

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Cometa](#), 12-11282 (Aug. 3, 2020)

The Eleventh Circuit affirmed convictions and sentences for multiple offenses. The issue on appeal was whether the district court erred by failing to conduct additional competency hearings prior to trial and sentencing.

After an initial determination of incompetency, Cometa was subsequently found competent to proceed to trial. Cometa argued on appeal that opinions of two experts concluding that he was competent suggested the possibility of incompetence, through their references to Cometa's failure to take medication, and statements made by Cometa, such as a desire to plead guilty and be executed within 30 days. Cometa further argued that other expert opinions should have been entitled to greater weight.

The Eleventh Circuit noted that Cometa had made similar statements to another doctor who had nevertheless opined that Cometa was competent in light of his many rational statements. The Court further noted that the record supported Cometa's continued ability to understand the proceedings and to assist counsel. The Court referenced discussions with Cometa at a hearing regarding the waiver of counsel for sentencing. Cometa also engaged in many discussions with counsel during the trial. Cometa's disagreement with counsel's reliance on an insanity defense did not alter any conclusions. "Refusing to work with defense counsel is not necessarily proof of incompetency because what matters is the *ability* to work with counsel."

[United States v. Knights](#), 19-10083 (Aug. 3, 2020)

The Eleventh Circuit affirmed a conviction, following a bench trial, for possession of a firearm and ammunition as a felon. An investigatory stop, resulting in the seizure of the firearm and ammunition, was permissible as it was deemed to constitute a consensual encounter. Having made that determination, the Court did not address the issue of whether reasonable suspicion existed.

Two officers approached Knights and another man, sitting in a car outside a residence at 1:00 a.m., as they were concerned about the possible theft of the car. The area was described as a high crime area, known for gang activity, shootings, and drug offenses. Knights, when observed, appeared to be nervous. Knights was in the driver's seat, and, when he opened the door after the officers knocked on the window, the officers smelled a very strong odor of marijuana. After Knights was arrested, they then searched Knights and his backpack, which was in the car, finding a firearm cartridge and ski mask. Two firearms, another cartridge, and marijuana residue were subsequently found in the car.

In support of the conclusion that the encounter was consensual, the Court noted that Knights' companion did, in fact, simply walk away. Knights, in the driver's seat, could have driven away, as the car was not blocked by the officers' vehicle. The officers did not activate any lights or sirens. They did not display weapons or ask for identification.

[Barritt v. Florida, Department of Corrections](#), 16-17789 (Aug. 4, 2020)

In a 2-1 decision, the Eleventh Circuit affirmed the denial of a habeas corpus petition and concluded that trial counsel was not ineffective.

Barritt pled no contest to multiple sex offense and child pornography charges, and one firearm charge. He was subsequently permitted to withdraw the plea in postconviction proceedings due to statute-of-limitations issues as to some of the charges and the absence of evidence as to the firearm. The State then amended the information and added three capital sexual battery charges and two charges of tampering with evidence. Barritt again entered a negotiated plea of no contest; the State dropped the new charges; and Barritt agreed to waive statute of limitations claims as to the original charges. The agreement also stated: "Because I wish to accept the State's plea offer, at my request and with my agreement, my attorney has not fully investigated my case nor talked to all of the witnesses."

Barritt argued that counsel was ineffective for failing to raise a prosecutorial vindictiveness claim, as a result of the adding of the capital sexual battery charges after the original plea was withdrawn due to statute of limitations issues. The "filing of additional charges in the context of plea negotiations is not necessarily a retaliatory penalty." "The State brought the additional charges when its earlier attempts proved futile in order to induce Barritt to plead instead of going to trial, which is a legitimate use of the plea-bargaining system." "Barritt received the same sentence based on the same original charges, not a more severe sentence,

demonstrating that it is unlikely the prosecutor’s motives were vindictive.” The Eleventh Circuit’s decision was based on the deferential standards of review that are mandated for federal habeas review of state court convictions when the state court adjudicated the claims on the merits.

