Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Bates, 18-12533 (May 28, 2020)

Bates appealed convictions for possession with intent to distribute marijuana, assaulting a federal officer with a firearm, and other offenses.

The Court held that the assault conviction, under 18 U.S.C. s. 111(b), qualified as a crime of violence under the elements clause of 18 U.S.C. s. 924(c). Section 18 U.S.C. s. 111(a) provides that it is an offense for anyone to forcibly assault designated individuals. Section 111(b) provides an enhanced penalty when the acts done in s. 111(a) are committed with a deadly or dangerous weapon or through the infliction of bodily injury. An assault, whether through the use of a deadly weapon, or through the infliction of bodily injury, requires the use of violent force.

The district court excluded psychiatric evidence of Bates' state of mind at the time of the offense. Psychiatric evidence is generally inadmissible to negate mens rea in general intent crimes. Section 111 is a general intent offense. In this case, Bates claimed self-defense, which the Government sought to negate by proving that he knew the victim was a federal officer. Thus, "Bates may have been able to introduce non-insanity psychiatric evidence to negate the criminal intent required under s. 111 – but only if it would actually bear on his knowledge of the victim's status."

The proffered testimony, which would have linked impaired reasoning ability to Bates' state at the time of the offense would likely have crossed the line into an affirmative defense category, which would have been statutorily impermissible "to negate *mens rea* because it would excuse conduct based on a defendant's 'inability or failure to engage in normal reflection.'" Additionally, the expert's testimony was to the effect that Bates would have reacted irrationally to anyone trying to gain entry to his home, not that he did not know that there were federal officers at his door.

The district court also excluded as hearsay a federal agent's statement that Bates said that he "had previously been robbed and did not know there were officers at his door." The appellate court agreed that it did not qualify as an excited utterance

because the state of excitement appeared to have ended prior to the time the statement was made by Bates. The statement by Bates was made after he had made a 911 call and he was already in a patrol car.

Bates' prior Georgia convictions for possession of marijuana with intent to distribute qualified as predicate offenses under both the ACCA and Sentencing Guidelines as a "serious drug offense" and a "controlled substance offense," respectively.

First District Court of Appeal

Boston v. State, 1D17-5190 (May 29, 2020)

The First District addressed the issue of whether Boston was entitled to a new stand-your-ground immunity hearing, on remand from the Florida Supreme Court, for reconsideration in light of its decision in Love v. State.

Boston did not have a pretrial immunity hearing. The trial court had held that it was his burden of proof as to immunity, and the parties stipulated that the immunity motion would be considered by the trial court during the trial. As the jury rejected the claim of self defense and found that the State proved its case beyond a reasonable doubt, the trial court's erroneous ruling with respect to the burden of proof was cured.

Kilburn v. State, 1D18-4889 (May 29, 2020)

The trial court erred in denying a motion to suppress evidence. A deputy sheriff approached the vehicle that Kilburn was in because it was parked with its door open, and a cover on the license made it difficult to determine whether the license was from Florida or another state. The defendant exited, holding a knife, which he placed on the seat of the vehicle. The butt of a gun was sticking out from his waistband. The deputy inquired if the defendant had a concealed weapons license, to which the defendant responded that he did not. Kilburn was then arrested for carrying a concealed weapon without a license. During a subsequent search of the surrounding area of the vehicle, a second firearm was found.

The officer testified that the only reason for the search and seizure was the presence of the first handgun. This did not constitute reasonable suspicion. A statutory amendment from 2015 made the absence of a license for a concealed

weapon an element of the offense. Mere possession of a concealed weapon cannot serve as a basis for seizing a person.

The State argued that the deputy could have arrested the defendant for open carrying of the handgun in the waist, and that the subsequent seizure and search would then be valid. The Court declined to entertain this theory because it was contrary to the deputy's testimony. And, for a violation of the open-carry law, it is not enough to openly display the firearm; the firearm must be displayed in an angry or threatening manner.

One just dissented, finding that the majority's construction of the facts was erroneous.

