Fla.R.Crim.P. prohibits recalling the jury for new evidence after deliberations have commenced.

Fifth District Court of Appeal

Hillman v. State, 5D19-468 (May 22, 2020)

A written sentence must conform to the oral pronouncement at sentencing.

Willoughby v. State, 5D19-2152 (May 22, 2020)

The defendant appealed convictions for second-degree murder and grand theft.

The defendant was staying at the residence of the victim, a drug dealer, and the State presented, from another person at the residence, of the defendant asking for drugs, producing a gun, and leaving the house, as seen on surveillance video, carrying a small safe and reentering with a larger safe. The other person in the house had stated that he left the house and later returned, finding the door to the master suite open, which was unusual, with the victim dead.

The victim was living in a trailer on someone else's property. The property owner was permitted to testify that on the day of the murder, while he was driving the defendant somewhere, he received a text, from an unknown source, stating that the defendant killed the victim. This was inadmissible hearsay, introduced for the truth of the matter. It was not necessary to establish "the subsequent interactions with Willoughby," especially as the person who received the text could not state that Willoughby had even seen it. The Court noted several other decisions discouraging "set the scene" hearsay testimony. The error, however, was harmless under the facts of this case.

The State asked for and obtained an instruction on principals, and argued to the jury in closing that if the jury was concerned about the failure of the State to produce the gun or to present an eyewitness stating who pulled the trigger, "the only other logical explanations is that he had something to do with this and assisted and allowed the people in and helped them take the safe." The testimony in this case, however, was insufficient to permit the principals instruction to be given. This error was also deemed harmless. The jury's verdict included express findings that the defendant possessed and discharged a firearm.