Case Law Update
July 6, 2020
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Eleventh Circuit Court of Appeals

United States v. Pon, 17-11455 (June 29, 2020)

Pon appealed convictions and sentences for 20 counts of health care fraud. Dr. Pon, an ophthalmologist, diagnosed large numbers of elderly patients with wet age-related macular degeneration. He then purportedly treated them with a laser treatment. However, the laser equipment he used was set to a low setting, which does not leave the scarring that typically evidences treatment for WMD. He then billed Medicare for the treatment. His practices came into question when one of his patients was examined by another doctor, who did not find any evidence of WMD, and did not observe the scarring that laser treatment for WMD would have left. Additionally, after laser treatment for WMD was replaced by other forms of treatment, and other doctors' reliance on the laser treatment substantially decreased, Pon's billing for the laser treatment continued to increase.

The lower setting of the equipment was referred to as "subthreshold micropulse photostimulation." The district court held a Daubert hearing and precluded the defense from presenting expert testimony about the use of this subthreshold micropulse photostimulation for treatment of WMD. Three of the four-factors analyzed under Daubert were adverse to the defense. The defense expert acknowledged that his theory had not been tested, and no evidence was presented regarding the rate of error. The evidence from the trial court hearing further demonstrated that the theory was not generally accepted in the ophthalmology field. The only evidence minimally favoring the defense was that the expert had published a peer-reviewed paper mentioning his theory. That was not enough to prove that the district court abused its discretion in concluding that the evidence was inadmissible under Daubert.

The Appellant further argued that the district court erred in permitting the government to present rebuttal evidence that Pon billed Medicare for services on one of his patients, J.L. "Pon presented J.L.'s testimony as an example of how he had treated a patient out of the goodness of his heart and not for a profit motive. In light of that, the district court did not abuse its discretion in admitting billings Pon had generated for services he claimed to have rendered on that patient's blind eye."

The district court then limited surrebuttal testimony that Pon could present. The court excluded testimony about non-surgical services on the blind eye and why Pon claimed that they were necessary. Although Pon preserved the surrebuttal issue through a proffer in the district court, a related Sixth Amendment claim based on the constitutional right to present a defense, was viewed by the Eleventh Circuit as most likely not having been preserved. The Court did not have to decide the Sixth Amendment issue, however, since any error would have been harmless under the facts of the case. The Court's opinion includes a multi-page discussion of the harmless error test when it is based on overwhelming evidence.

The Court also addressed several sentencing issues, including the calculation of the loss, which resulted in an 18-level enhancement.

Jenkins v. Commissioner, Alabama Department of Corrections, 17-12524 (June 29, 2020)

The Court sua sponte withdrew its prior opinion and issued a revised opinion, affirming the denial of a habeas corpus petition, and rejecting arguments that trial counsel were ineffective during the penalty phase of a capital case and that Jenkins was intellectually disabled and not eligible for the death penalty.

The case is discussed in the Case Law Update of September 19, 2019. One judge still dissented as to both issues.

United States v. Clotaire, 17-15287 (June 30, 2020)

The defendant was convicted for multiple offenses related to fraudulent acts in connection with unemployment applications. He and his brother used multiple false identities to obtain the benefits. The brother worked for the post office and intercepted preloaded debit cards that the two brothers ordered for delivery to addresses on the postal delivery route. Banks where the stolen debit cards were used had surveillance video. The defendant raised multiple evidentiary issues that went to the government's proof of his identity. His defense was one of mistaken identity.

Photo stills were created for use at trial from the surveillance videos. While the surveillance videos would clearly be admissible as business records, the issue existed as to whether the still photos were "new records," apart from the videos. The Court concluded that while the format of the "records" was changed, the communicative content was not. And, "little human discretion or judgment was

involved; only a technical format change was needed." Thus, just as the surveillance videos qualified as self-authenticating business records under Rule 803(6), so, too, the still photos derived from the videos were self-authenticating business records.

The defendant further argued that he had the right to confront the methods used to produce the still photos and to cross-examine a person who had knowledge of how the exhibits were created. The Confrontation Clause applies only to "testimonial" statements, and that was not at issue with the still photos. The Court also rejected the related argument that the certification of the records itself was testimonial in nature and subject to the Confrontation Clause.

