

Case Law Update
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Eleventh Circuit Court of Appeals

[James v. Warden, Holman Correctional Facility](#), 17-11855 (Apr. 28, 2020)

The Eleventh Circuit affirmed the denial of a habeas corpus petition. James’s claim that counsel was ineffective in the penalty phase of a capital case for failing to investigate or present mitigating evidence was rejected because James failed to show “a reasonable probability that his counsel’s performance affected the outcome of his sentencing proceeding.”

Prior to the trial and sentencing proceeding, lead counsel for sentencing mitigation did negligible work with respect to the development of mitigating evidence. At the sentencing hearing, potential mitigating factors were argued on the basis of evidence from the guilt-phase trial, including the defendant’s age of 22, his emotional immaturity, and his being under the influence of strong emotions. At a post-conviction evidentiary hearing, potential mitigating evidence was presented through several family members, regarding James’s family life; a police report showing that the victim had previously attacked James, striking his car at a restaurant drive-thru with a car jack; and psychological evaluations while James was incarcerated prior to the sentencing hearing, reflecting schizoid characteristics and a psychometric test score indicating a possible “thought disorder.”

Evaluating the prejudice prong of the claim of ineffective assistance, the Court noted that “James has not presented any evidence showing that he would have permitted his counsel to introduce mitigation evidence at sentencing, even if they had collected any.” James’s counsel testified at the hearing that he instructed her not to call any mitigation witnesses. James had also expressed his preference for a death sentence, where he would spend his years in prison with the comforts of a television of his own and ample reading material, as opposed to the conditions endured by prisoners in the general prison population.

[Knight v. Florida Department of Corrections](#), 18-12488 (May 1, 2020)

The Eleventh Circuit affirmed the denial of a habeas corpus petition challenging a sentence of death. Even assuming that counsel was deficient for

failing to investigate and present mitigating evidence, Knight failed to demonstrate prejudice as a result of counsel's failure.

At the penalty phase of the trial, counsel for Knight presented evidence of Knight's mental health from his mother, his sister, and two expert witnesses. At the evidentiary hearing on the state-court postconviction motion, Knight again presented his sister and one of the two original experts, plus testimony from his two coconspirators, two new expert witnesses, a counselor from a reform school he attended, and an affidavit from a student at the same reform school.

Testimony at the penalty phase of the trial included: family background; troubled childhood; drug use; academic struggles; disciplinary struggles; a diagnosis of either paranoid disorder or paranoia. In the written sentencing order, the trial court found the existence of two statutory mitigating factors: killing under the influence of extreme mental or emotional disturbance; and a "somewhat impaired" capacity to appreciate the criminality of his own conduct or conform his conduct to the requirements of the law. The court also gave some weight to several nonstatutory mitigators based on the testimony noted above. The court also found the existence of four aggravating factors: prior conviction for a murder; murder during the course of a robbery; pecuniary gain; cold, calculated and premeditated.

One of the experts at the postconviction evidentiary hearing concluded that Knight must have been under the influence of drugs at the time of the murder. Other testimony related to further details of Knight's troubled childhood and family life.

In federal habeas corpus proceedings, the courts review state court adjudications on the merits under highly deferential standards of review. Applying those standards, the Eleventh Circuit concluded that "the state court did not err when it concluded at sentencing that the aggravating circumstances 'far outweigh the mitigating circumstances.'" With the new testimony, the overall balance remained essentially the same, and there was no probability that the outcome of the sentencing proceeding would have been different. The Court emphasized weaknesses in the drug-related testimony regarding Knight's condition at the time of the murder. Alleged abuse of Knight at the reform school, from the affidavit of a fellow student, was deemed potentially explosive, but weak because it was questionable as to whether the affidavit was referring to the Ronald Knight who was convicted and sentenced in this case. And, suspicions of such abuse were aired at the original sentencing proceeding.

