Case Law Update
August 24, 2020
Prepared by
Richard L. Polin

First District Court of Appeal

Jackson v. State, 1D19-83 (Aug. 19, 2020)

Jackson appealed a conviction for lewd and lascivious battery. The First District affirmed and concluded that neither of the two unpreserved issues raised constituted fundamental error.

A lay witness testified that she believed the allegations of the 15-year-old victim were erroneous, because the commented on the credibility of another witness, but the error was not fundamental. Other evidence in the case included DNA evidence implicating the defendant and a nurse who testified that the victim "exhibited recent genital trauma consistent with sexual assault."

In closing argument, the prosecutor argued: "All this other stuff about who heard what or didn't hear what is smoke screen and mirrors nonsense until you hear an explanation for that." When read in context, this was not a burden shifting comment because the prosecutor "immediately followed that statement with a reminder that the State has to prove the elements of the crime to the jury." And, while the reference to smoke and mirrors "may have been objectionable," it was not fundamental error because the single reference was "not sufficient to vitiate the whole trial."

The First District agreed that the following comment was objectionable, as it referred to the accused in derogatory terms:

> But we know from our existence, from our experience, from reading the news, we know that pedophiles exist, we know that child molesters exist. And we hope we never come into contact with one, we hope we never see one, we hope we never have to call somebody one. But take a good look because one sits right there.

However, based on the totality of the facts of the case, including prior closing arguments by defense counsel, the comment did not constitute fundamental error.

The evidence of guilt was substantial and the comment was just a single reference to the defendant as a pedophile.

McNeil v. State, 1D19-4318 (Aug. 19, 2020)

The First District reversed the denial of a Rule 3.801 motion seeking credit for jail time previously served. The motion sought credit based on time served in Pathways for Change, after release from jail. The trial court correctly noted the legal principle that a defendant is not entitled to credit for time spent in a drug treatment program that was a condition of probation or community control. However, the trial court did not attach documents to its order the contention that this program was not imposed as a condition of probation or community control.

Second District Court of Appeal

Feaster v. State, 2D17-3612 (Aug. 21, 2020)

On remand from the Florida Supreme Court, for reconsideration in light of its decision in Love v. State, the Second District held that Feaster was not entitled to a new stand-your-ground immunity hearing. His SYG hearing had been held prior to the effective date of the 2017 statutory amendment which changed the burden of proof and placed it on the State.

Chapman v. State, 2D18-1067 (Aug. 21, 2020)

The Second District affirmed in part and reversed in part an order denying credit for jail time under Rule 3.801. The order was reversed with directions to the trial court to determine the amount of time served in jail after the original sentencing and prior to a resentencing. A distinct claim was barred under the law of the case doctrine, as it had previously been raised and rejected on direct appeal.

Witteman v. State, 2D19-292 (Aug. 21, 2020)

The Second District recalled its mandate, withdrew its prior opinion, and issued a new opinion. The Court found that the trial court lacked jurisdiction to vacate an order granting a Rule 3.850 motion and setting a resentencing hearing.

In 2017, Witteman filed a Rule 3.850 motion, challenging the sentence imposed of life, with parole eligibility after 25 years. Witteman was a juvenile when the first-degree murder was committed in the early 1990's. The trial court granted

the Rule 3.850 motion and stated that Witteman was entitled to a resentencing. The Florida Supreme Court then issued new decisions, under which the original sentence of life with parole eligibility after 25 years would have been deemed lawful. The trial court then vacated the order for a resentencing hearing.

On appeal, the Second District held that because the motion was filed under Rule 3.850, the order granting resentencing was a final appealable order, and the trial court lacked jurisdiction to vacate it when the State did not file a timely motion for rehearing or appeal. Had Witteman sought relief under Rule 3.800(a), an order granting such a motion would have been nonfinal and nonappealable, and the trial court would have retained jurisdiction to vacate its own order.

State v. Hunt, 2D19-1581 (Aug. 21, 2020)

The Second District reversed a downward departure sentence because the departure reason was not supported by substantial, competent evidence.