The trial court properly excluded two items of evidence proffered by the defense. One email was offered "to demonstrate that the bank's surveillance images may have been distorted." Another, from a prosecutor, "was offered to show that the government was investigating an additional phone number associated with [the defendant]." Both were offered to prove the truth of the matter asserted by out-of-court declarants and were thus inadmissible hearsay.

The Appellant also challenged testimony from one witness as inadmissible expert testimony – statements "about the difference between what one sees with the naked eye and what one sees in a two-dimensional photograph, as well as his statements about the difference between needle distortion and the barrel distortion caused by the camera lens." The first point was admissible as lay witness testimony, as it "does not take specialized expertise to understand that three-dimensional objects may look different in person than in a two-dimensional photograph." The government conceded that the testimony about distortion was expert testimony. The Appellant did not object to the witness's qualifications, and that issue was therefore reviewed under the plain error standard. The witness did have specialized training and experience with closed circuit television cameras. There was no error, let alone plain error, based on the witness's training and experience.

The district court permitted the government to introduce the defendant's booking photo for comparison by the jury to ATM photos. While the admission of mug shots raises serious concerns, they are not completely barred, and exceptions exist based on necessity. The government's burden of demonstrating need was satisfied because the defendant's identity was central to the case.

United States v. Harris, 18-15055 (July 1, 2020)

Harris challenged the procedural and substantive reasonableness of his sentence of 92 months, well above the Guidelines range of 33-41 months, for the offense of being a felon in possession of a firearm.

Major departures from the Guidelines require more extensive explanations than minor departures. The district court's explanation was sufficient: Harris had an extensive prior record, including convictions for violent offenses; he started a confrontation that resulted in death; and the judge took into consideration "Harris's salutary post-offense conduct."

United States v. Cuya, 18-14380 (July 1, 2020)

The Eleventh Circuit affirmed the denial of several discovery motions that Cuya filed in anticipation of his filing of a future motion under 28 U.S.C. s. 2255. As a convicted defendant who has not yet filed a section 2255 motion has not entitlement to discovery, the district court's orders were affirmed.

First District Court of Appeal

Porter v. State, 1D18-5024 (June 29, 2020) (on motion for rehearing)

The Court issued a revised opinion on rehearing and affirmed convictions for first-degree murder and other offenses.

Porter was apprehended as a result of a DNA match to his profile in FDLE's system (CODIS). Porter argued that his profile should not have been in CODIS and that the search was therefore the fruit of the poisonous tree. His profile was lawfully taken after prior convictions in 1988, but those convictions were overturned on appeal and Porter was acquitted on retrial. Although Porter thereafter obtained an order sealing criminal history records in any criminal agency and in court records, the order did not reference FDLE's DNA database. "Regardless of whether FDLE was obliged to remove his DNA record upon receipt of the judgment of acquittal, the order to expunge, or the enactment of certain laws, any error by FDLE's CODIS unit did not result in a search or seizure violative of the Fourth Amendment. . . ." Furthermore, the exclusionary rule was inapplicable, as neither the DNA evidence seized at the crime scene, nor the DNA stored in CODIS, was obtained by a warrantless search or seizure. The DNA at the crime scene was at an area where Porter had no privacy interest. And the DNA in CODIS, was lawfully obtained.

Davis v. State, 1D18-5253 (June 29, 2020)

The sentence imposed was reversed for resentencing before a new judge; the sentencing judge relied upon conduct for which the defendant was acquitted when imposing the sentence. When imposing the sentence, the judge detailed the reasons for the sentence that was imposed and referred, in detail, to facts related to the offenses for which the defendant had been acquitted.

Dyett v. State, 1D19-256 (June 29, 2020)

Aggravated battery, based on the use of a deadly weapon during the commission of the battery, cannot be reclassified to a higher degree offense based on the use of the firearm or deadly weapon; the firearm is already an inherent element of the offense of aggravated battery.

Blanding v. State, 1D19-665 (June 29, 2020)

The First District affirmed the defendant's convictions and concluded that the trial court did not err in giving the jury an Allen charge. Thirty minutes after deliberations commenced, a note was sent to the court from one juror, stating: "I am not comfortable making a decision in the verdict of guilty or not guilty and would like an alternate to take my place." The defendant argued on appeal that the Allen charge was unnecessary and that a motion for mistrial should have been granted.