Melton v. State, 1D19-1286 (May 29, 2020) (on motion for rehearing)

The First District withdrew its prior opinion and issued a new opinion, addressing the issue of whether the postconviction trial court lost jurisdiction to vacate its order granting a resentencing.

The Court noted its own recent en banc decision in Rogers v. State, holding that a trial court did have authority to rescind an order granting a new sentencing hearing, prior to the resentencing, when the motion giving rise to the order was a Rule 3.800(a) motion to correct illegal sentence.

The Court further rejected Melton's argument that it would be a manifest injustice to prohibit the resentencing when other postconviction litigants had already obtained the same relief that Melton was seeking. The Court responded that the law in effect at the time of an appeal is controlling, and that the Florida Supreme Court had receded from several of its previously controlling decisions. Based on the change in decisional law from the Florida Supreme Court, that Court's more recent decisions regarding juvenile life sentences were controlling and there was no entitlement to relief.

Porter v. State, 1D18-5024 (May 26, 2020)

The First District affirmed convictions for first-degree murder, sexual battery and burglary.

A partial DNA sample found at the crime scene in 2013 matched Porter's DNA profile which was stored in FDLE's DNA database. Porter sought the

suppression of the DNA evidence, arguing that his sample should not have been in FDLE's database. His DNA profile had been lawfully obtained by FDLE following his 1988 convictions for multiple felonies, including sexual battery. Porter appealed those convictions, obtained a new trial, and was acquitted on retrial. He subsequently obtained an order expunging all court records.

The First District avoided issues regarding the scope of the order of expungement and did not rule on the question of whether Porter's DNA sample should have been removed from FDLE's database. The original sample/profile was lawfully obtained and it did not constitute a "seizure." Regardless, there was no statutory authority mandating the exclusion of evidence based upon a violation of the statute.

Williams v. State, 1D19-58 (May 26, 2020)

Williams appealed convictions for kidnapping, aggravated battery and aggravated assault. The First District found that the trial court did not abuse its discretion in denying a motion for mistrial. The motion was based on two jurors, one of whom was an alternate, who indicated that they did not hear about 20% of the testimony of one of the State's witnesses, one of the alleged victims. The trial court granted the State's request for a read-back of the testimony of that witness, and the read-back was done with the witness reading the prior testimony.

The defendant's argument focused on the ability of the read-back to convey the demeanor of the witness while testifying. The Court found that the jury had already had the ability to see the demeanor of the witness, and, the witness did the read-back as well.

Golden v. State, 1D19-1644 (May 26, 2020)

Robbery with a firearm is a first-degree felony punishable by life, not a life felony.

Cogdell v. State, 1D19-3418 (May 26, 2020)

Challenges to the procedure leading to the sentence imposed are not cognizable in a Rule 3.800(a) motion to correct illegal sentence.

Moore v. State, 1D19-3829 (May 26, 2020)

A claim that the trial court never ruled on a motion to disqualify the judge should have been raised in the prior direct appeal; it could not be raised in a habeas corpus petition after the direct appeal. Moreover, the motion to disqualify was a nullity; it was signed and filed by Moore, not by counsel, at a time when Moore was represented by counsel.

Second District Court of Appeal

Aswell v. State, 2D19-2854 (May 29, 2020)

The defendant filed a motion seeking postconviction relief under Rule 1.540, Florida Rules of Civil Procedure, and the trial court denied it because that rule was not available for seeking relief in a criminal case. The trial court erred, however, by not treating it, in the alternative, as a motion filed under the proper rule, Rule 3.850, Florida Rules of Criminal Procedure. The case was remanded for further proceedings.

Moore v. State, 2D18-1842 (May 27, 2020)

Moore appealed convictions for felony grand theft of a motor vehicle and misdemeanor possession of paraphernalia with intent to use. The grand theft charge was reversed because the court erred in giving an instruction on "the inference of knowledge arising from possession of recently stolen property." The paraphernalia conviction was affirmed, and the Court addressed the sufficiency of the evidence to prove intent to use a crack pipe to smoke crack.