The trial court entered the departure sentence, concluding that the defendant was "too young to appreciate the consequences of the offense." The defendant was 22 years old at the time of the offenses – aggravated assault, domestic battery by strangulation, resisting without violence. At the sentencing hearing, the defense presented testimony from the defendant's father, that the defendant was misguided and needed encouragement; that he was enrolled in a program to obtain a barber's license; that he was doing well in the program; that he was working in a restaurant and was doing well in that position. The defendant apologized for his conduct.

With respect to the lack of maturity, the trial court referenced the defendant's age, social science studies about the lack of fully developed brains until age 25, and the failure to graduate high school or obtain a GED.

Age alone is insufficient to establish this departure reason. There must be evidence that the "defendant is emotionally immature or lacks ordinary intelligence." The evidence did not support that. The defendant was almost 23; he went to school until 12th grade; he was gainfully employed; he was studying for a new career; he had three children.

Third District Court of Appeal

West v. State, 3D19-2008 (Aug. 19, 2020)

Although the trial court orally revoked probation and specified the conditions that had been violated, the court failed to enter a written order. The case was remanded with directions to enter the written order and specifying the conditions violated. That could be done without the presence of the defendant.

Fourth District Court of Appeal

Little v. State, 4D18-3128 (Aug. 19, 2020)

Little appealed his conviction for aggravated assault with a deadly weapon. The trial court conducted a stand-your-ground immunity hearing prior to the June 2017 statutory amendment, which placed the burden of proof on the State. The Fourth District affirmed the conviction and addressed and rejected several issues related to the stand-your-ground claim.

Counsel was not ineffective at the stand-your-ground hearing for seeking relief on the basis of the defendant's alleged use of deadly force, as opposed to non-deadly force. Section 776.031, Florida Statutes, was amended in 2014, adding "threatening to use" language, which therefore brought the defendant's alleged conduct within the ambit of that statutory provision, as counsel argued. As of 2014, the statutory language provides, in part: "A person is justified in using or threatening to use force, except deadly force, ... A person who uses or threatens to use force in accordance with this subsection does not have a duty to retreat before using or threatening to use such force." Section 776.031(1), Fla. Stat. Section 776.031(2) is limited to the use or threatened use of deadly force.

With those statutory provisions in mind, the Court addressed a question of first impression: "In a case where the defendant did not discharge his loaded firearm but was found to have pointed it at another individual while vocally ordering that person to do something (in this case, to get down on the ground), did the failure to argue that this situation could be viewed as 'threatening to use *non-deadly* force' constitute ineffective assistance of counsel?" The defendant's conduct was deemed to constitute a threat to discharge a firearm, and counsel was not ineffective for failing to argue an entitlement to relief on the basis of section 776.031(1), for non-deadly force.

Based on the same analysis, the trial court did not err, let alone commit fundamental error, by instructing the jury on justifiable use of deadly force, in addition to a non-deadly force instruction.

The pretrial stand-your-ground immunity hearing was held in 2018, after the statutory amendment to the burden of proof, placing the burden on the State. The trial court applied the pre-amendment burden of proof, concluding that the amendment did not apply retroactively. Although the trial court erred in light of the Florida Supreme Court's decision in Love v. State, that the statutory amendment was applicable to all immunity hearings held after the effective date of the statute, the Fourth District held that that error was cured by the subsequent jury trial, where the State was found to have proved its case by proof beyond a reasonable doubt, a standard which is higher than its pretrial burden under the immunity statute, which applies the clear and convincing standard. District Courts of Appeal have now reached contrary conclusions on the issue of whether the verdict at the subsequent trial cures the failure to apply the correct burden of proof at the pretrial immunity hearing. The Fourth District therefore certified conflict on this issue with a decision of the Second District Court of Appeal.