Allen v. State, 1D19-1315 (June 29, 2020)

The defendant was charged with several offenses, including capital sexual battery on a person less than 12 years of age. The jury was instructed, on that count, with the lesser offenses of lewd and lascivious battery on a victim less than 16 years of age and simple battery. The defendant was convicted as charged of capital sexual battery and argued on appeal that the court should have granted his request for an instruction on the lesser offense of sexual battery. This was a factual argument, in which the appellant argued that the jury could have found that the offense was committed after the victim reached the age of 12. The First District rejected that argument because of the verdicts rendered by the jury on other sex offense charges, which entailed consideration of the dates of the offenses and the victim's age at the times of the offenses.

Allen further argued that it was per se reversible error not to instruct on a necessarily lesser included offense. The Court addressed the decisions of the Florida Supreme Court in Knight v. State, 286 So. 3d 147 (Fla. 2019), and Wimberly v. State, 498 So. 2d 929 (Fla. 1986). In Wimberly, the Court held that once a trial court concludes that a lesser included offense is a necessarily lesser included offense, the court must give that instruction to the jury. In Knight, however, the Court addressed the issue of lesser included offenses as they relate to the jury pardon doctrine. Although sexual battery is listed on the chart in the Standard Jury Instructions as a necessarily lesser included offense of capital sexual battery, those charts are not necessarily correct and may be questioned by trial courts. The First District found that in the instant case the elements of sexual battery, are not always "subsumed within the elements of capital sexual battery." Sexual battery requires a victim between the ages of 12 and 18; capital sexual battery pertains to a victim under the age of 12. The Court further noted that Wimberly's rationale did not appear to be consistent with Knight's subsequent holding based on the jury pardon. And, the Court certified to the Florida Supreme Court the question of whether the chart in the Standard Jury Instructions correctly lists sexual battery as a necessarily lesser included offense of capital sexual battery.

Second District Court of Appeal

Brown v. State, 2D19-2743 (July 1, 2020)

Convictions on two counts of resisting an officer with violence were reversed and reduced to simple battery. The evidence did not establish that the officers were engaged in the lawful execution of a legal duty.

One officer responded to a call about a disturbance at a motel and arrived to observe Brown walking in the parking lot. The motel manager pointed towards Brown. The officer approached Brown and asked about the disturbance; Brown started yelling profanities, saying that he wanted to leave and tried to walk away a few times. Three minutes later, a second officer arrived and saw the two talking; she observed Brown's fists clenched and said that Brown looked like he was going to approach the first officer in an aggressive manner. When the second officer joined them, Brown indicated he wanted to leave and when he began to walk away, he was ordered to stop. Brown continued walking away even after ordered to stop. When Brown was apprehended, the officers attempted to handcuff him, and he struggled with the officers.

There was no proof that the officers were engaged in the lawful execution of a legal duty as the officers had no reasonable suspicion that Brown had committed any criminal activity. As the detention was not supported by reasonable suspicion, it was unlawful.

Third District Court of Appeal

Palos v. State, 3D19-1150 (July 1, 2020)

Palos argued that the trial court erred in limiting re-cross-examination. The Third District concluded that the issue was not preserved for appellate review.

Questioning of a witness on direct examination, cross examination, and redirect examination, focused on whether the testifying witness observed the defendant reaching for his waistband. Defense counsel then asked for "one more question" on re-cross, which the court denied. Defense counsel responded, "okay," and did not proffer what the additional question would have been. Several hours later, defense counsel was, on request, permitted to proffer the question, and indicated that it would have been an effort to impeach the previously testifying witness, an officer, with a prior inconsistent statement.

Preservation of the issue was untimely because the proffer was made after the conclusion of the testimony of the testifying witness, when another witness was already testifying. The Court alternatively found that the State did not elicit any new matter on direct examination, "'but only a detail which had been addressed on cross-examination,'" and that under such circumstances, an abuse of discretion in limiting re-cross examination could not be found.

Jordan v. State, 3D20-151 (July 1, 2020)

For a first-degree felony and a second-degree felony, Jordan was sentenced to 12 years in prison, followed by 12 years on probation. In an appeal from the denial of a Rule 3.800(a) motion to correct illegal sentence, the Third District found that the trial court erred by striking the motion, and further found that the sentence imposed was an improper "general sentence."

The motion had been improperly stricken based on an incorrect notation in the clerk's docket indicating that Jordan was still represented by counsel. The imposition of the "general sentence" in this case resulted in the sentence for the

second-degree felony exceeding the 15-year maximum for that offense, even though the sentence was within the statutory limits for the first-degree felony.