First District Court of Appeal

[Rogers v. State](#), 1D19-878 (May 1, 2020) (on motion for rehearing en banc)

On motion for rehearing en banc, the Court withdrew its opinion of February 13, 2020, and issued a new opinion. The opinion addresses the issue of whether a trial court lacks jurisdiction to rescind an order granting resentencing once it becomes a final appealable order when it is not the subject of a motion for rehearing and is not the subject of an appeal. In the prior opinion, the Court had concluded that jurisdiction had been lost and that the trial court could not vacate the order scheduling resentencing. The State, on rehearing, asked the Court to recede from its prior case law because the postconviction motion at issue was a Rule 3.800(a) motion to correct an illegal sentence, and that an order granting resentencing on such a motion does not constitute a final order until the resentencing occurs, and that the trial court retains inherent authority to reconsider an order granting a Rule 3.800(a) motion until the resentencing occurs. The Court recognized the existence of a conflict with decisions of the Fourth and Fifth Districts and certified conflict.

The opinion of the en banc Court was accompanied by concurring opinions with differing rationales, as well as one dissenting opinion which noted that the issue was currently before the Florida Supreme Court and found that it would have been more prudent to await the decision of the Florida Supreme Court.

[Harris v. State](#), 1D19-135 (Apr. 29, 2020)

The First District reversed and remanded for reconsideration the trial court's summary denial of one claim of ineffective assistance of counsel that had been raised in a Rule 3.850 motion.

The defendant entered an open plea to the court on a charge of organized fraud. The claim at issue alleged that counsel provided misadvice when counsel said that the defendant would likely have adjudication withheld if he entered an open plea, "that a withhold was very important to him because he did not want to become a convicted felon and lose his civil rights, and that this advice was the reason he entered the plea." The trial court rejected the claim on the basis of the State's arguments "that any misadvice by counsel did not prejudice Harris because he was advised by the court at the plea colloquy that he could be sentenced to fifteen years in prison and because the prior withhold was not a factor that the trial court considered in imposing his sentence."

The appellate court disagreed with the lower court's rationale and remanded for further proceedings. The relevant factor was not whether the withhold of adjudication was considered as a sentencing factor; it was whether the defendant would have agreed to the open plea had he not been given the allegedly incorrect advice.

[Swander v. State](#), 1D19-1799 (Apr. 29, 2020)

An appellate court's mandate to strike an improper habitual felony offender designation as to a conviction for driving while a license is suspended or revoked is a purely ministerial act, and the defendant's presence is not required for resentencing.

[Williams v. State](#), 1D19-2099 (Apr. 29, 2020)

The failure to give the standard jury instruction on reasonable doubt constitutes fundamental error.

Second District Court of Appeal

[Rivera v. State](#), 2D17-496 (May 1, 2020)

On remand from the Supreme Court of Florida, in light of that Court's decision in [Love v. State](#), the Second District held that Rivera was not entitled to a new Stand Your Ground immunity hearing because the hearing that was held in the trial court preceded the effective date of the 2017 statutory amendment which placed the burden of proof on the State.

[Bullington v. State](#), 2D18-2197 (May 1, 2020)

The defendant appealed convictions for multiple sex offenses. The Second District held that the trial court erred in admitting "prior consistent statements that A.B. made to two detectives and a nurse practitioner describing the sexual abuse to which she was subject and identifying Mr. Bullington as her abuser," but that the error was harmless under the facts of this case.

A prior consistent statement is not inadmissible as hearsay when the declarant testified and is subject to cross-examination, and "the statement is made to rebut a charge of improper influence, motive, or recent fabrication." In this case, the charge that A.B. fabricated the allegations was based on a motive that existed before the

detectives interviewed her. “The defense theory was that A.B. was influenced by a book about a child who bettered his circumstances by reporting abuse and, based on that influence, went to school and told the story to friends until it reached school officials and was reported. Under this theory, all of the statements A.B. made to the detectives were consistent with her trial testimony but were nonetheless made after the facts giving rise to the charge of fabrication existed.”