The instruction on the inference of knowledge is given when the property was recently stolen. In this case, that was highly disputed. As a result, Moore argued on appeal that it was fundamental error to instruct the jury on the inference as the instruction was likely to mislead the jury into "believing that the truck was stolen, effectively nullifying his defense that he took it with the victim's consent." The Court agreed. The Florida Supreme Court has previously held that this instruction should be given only where the property is "undisputably stolen."

The evidence of intent to use the crack pipe to smoke crack was sufficient. "Taken as true, the State's evidence showed that Mr. Moore was found in the wee hours of the morning driving a stolen truck on a suspended license with a handgun under the driver's seat and with what everyone agreed was a crack pipe, the sole or

dominant purpose of which is smoking crack, in his pocket." There was no indication in the evidence and no argument by defense counsel "that the pipe had any use other than the one the State's evidence proved – smoking crack cocaine." Moore emphasized the absence of any residue or any drugs found on or about the defendant. The Court emphasized that the sole or predominant purpose of the pipe was smoking crack cocaine.

One judge concurred in result only as to the Court's opinion regarding the sufficiency of evidence of intent to use the paraphernalia for drug use.

Schofield v. State, 2D18-2175 (May 27, 20200

Schofield appealed the denial of a Rule 3.850 motion following an evidentiary hearing. He was convicted for the murder of his wife in 1989. Her body was found in her abandoned car and it was known since 1989 that there were unidentified fingerprints in the vehicle.

A prior motion asserted a claim of newly discovered evidence – that the fingerprints were identified as those of Jeremy Scott, who was currently serving a life sentence on an unrelated murder. That motion was denied and the denial was affirmed on appeal. The current motion asserted two more claims of newly discovered evidence – that Scott, more than 10 years earlier, confessed to the murder to another inmate; and that he confessed both orally and in writing.

An evidentiary hearing was held and the Second District described the evidence as "bizarre." Scott was questioned by defense counsel as a hostile witness. Scott ultimately admitted to having committed the murder, but "he also confessed to murdering every other person who was murdered in Polk County between 1987 and 1988." He admitted to having told Schofield's defense team that he would confess for $1,000. In prior testimony, he denied involvement in the murder although his prints were in the vehicle. He "explained that he was confessing to the murder because he was tired of being hauled from prison to county jail for interviews and court proceedings and just wanted to go back to prison and stay there."

The claim of newly discovered evidence failed on appeal because the evidence was not such as would be likely to produce a different outcome at trial. When evaluating such claims, the trial court may take into consideration the credibility of the evidence. The trial court did that in this case.

One judge concurred in result only, and was troubled by the majority's conclusion that the trial court judge could make a determination of credibility as the basis for denying the motion. The concurring judge would have affirmed on other grounds related to the inadmissibility of testimony at trial, and that they did not rise to the level of probably producing an acquittal at trial when the weaknesses of the testimony were considered in light of the totality of the circumstances of the case.

State v. Morales, 2D18-3428 (May 27, 2020)

Morales, a juvenile at the time of the kidnapping for which he was convicted, received a 30-year sentence. The trial court granted a Rule 3.800(a) motion to correct illegal sentence based on then-existing case law regarding juvenile life sentences. In light of the recent decision of the Florida Supreme Court in Pedroza v. State, the Second District reversed. Pedroza held that a 40-year sentence was not unconstitutional as it was not the equivalent of an impermissible life sentence.

Shields v. State, 2D19-493 (May 27, 2020)

In an appeal from a revocation of probation, the Second District reversed the sentence for resentencing. The judge, rather than the jury, had made the determination that a state-prison sanction was needed, based on the presumptive nonstate prison sanction (based on the Criminal Punishment Code scoresheet total of less than 22 points) being a danger to the public, under section 775.082(10), Florida Statutes.

The Florida Supreme Court held, in Brown v. State, 260 So. 3d 147 (Fla. 2018), that such findings had to be made by the jury. The State argued, in the trial court, that Brown was inapplicable because the sentence was being imposed for a revocation of probation, as opposed to a sentence being imposed immediately after the jury trial.