The Court also rejected the related claim that the state courts failed to apply a presumption of vindictiveness based on the filing of the additional charges only after Barritt “exercised a constitutional right in defending the first charges.” However, there is no such presumption “when the new charges are based on independent conduct.” Here, there was no substitution of charges for the originally charged offenses; the new charges were based on distinct acts.

Barritt also argued that counsel was ineffective for failing to pursue a double jeopardy challenge to the child pornography charges because he possessed only a single videotape. The state court engaged in erroneous analysis when it concluded that there was no prejudice because Barritt derived a benefit from the plea agreement. As a result of that erroneous analysis, the state court adjudication was not entitled to federal court deference. However, the double jeopardy claim was without merit and counsel was therefore not ineffective. The video contained multiple distinct images of four different incidents.

The dissenting judge disagreed with the majority’s conclusion with respect to the claim of ineffective assistance based on prosecutorial vindictiveness.

[United States v. Henry](#), 18-15251 (Aug. 7, 2020)

The Eleventh Circuit vacated Henry’s sentence and remanded the case to the district court to adjust the sentence in accordance with the mandatory provisions of section 5G1.3(b)(1) of the Guidelines.

Henry pled guilty to a state court charge of burglary, which involved the theft of multiple firearms. He had a prior conviction for assault and 10 burglaries. He was subsequently indicted and convicted on the federal charge of being a felon in possession of a firearm. He sought a downward adjustment of the sentence under section 5G1.3(b)(1), because he had already served 24 months on the state court burglary conviction, which was related to the federal firearm charge.

“To trigger a mandatory adjustment under this guideline, four requirements must be satisfied. First, the defendant must have served a period of imprisonment for another offense. Second, that term of imprisonment must remain undischarged.

Third, the offense must be relevant conduct to the instant offense of conviction. And fourth, the Bureau of Prisons must not credit that period of imprisonment to the defendant's new sentence."

The parties agreed that the four requirements were satisfied. The government argued that the Guidelines provision was advisory under United States v. Booker. Booker held that the Guidelines ranges could be applied only in an advisory manner. It did not make every application of the Guidelines optional. Sentencing requirements in the Guidelines "that neither enhance a defendant's sentence based on judicial factfinding nor mandate the imposition of a sentence within the guideline range are binding on sentencing courts, so long as they do not conflict with a federal statute or the Constitution." This provision was mandatory under that analysis.

[Osbourne v. Secretary, Florida Department of Corrections](#), 18-11004 (Aug. 7, 2020)

The Eleventh Circuit affirmed the denial of a federal habeas corpus petition challenging a state court conviction.

The district court found that the petition was an unauthorized successive petition. Osbourne argued that the petition was not successive. He argued that the state court granted relief on his motion to correct sentence when it removed a 10-year mandatory minimum sentence on one of his convictions. He argued that this created a new judgment and sentence and therefore permitted a second habeas corpus petition without prior authorization of the Eleventh Circuit.

The Eleventh Circuit disagreed. Because "the amended sentence was entered nunc pro tunc under Florida law, it related back to the date of the original judgment and it was not a 'new judgment' for purposes of 28 U.S.C. s. 2244(b)." Had the amended sentence not been entered nunc pro tunc, it would have constituted a new judgment, and a new habeas petition would therefore have been addressed to the new judgment and not been a second or successive petition directed towards the first, original sentence.

First District Court of Appeal

[Boone v. State](#), 1D19-3282 (Aug. 6, 2020)

The First District affirmed the summary denial of a Rule 3.850 motion and addressed multiple claims.

Trial counsel was not ineffective for failing to move to dismiss the information as fundamentally defective. Boone was charged with armed robbery and he argued that the information was grammatically flawed, because the phrase “with intent to permanently or temporarily deprive [T.M.] of the vehicle, money, or other property,” was set off by commas, and therefore removed an essential element from the charged offense. The First District disagreed.

Trial counsel was not ineffective for failing to object to the jury instructions on robbery. Boone argued that he was charged with only one form of robbery, by threat or force, but the jury instructions referred to four kinds of robbery.