The issue regarding statements made to the nurse practitioner was abandoned on appeal. Those statements were not admitted as prior consistent statements; they were admitted as statements made during the course of medical treatment.

[Peret v. State](#), 2D19-215 (May 1, 2020)

Peret appealed a conviction for reckless driving with serious bodily injury, a lesser-included offense of the original charge of aggravated battery. The Second District reversed for a new trial “because Peret was improperly prevented from questioning the victim about her alleged bias or motive to lie.”

The incident occurred while Peret was driving home with Lamond, the victim, who was a tenant living at his house. “Peret wanted to establish that Lamond had continued to live with him for months after the alleged battery and that she only wanted to cooperate with prosecutors after he evicted her from his residence.” The trial court erred in concluding this was irrelevant. “This evidence clearly indicates the type of bias or motive to lie contemplated by section 90.608(2).”

[Schwebel v. State](#), 2D19-1092 (May 1, 2020)

The summary denial of a Rule 3.850 motion was reversed for further proceedings. The motion alleged that counsel was ineffective for not filing a motion to suppress evidence and that if counsel had filed one, the defendant would not have pled guilty. The opinion does not include detailed facts regarding the allegations in the motion. The Second District directed the trial court to proceed as follows: “On remand, the trial court is to determine if trial counsel was ineffective by failing to file a meritorious motion to suppress, that is, a motion that would have been successful. If so, the court must next determine whether the defendant sustained prejudice as a result of the performance failure. . . .”

[Booker v. State](#), 2D18-3063 (Apr. 29, 2020)

Booker appealed a conviction for possession of a controlled substance. The Second District reversed, finding that trial counsel was ineffective on the face of the record for “neglecting to move to suppress the fentanyl found in his backpack following his illegal arrest and the search incident to that arrest.” This was one of the rare cases where a claim of ineffective assistance of counsel could be raised on direct appeal.

An officer observed Booker sitting at a picnic table in a public park at 1:30 a.m. Booker was alone, with a bicycle and backpack. Signs posted in the park stated that the park closed at dusk. The officer advised Booker that he was being arrested for violating park rules. The officer, a sergeant, called for backup to make the arrest, stating that as a supervisor, he usually lets deputies make the arrests. A deputy arrived and took over the “investigation,” and arrested Booker for violating park rules. The deputy searched the backpack and found the substance later identified as fentanyl.

The offense for which Booker was arrested was a violation of a county ordinance, which provided that being in a city park after closing was punishable by a fine of up to \$500 for a third violation. It was not an arrestable offense. An arrest for violating such an ordinance should result only in the issuance of a citation or summons for a civil infraction.

The State’s argument relied on section 901.15(1), Florida Statutes, which provides that “[a]n arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately. . . .” The State’s reliance on that statute was rejected on the basis of prior case law holding that “arrest,” as used in the statute, “does not mean a full or custodial arrest and search incident thereto, but rather, that the officers may detain an individual only ‘for the limited purpose of issuing a ticket, summons, or notice to appear.’”

Third District Court of Appeal

[Schminky v. State](#), 3D18-959 (Apr. 29, 2020)

Schminky appealed convictions for two counts of attempted murder of a law enforcement officer and other charges. These two convictions were reversed for a new trial. The trial court committed fundamental error by failing to instruct the jury

“regarding whether [the defendant] had knowledge that the victims were law enforcement officers.”

In Ramroop v. State, 214 So. 3d 657 (Fla. 2017), the Supreme Court held that knowledge of an officer’s status as a law enforcement officer was an element of the offense of attempted murder of a law enforcement officer. Ramroop construed the charging statute, section 782.065(2), Florida Statutes, as a reclassification statute that created a substantive offense, of which such knowledge was an element of the offense.