This was an issue of first impression, and the Second District held that Brown applied to post-revocation sentencing proceedings. Among other arguments presented, although the Court agreed with the State's assertion that the Sixth Amendment, upon which Brown was based, does not apply to probation revocations, the defendant was not challenging the revocation; the defendant was challenging the sentence imposed.

Fourth District Court of Appeal

Elder v. State, 4D18-2891, 4D18-2892 (May 27, 2020)

The Fourth District reversed a conviction for manslaughter with a deadly weapon for a new trial. Elder asserted at trial that he killed the victim in self-defense of his codefendant, Baptista.

The jury heard two conflicting versions of the incident. The defendant's version was based primarily on his own testimony from the pretrial stand your ground immunity hearing, which was played for the jury. He stated that he was driving, with Baptista as his passenger, and, while stopped at an intersection, the victim approached the passenger's window. A tussle ensued between Baptista and the victim. Elder exited the car, went around to the passenger side, tried to pull the victim off Baptista, and, upon hearing Baptista scream that the victim was trying to kill him [Baptista], Elder picked up a knife that he saw on the floorboard and stabbed the victim.

The trial court abused its discretion in denying the defense-requested instruction on the presumption of fear for the justifiable use of deadly force under section 776.013(1), Florida Statutes. A person is presumed to have a reasonable fear if, inter alia, "the person against whom defensive force was used . . . was in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered, a . . . vehicle. . ," and the defendant had reason to believe that such an unlawful and forceful entry was occurring or had occurred. There was sufficient evidence to support the requested instruction. Although Elder said that he did not know who opened the passenger door, he stated that he saw the victim on top of Batista, striking Batista, in the passenger seat. Elder also stated that Batista never exited the vehicle.

The trial court also abused its discretion in excluding testimony that Elder had a disease called myasthenia gravis, which affects his muscles and makes it difficult for him to breathe. Immediately preceding the incident, Elder's car had been stopped at the intersection. The victim's girlfriend testified that the victim had exited and approached Elder's car because it had been stopped for a very long time and their car was behind it. Elder stated that he had stopped because he was having a coughing fit and had to catch his breath. The defense sought to introduce evidence of the medical condition to rebut the inference the State was creating – that Elder had stopped the vehicle in order to provoke a fight with the occupants of the vehicle behind him. This proffered testimony was relevant to prove a material fact – that

the medical condition made it unlikely that Elder would pursue "activity requiring violent physical exertion."

Elder was not entitled to a new stand your ground immunity hearing, even though his hearing was conducted after the 2017 statutory amendment to the burden of proof. The trial court made alternative rulings, covering the burdens of proof under the pre- and post-2017 statutory amendment.

Ward v. State, 4D18-3620 (May 27, 2020)

Ward appealed convictions for burglary of an occupied dwelling and resisting an officer without violence. The trial court did not err in denying a defense-requested instruction on "lost evidence," because the instruction was not accurate and the evidence was only "potentially exculpatory." The instruction related only to the offense of resisting an officer.

The lost evidence was video footage from one of the pursuing officer's body-cams. The officer testified that while she was pursuing the defendant, she had a "technical glitch," that the video should have been there, and that she did not know what happened. The language in the requested instruction would have erroneously permitted the jury to find against the State regardless of whether the evidence was exculpatory. Additionally, under the facts of the case, the video would have shown only what happened at a point in time after the officer entered a residence; the crime of resisting had been completed prior to that time.

State v. Fidemon, 4D19-438 (May 27, 2020)

The trial court dismissed a probation revocation proceeding, finding that the defendant's probation had terminated prior to the filing of the affidavit of violation. The State appealed and the Fourth District reversed.

Cases from 2010 and 2012 were originally disposed of separately. In the 2010 case, the defendant was sentenced to three years in prison, followed by two years on probation. Nine months later, in the 2012 case, the defendant was sentenced to eight years in prison. The sentence was concurrent with the 2010 sentence. The parties did not discuss how the 2012 sentence would affect the probation from the 2010 case. The defendant was released from prison in 2018 and the Department of Corrections placed him on probation for the 2010 case at that time. The trial court granted the defendant's motion to dismiss the probation violation proceeding, concluding that the probationary period on the 2010 case expired while the defendant

was still incarcerated on the 2012 case, several years prior to his release from prison in 2018.