Gerome v. State, 3D20-770 (July 1, 2020)

Appellate counsel from the direct appeal was not ineffective for failing to argue that the trial court erred in allowing the State to amend the charging document in the middle of jury selection.

Both the original and amended informations alleged that the defendant aided and abetted another in the commission of a sexual battery. The amended information added an alternative means by which the victim was violated. The jury had not yet been sworn; the alternative means of commission of the offense had been disclosed through discovery since the inception of the case.

Fourth District Court of Appeal

Cosme-Sella v. State, 4D18-3425 (July 1, 2020)

Cosme-Sella appealed convictions for second-degree murder wit a weapon and robbery with a weapon.

A comment by the prosecutor in the rebuttal argument was found to be subject to misinterpreted as burden shifting, but it was sufficiently cured by an instruction by the court. The prosecutor stated: "So this is not an independent act, it doesn't apply in this case. And again, look at all those acts, it requires all three elements to be proven and they just weren't."

The sentence for robbery with a weapon, 32 years in prison, exceeded the statutory maximum of 30 years, and was remanded for reduction.

Cruz v. State, 4D19-1955 (July 1, 2020)

During jury selection, one prospective juror stated that he or she recognized the "Public Defender," as that prospective juror had interned with the Public Defender's office. Defense counsel stated that he did not recognize the juror, and added that counsel tries to avoid referencing the Public Defender's Office in front of the jury to avoid the possibility of some jurors thinking less of the defendant because of representation by the Public Defender's Office. Counsel moved for a mistrial. The judge gave a curative instruction, advising the venire that there was "nothing

negative" about lawyers working for government offices, whether the State Attorney's Office or the Public Defender's Office. Defense counsel was "fine" with the curative instruction. Upon inquiry by the judge, none of the panel members had any feelings or reaction to the one panel member's reference to knowing one of the defense attorneys as a member of the Public Defender's Office.

The motion for mistrial was renewed a few times during jury selection and was later denied by the court, with leave to "renew" it later. Jury selection continued the following day, and the court noted that counsel could still renew the motion for mistrial, but counsel did not do that, and the jury was subsequently sworn.

On appeal, the Court found that this issue was not preserved for appellate review, because counsel did not renew the motion for mistrial at the time of the swearing of the jury, or indicate that the jury was being accepted subject to the prior objection. Alternatively, there was no error in failing to strike the panel. The comment by the one prospective juror was not disparaging and the court gave a "suitable" curative instruction.

Langel v. State, 4D19-2198 (July 1, 2020)

A manslaughter conviction was reversed for new trial. Statements by the defendant were erroneously admitted into evidence as the defendant unequivocally invoked his right to remain silent prior to the subsequent interrogation.

During the post-arrest questioning, Langel was read his Miranda warnings and questioning proceeded. At one point, when questioned asked for his side of the story, Langel responded: "I don't know mine and I have the right to have representation." When the officer agreed with that, Langel added: "And that's all I'm saying." Questioning continued, and, at a later point, Langel added: "[I]t's over, it's done," and "I want a lawyer right now because you guys are confusing me . . . I said that [] how many times?"

The trial court suppressed those statements made after the final assertions by Langel – "It's over, it's done." The trial court erred, however, by not suppressing the statements that were made subsequent to Langel's initial assertion: "And that's all I'm saying."

Maykel-Torres v. State, 4D20-299 (July 1, 2020)

The summary denial of a Rule 3.850 motion was reversed and remanded for an evidentiary hearing, because the claim of ineffective assistance of counsel was sufficiently pled and was not conclusively refuted by record attachments. The motion alleged that in a burglary prosecution, trial counsel failed to advise the defendant that the State would be able to rely on the statutory inference based on stealthy entry in order to prove intent. The motion further alleged that this inference negated the sole defense and that if he had been advised of it, the defendant would have accepted the State's pretrial plea offer and not gone to trial.

Fifth District Court of Appeal

Humphreys v. State, 5D18-2535 (July 2, 2020)

The Fifth District reversed a conviction for aggravated battery. The trial court committed fundamental error by editing the instruction for aggravated battery and omitting the element and definition of "deadly weapon."