On the question of whether the error in this case was fundamental, the Third District rejected arguments of the State. The defense in this case was a defense of insanity. The Court rejected arguments that made the instructional error nonfundamental: “The defense put Schminky’s mental state and awareness at issue by arguing that he was suffering from PDS [Paxil Discontinuation Syndrome] at the time. . . . They specifically asserted that Schminky did not have the requisite knowledge at the time of the offenses to know the victims were law enforcement officers. The defense never conceded that Schminky knew that the victims were law enforcement officers.”

Nor was it sufficient that the charging document, which was read to the jury during jury selection, included the knowledge element, and that the jury’s verdicts found the defendant “guilty as charged.” Additionally, jury instructions on other offenses, including aggravated assault on law enforcement officers, which did include the element of knowledge of the officers’ statuses, did not affect the conclusion of the appellate court because there were multiple officers involved in the pursuit of the defendant and the instructions on those charges did not specify which officers Schminky was fleeing from.

[Knespler v. State](#), 3D18-1592 (Apr. 29, 2020)

Knespler appealed convictions for burglary and grand theft. He argued that the trial court erred in denying a motion to disqualify the Monroe County State Attorney’s Office. He further challenged the sufficiency of the evidence.

Dennis Ward was elected the State Attorney in November 2016. His name thereafter appeared on pleadings submitted by an assistant state attorney on behalf of Dennis Ward as State Attorney. Knespler alleged that “he provided confidential information to Mr. Ward” when Knespler previously consulted Ward when Ward

was an attorney in private practice. Knespler alleged that he shared information about this case with Ward at that time.

The trial court conducted an evidentiary hearing on the disqualification motion. Ward testified that he did not take the case when he was consulted; that he remembered some communications; and that Ward had not provided any prejudicial information gained from the consultation to the assistant state attorney handling the case or any other employee in the State Attorney's Office. Ward further stated that he did not assist in the prosecution in any capacity.

For the purpose of potential disqualification, government prosecutorial offices are treated differently than private law firms. The “imputed disqualification of the entire state attorney's office is unnecessary when the record establishes that the disqualified attorney has neither [1] provided prejudicial information relating to the pending criminal charge nor [2] has personally assisted, in any capacity, in the prosecution of the charge.” Based on Ward's unrefuted testimony at the evidentiary hearing, the disqualification of Ward, himself, was sufficient.

The defendant renewed motions to disqualify the entire office during the trial, and the denial of those, too, was not an abuse of the lower court's discretion. The parties stipulated that Ward did not communicate with the assistant handling the case during trial or sentencing, “and that Mr. Ward did not participate in the proceedings, despite his presence at various critical stages of the trial.” Further, the issue of Mr. Ward's presence at trial was not noted on the record and was not properly preserved for appellate review.” The Third District was bound by that stipulation, and the stipulation foreclosed the arguments being made on appeal.

With respect to the sufficiency of evidence for grand theft, the State's expert's testimony was based on insurance replacement cost values, not market value at the time of the offense. The evidence of value was therefore insufficient. The conviction for grand theft was reduced to a conviction for second-degree petit theft.

One judge dissented based on concerns about the State Attorney's attendance at the trial and sentencing proceedings.

[Small v. State](#), 3D19-1667 (Apr. 29, 2020)

The Third District denied a habeas corpus petition in which Small contended that his 30-year sentence for selling heroin, a second-degree felony, was cruel and unusual punishment. That sentence was imposed under the habitual offender statute,

and enhancement on that basis “does not turn a sentence into a ‘grossly disproportionate’ one.”

Fourth District Court of Appeal

[R.B. v. State](#), 4D19-817 (Apr. 29, 2020)

The trial court erred by failing to comply with E.A.R. v. State, 4 So. 3d 614 (Fla. 2009), “in deviating from the DJJ’s recommendation for a nonsecure residential treatment program.” The trial court committed R.B. to a high-risk facility.