Boone challenged the failure to object to dual convictions for armed robbery and aggravated battery. The court treated this as a double jeopardy claim and found that there were two distinct acts – hitting the victim in the head and taking the car at gunpoint. For the robbery, the jury found that the defendant possessed a firearm; for the aggravated battery, it found that he did not. However, Boone was charged as a principal, and an argument based on inconsistent verdicts failed because personal possession of a firearm was not required for the evidence to be sufficient. Furthermore, any inconsistency with respect to the finding of the firearm could have been attributable to the jury pardon power as it relates to enhancements or reclassifications.

Trial counsel was not ineffective for failing to request an independent act jury instruction. The evidence at trial did not support such an instruction. The victim testified that all three perpetrators, including the defendant, were actively involved in the offense.

Counsel was not ineffective for failing to obtain an expert to establish that the victim did not suffer great bodily harm with respect to the charge of aggravated battery. The defendant alleged that had he known there was no great bodily harm, he would have entered a plea. At trial, defense counsel successfully obtained testimony from the victim and multiple officers regarding the limited nature of the victim’s injuries. Additionally, aggravated battery was charged solely on the basis of the use of a deadly weapon, not on the basis of great bodily harm.

[Whitfield v. State](#), 1D18-4280 (Aug. 7, 2020)

The First District affirmed a conviction for first-degree murder. At trial, Whitfield conceded that the killing constituted manslaughter, asserting that the death was accidental, during consensual sex. On appeal, he argued that the trial court’s

redaction of statements to police officers, along with a limiting instruction to the jury regarding the redacted statements, was insufficient, as the remaining portions of the statements were alleged to be irrelevant, hearsay, unfairly prejudicial, and violations of the Confrontation Clause.

Most of the statements showed how the defendant evolved from complete denial to an accidental death during consensual sex. The statements were found to be relevant, and the limiting instruction further advised the jury that statements by the officers were not evidence and “could only be considered to establish the context of the defendant’s reactions and responses.”

Alternatively, any error was harmless. The only issue at trial after the defendant’s concession that the death was an accidental strangulation during sex was whether the strangulation was premeditated or accidental. In one statement at issue, a detective had said that the defendant’s statements did not make it sound like an accident. That had been in response to an earlier statement in which the defendant said that he hit the victim in the head when she tried to rob him. The detectives did not comment on the credibility of that version of events, and, as the defendant did not testify at trial, the comment by the officer would not have any bearing on the believability of the version offered at trial.

[Wilson v. State](#), 1D19-3764 (Aug. 7, 2020)

The First District affirmed the denial of a Rule 3.850 motion, for which the trial court conducted an evidentiary hearing. The Court addressed the claim that counsel was ineffective for failing to object “when the prosecutor commented on a partially inaudible recording during the State’s closing argument.”

The recording was a video recording of the offense, and the prosecutor was giving his interpretation of what was being said during the inaudible portions. “During closing arguments, both the prosecutor and defense counsel were permitted to offer their interpretations of the evidence admitted at trial, which included the video recording.” The jury was also instructed that what the attorneys say during closing argument does not constitute evidence.

And, notwithstanding defense counsel’s testimony at the postconviction evidentiary hearing, that he should have objected, the trial court was found to have properly concluded that counsel had made a reasonable strategic decision not to object. Both attorneys were being permitted by the trial court to give their interpretations of what had been said in the inaudible portions.

Second District Court of Appeal

[Turner v. State](#), 2D18-4281 (Aug. 7, 2020)

Turner appealed convictions for burglary and two counts of attempted lewd or lascivious molestation of a child. The Second District reversed the burglary conviction for a new trial. The trial court erred in denying a continuance to the defense when the State materially amended the information on the eve of the trial and added three additional law enforcement witnesses with respect to the burglary charge.

The original information alleged only one of the attempted molestation charges. The burglary charge was added less than one week prior to the start of the trial. The amended information was going to require additional discovery, as well as reasonable opportunity for counsel to develop a defense based on the defendant being an invited guest who had consent to enter the home where he had previously been allowed to enter. The three witnesses were also disclosed five days prior to the trial.