The evidence at trial was that the defendant used a flare gun. In the jury instructions, the court deleted reference to "deadly weapon" and its definition, and instructed the jury that aggravated battery required proof that the battery was committed with a firearm. The jury found that the defendant possessed a firearm. At trial, Humphreys moved for judgment of acquittal, arguing that a flare gun was not a firearm.

"Whether Humphreys's flare gun was a deadly weapon therefore depended on how he used it, and this was a jury question." The jury instruction was therefore incorrect and incomplete and affected the jury's verdict. The jury "could have concluded Humphreys used a deadly weapon when he struck Maranda on the head and left a mark. . . . Or it could have decided he did not use a deadly weapon when he tapped her on the head and only startled her. Accordingly, the trial court's alteration of the standard instruction by substituting 'firearm' for 'deadly weapon' and omitting the definition of 'deadly weapon' was fundamentally erroneous."

Walker v. State, 5D19-1732 (July 2, 2020)

Walker appealed convictions for vehicular homicide and related offenses. An issue at trial was whether Walker or another individual, both of whom fled their vehicle, had been driving. The court reporter did not transcribe bench conferences.

After the parties engaged in an effort to reconstruct the bench conferences, and all but two were reconstructed, Walker argued on appeal that the missing portions of the record precluded the appellate court from engaging in meaningful appellate review, and that reversal was required. The Court disagreed.

Walker did not meet his burden of demonstrating prejudice. In such cases, the appellant must demonstrate that the missing portion of the transcript is relevant to matters that would prejudice the defendant.

One of the bench conferences that was not transcribed took place after an objection when the State asked a DNA expert whether DNA found in the vehicle matched that of a relative of the individual who fled the vehicle with Walker. Walker argued on appeal that the reconstructed record did not give the trial court's rationale for overruling the objection. The second missing portion of the transcript related to an objection to defense counsel's closing argument. Counsel argued that the State had the resources to "outman" and "out-finance" a person charged with a crime. After the bench conference, defense counsel presented similar arguments – that the jury was the great "equalizer." Walker argued on appeal that due to the absence of the transcription of the bench conference, it was unknown whether defense counsel "toned down" the argument as a result of the court's ruling on the State's objection during the bench conference.

Burnette v. State, 5D19-1874 (July 2, 2020)

After seeking severance of charges, a defendant cannot challenge the subsequent prosecution of a severed charge based on double jeopardy.

State v. Midkiff, 5D19-2135 (July 2, 2020)

The defendant entered into a written plea agreement to a reduced charge of second-degree murder and other offenses. The agreement called for a sentence within the range of 35-55 years. The court accepted the plea and deferred sentencing pending the close of a codefendant's case. The codefendant received and accepted a plea offer with the same range, but with the caveat that the codefendant would receive a lengthier sentence that Midkiff.

The two were then sentenced at the same time, with the defendant, Midkiff, receiving a sentence of 38 years in prison followed by 15 years of probation; the codefendant, Swett, received a sentence of 38 ½ years in prison plus 15 years of probation. In 2018, Swett successfully challenged his sentence based on the

Supreme Court decisions in Graham v. Florida and Miller v. Alabama, based on his status as a juvenile at the time of the offenses, and he was released after serving 20 years in prison. Midkiff then sought relief through a Rule 3.850 motion, asserting that Swett's resentencing constituted newly discovered evidence. Pursuant to a recent decision of the Florida Supreme Court, Archer v. State, 293 So. 3d 455 (Fla. 2020), the Fifth District held that Swett's resentencing did not constitute newly discovered evidence and that the Rule 3.850 motion was otherwise time barred, as the convictions and sentences became final in the late 1990's.

Midkiff also filed a separate motion seeking specific performance of his plea agreement. This claim failed, however. Midkiff received what he bargained for – a prison sentence between 35 and 55 years. The provision in Swett's agreement, that Swett receive a harsher sentence than Midkiff, was not a part of Midkiff's agreement.

The Fifth District therefore reversed the trial court's order, which had granted relief to Midkiff.

Espino v. State, 5D19-3361 (July 2, 2020)

The trial court found a claim in a Rule 3.850 motion insufficient, but failed to provide the defendant with an opportunity to amend the claim.

Foley v. State, 5D19-3600 (July 2, 2020)

A claim of newly discovered evidence in a Rule 3.850 motion was facially insufficient because it failed to attach an affidavit from the witness in question and did not provide any explanation as to why an affidavit could not be obtained. The trial court should have provided the defendant with leave to amend the claim.