The Fourth District construed multiple statutory provisions in Chapter 948, Florida Statutes (provisions pertaining to probation), as well as case law from the Florida Supreme Court, and concluded that there was a tolling of the probationary period after the completion of the 2010 incarcerative sentence until the completion of incarceration in 2018.

One judge dissented.

Jones v. State, 4D19-1189 (May 27, 2020)

The Fourth District affirmed convictions for first-degree murder and armed burglary. The trial court did not err in permitting the State to present collateral offense evidence of a prior burglary.

Jones argued that the prior burglary was not sufficiently similar to the charged burglary. Similarity of the offenses was not required, however, when the prior burglary was being presented for some other relevant purpose, as it was in this case. The prior burglary was relevant to the issue of "ownership and possession of the gun purportedly used in the subsequent commission of the [charged] murder/burglary."

The State presented evidence that the prior burglary was committed five days before the charged offenses, and that the defendant and one other person stole five firearms and .22 caliber bullets and blanks. Bullets and blanks matching those stolen were found in Jones's motorcycle storage compartment. Although the firearm used in the murder was not recovered, other evidence was presented which linked a unique firearm stolen in the earlier burglary to one that Jones was seen possessing and using during the charged offenses.

The Fourth District further found that the probative value of the collateral offense evidence outweighed its prejudice and that it did not become a feature of the murder/burglary trial. The murder trial entailed a transcript exceeding 1,000 pages, with 23 witnesses, and only three witnesses addressed the collateral offense, for a total of about 40 pages.

Fifth District Court of Appeal

Melendez v. State, 5D19-1624 (May 29, 2020)

The Fifth District affirmed a conviction for second-degree murder with a firearm.

The jury was instructed on manslaughter as a lesser-included offense. However, the court omitted the instructions on justifiable and excusable homicide, which are needed to understand the elements of manslaughter: manslaughter is defined as a killing which is neither justifiable nor excusable. Defense counsel did not object to the omission, and this omission was reviewed on appeal for fundamental error.

In light of the Florida Supreme Court's recent decision in Knight v. State, 286 So. 3d 147 (Fla. 2019), which disavowed any fundamental right to partial jury nullification, fundamental error did not exist where the error related to a lesser included offense and the defendant was convicted of the greater offense, for which the jury instructions were correct. The Fifth District concluded that the Florida Supreme Court's decision in State v. Spencer, 216 So. 3d 481 (Fla. 2017), which held that the failure to instruct on justifiable and excusable homicide as part of the instructions on manslaughter as a lesser included offense was fundamental error, was no longer operative in light of Knight.

Weiand v. State, 5D19-2993 (May 29, 2020)

In 1988, Weiand was sentenced to life without parole for offenses committed while he was a juvenile. In 2019, he filed a motion for sentence review pursuant to section 921.1402, Florida Statutes, and Rule 3.802, Fla.R.Crim.P. The trial court denied the motion, concluding that it had done sufficient review during a 2017 resentencing.

The Fifth District reversed the denial of the Rule 3.802 motion, because neither the 2017 sentencing order nor the order denying the Rule 3.802 motion contained the required written findings for a sentencing review under section 921.1402.

Based on concerns from statements by the judge that the judge had already formed an opinion on this cause, the sentencing review was ordered to be conducted by a new judge.

Hartman v. State, 5D19-3031 (May 29, 2020)

The summary denial of a Rule 3.850 motion, alleging newly discovered evidence, was remanded for attachment of court records conclusively refuting the claim or for an evidentiary hearing. The motion alleged a witness recantation. Although there had been a prior motion alleging newly discovered evidence based on witness recantation – something alleged to have been learned during a jailhouse visit – there was nothing on the face of the record before the appellate court indicating that the currently alleged recantation could have been discovered during the prior jail visit.