Third District Court of Appeal

[Pestano v. State](#), 3D19-180 (Aug. 5, 2020)

The Third District affirmed a conviction for sexual battery. The jury acquitted as to a second count of the same offense.

Pestano argued that the State was erroneously permitted to present evidence of multiple instances of sexual battery in a single charge. The alleged error was unpreserved and was reviewed on appeal for fundamental error.

“Pestano contends that permitting the State to present evidence of multiple instances of sexual battery in support of a single charge creates the potential for a non-unanimous verdict. He argues that each unwanted sexual act is distinct and must be charged by separate counts in the information.” The testimony at trial referred to several instances of oral penetration or union and several instances of penetration or union by the defendant’s penis. The count for which the defendant was convicted was for penile penetration.

The acts of penile penetration at issue on appeal occurred over a several hour period, at the same location, and “were not definitively temporally separated, but rather part of an ongoing criminal episode. As such, we conclude there was nothing improper about the way Pestano was charged.”

[Butler v. State](#), 3D19-1172 (Aug. 5, 2020)

The Third District affirmed a conviction for attempted burglary. The “trial court did not abuse its discretion by allowing, over Butler’s hearsay objections, the supervising officer to testify as to matters rebutting Butler’s direct testimony that Butler had been invited into the victim’s home.”

Butler testified at trial that Coleman had invited him, via text messages, to retrieve clothing he had stored in her home, and that he entered when she did not respond to either his knocking or his phone call from outside the residence. Officer Valdez testified as a rebuttal witness that arresting officers advised her that they did not find men’s clothing in the house other than that of Coleman’s son; and that Valdez looked at Butler’s phone and saw threatening text messages from Butler to Coleman, but no reference to Butler retrieving clothing.

As to the testimony about the absence of clothing in the house. Butler relied on cases prohibiting inferential hearsay. Those cases involve, however, “the improper admission of statements by non-testifying witnesses who provided the police with information *that tied the defendant to the crime and led the police to investigate and arrest the defendant.*” That was not the purpose of the testimony from Valdez in this case.

The text messages were not offered to prove that the defendant committed the burglary. They were offered to rebut his direct testimony about an invitation to retrieve clothing. “While this testimony may have amounted to hearsay, it was not offered to prove Butler’s guilt.” It was used solely to rebut Butler’s testimony.

Fourth District Court of Appeal

[Pridemore v. State](#), 4D19-1555 (Aug. 5, 2020)

The Fourth District affirmed a conviction for a single count of sexual battery on a person under the age of 12. The Court addressed issues regarding collateral offense evidence and the admission of a suicide note authored by the victim.

Explaining the admissibility of the collateral offense evidence, the Court stated: “Pridemore’s acts with the two prepubescent victims were close in time and sequential, demonstrating an escalating level of criminality. The means of access was identical – Pridemore obtained dating relationships with single mothers with young daughters. He exploited his ‘familial’ relationship to find time alone with the girls and assault them in their mothers’ respective bedrooms. The collateral act was not too remote in time – Pridemore commenced a relationship with the victim’s mother soon after his relationship with the prior victim’s mother ended. Nor was the collateral crime more serious than the charged crime, so that its introduction into evidence did not unfairly prejudice the defendant.”

The victim’s suicide note was admitted pursuant to the child hearsay exception to the hearsay rule. Relevant factors included the spontaneity of the statement and the absence of any motive to fabricate as the note ““was something the child wrote on her own and hid from her stepmother, intending it to be a suicide note referencing Mr. Pridemore’s molestation of her.”” The trial court found indicia of reliability. Although the second version of the note was written after the discovery by the stepmother, “the victim explained that she wrote down the allegations against Pridemore ‘because she had to get it out.’ She said she believed that no one was going to look at the journal in her room, because it looked like a regular notebook.”

Fifth District Court of Appeal

[Allen v. State](#), 5D19-1580 (Aug. 7, 2020)

In a brief opinion, the Court stated that it was treating the appeal as a motion to enforce the mandate from a prior appeal, denied the motion to enforce mandate, and cited recent decisions permitting a trial court to decline to follow a mandate on the basis of intervening Florida Supreme Court decisions regarding juvenile life sentences.