In the instant case, the trial court did not set forth a comprehensive and through basis for its departure from the DJJ’s recommendation. The record clearly shows that the trial court was concerned that the PDR assessed R.B.’s risk to reoffend as high. Additionally, the trial court expressed concern that R.B. was ungovernable and “does as he pleases.” In the view of the trial court, a high risk to reoffend meant that R.B. presented a public safety concern and a “danger to the community.” Although the State argued at the disposition hearing, and the trial court agreed, that the comprehensive evaluation concluded that R.B. presented a concern for public safety, a review of the written evaluation does not support such an assertion. Nowhere in the written evaluation is the term “public safety” used. Nor does the evaluation support the conclusion stated by the trial court that R.B. was a danger to the community.

Furthermore, “at no point during the disposition hearing did the trial court elicit information as to the different treatment programs or services offered either at the nonsecure or high-risk facilities to support the analysis.” Finally, the trial court focused only on the concern of public safety and did not justify the deviation based upon the needs of the child.

[Buchmann v. State](#), 4D19-2904 (Apr. 29, 2020)

Upon revocation of probation, the defendant requested a nonprison sanction because his scoresheet total was less than 22 points. At the time of sentencing, the

First District had held, in Booker v. State, 244 So. 3d 1151 (Fla. 1st DCA 2018), that section 775.082(10), Florida Statutes, was unconstitutional, as it enabled the judge, as opposed to the jury, to determine whether a nonstate prison sanction would present a danger to the community. The First District had further relied on the doctrine of statutory revival to permit sentencing to proceed under predecessor statutes.

Although Booker was the only decision on the subject at the time of the sentencing hearing, the Florida Supreme Court subsequently rejected the remedy of statutory revival. As that case law was in effect at the time of the direct appeal in this case, it was controlling. Pursuant to that case law, upon remand, “the trial court has two options: (1) impose a non-state sanction; or (2) empanel a jury to make a finding that the defendant is a danger to the public.”

Fifth District Court of Appeal

[Wilkins v. State](#), 5D19-970 (May 1, 2020)

The Fifth District affirmed a conviction for first-degree murder with a firearm. Wilkins argued that the trial court erred in denying a motion for judgment of acquittal. “However, Appellant’s counsel for this appeal, who was not trial counsel, has chosen to ignore [the] legal standard which governs whether or not a judgment of acquittal should be granted, and instead has treated the Court to what amounts to a jury trial closing argument. Appellant’s counsel argues that Grajales’ testimony cannot be relied upon because of her obvious bias against Appellant, who chose to marry another woman and because of her deal to avoid prosecution.” Other arguments based on witness credibility and bias were added to this. In addition to being arguments that were not based upon an appellate court’s standards of review, the arguments were not preserved in the trial court as the motion for judgment of acquittal was a barebones boilerplate motion, and these arguments were not presented.

During the testimony of witness Lane, “when the State asked him if he had received any threats from other inmates once they learned he was going to testify against Appellant,” defense counsel objected and moved for a mistrial because an affirmative response by the witness would suggest to the jury that the defendant instigated the threats, which would make the defendant look guilty. The trial court permitted Lane to answer “yes” or “no,” and not say anything about who instigated the threats or anything else. There was no abuse of discretion in denying the motion

for mistrial as it was an isolated comment, and could not be viewed as denying a fair trial, especially when considered in the context of all of the other evidence at trial.

[Department of Children and Families v. Campbell and State of Florida](#), 5D19-3309 (May 1, 2020)

During the course of a criminal case, the defendant was found incompetent to proceed to trial and was committed to a facility of the Department of Children and Families. A psychologist had testified that the defendant had significant memory deficits which were consistent with Korsakoff's Syndrome, which is often caused by alcohol abuse. DCF sought review of the commitment order and the Fifth District granted DCF's petition for writ of certiorari.

One of the statutory requirements for commitment to DCF during a criminal case is the existence of "a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future." "Here, the evaluating psychologist opined that it was 'doubtful' Campbell would be restored to competency in the foreseeable future." As a result, the trial court's commitment order departed from the essential requirements of law.