State v. Kraft, 4D19-1499 (Aug. 19, 2020)

In consolidated cases, the State appealed "trial court orders granting motions to suppress non-audio video surveillance that was recorded with hidden cameras covertly installed inside massage parlors suspected of housing prostitution activity." The Fourth District concluded that the defendants had standing to challenge the video surveillance and that suppression was "constitutionally warranted."

"The spa-client defendants in all of these cases had a subjective and objectively reasonable expectation of privacy in the massage parlor rooms. The surveillance took place in a professional and private setting where clients are expected to partially or fully disrobe. The spa owners and their employees also had a reasonable right to expect that the interactions with nude or partially nude clients in the massage rooms would not be exposed to the public. As soon as the door to the massage room was closed, they had a reasonable expectation of privacy." The Court rejected the State's argument that the defendants lacked standing because they "had, at most, a diminished expectation of privacy in a business open to the public."

The recordings had been done pursuant to ongoing investigations by law enforcement offices. The Fourth District further agreed with the trial courts' conclusions "that the warrants failed to contain sufficient minimization guidelines

and that police did not sufficiently minimize the video recording of innocent spa goers receiving lawful massages." "The warrants at issue did not set forth any specific written parameters to minimize the recording of innocent massage seekers, and law enforcement did not actually employ sufficient minimization techniques when monitoring the video, or deciding what to record. In all the investigations, some innocent spa goers were video recorded and monitored undressed. There was no suggestion or probable cause to believe that female spa clients were receiving sexual services, yet law enforcement failed to take the most reasonable, basic, and obvious minimization technique, which was simply to not monitor or record female spa clients."

In one of the investigations, which the Court referred to as the most egregious, the cameras recorded continuously for 60 days.

Finally, the application of the exclusionary rule was proper and the State's reliance on the good-faith exception of United States v. Leon was rejected. "We cannot conclude here that the law enforcement agencies acted in good faith with respect to minimization due to lack of Florida law on point. The warrant applications themselves the decades-old federal law . . . setting out the requirements for obtaining a warrant to conduct secret video surveillance in private locations, including the need to minimize the recording of innocent conduct. These citations negate a finding of ignorance of minimization requirements."

The Court then rejected the argument that only recordings of innocent conduct should be excluded.

Fifth District Court of Appeal

State v. Elma, 5D19-2409 (Aug. 21, 2020)

The Fifth District agreed with Elma's cross-appeal, that "the postconviction court failed to grant him the appropriate remedy after it found that he was deprived of an opportunity to accept a favorable plea offer because his trial attorney misadvised him of the maximum possible sentence and misadvised him that the minimum mandatory component of the State's offer had to be served day-for-day and was not subject to gain time credit."

The trial court, after making these findings, vacated the convictions, ordered the case to be set on the docket, and "encouraged the State to engage in 'good faith resumption of plea negotiations,' and warned Elma that his potential exposure was

life in prison if convicted upon retrial." Elma argued that the trial court should have reinstated the pretrial plea offer that had been rejected.

Schultz v. State, 5D20-1052 (Aug. 21, 2020)

A petition alleging ineffective assistance of appellate counsel was granted. Although the trial court appointed an expert to determine competency, the court did not conduct a competency hearing or make a determination of competency. The trial court was permitted, on remand, to make a competency determination nunc pro tunc, if possible. Otherwise, a new trial must be held after competency is restored.

State v. Patterson, 5D20-1082 (Aug. 21, 2020)

The Fifth District granted a certiorari petition. The State challenged the trial court's granting of bail without making the required finding under section 948.06(4), Florida Statutes, that the defendant's release would not pose a danger to the public. That statutory provision applied because Patterson was a registered sexual offender.

When the trial court failed to make that determination, the State, in the trial court, moved for rehearing on that ground, and that motion was denied.

In the Fifth District, Patterson argued that the State was not entitled to certiorari relief because the trial court's omission did not rise to the level of a miscarriage of justice. Patterson further argued that the affidavit of violation of probation did not allege that the violations were willful and substantial.

As to the first of those arguments, the Fifth District stated that "[c]ertiorari relief is appropriate when a trial court grants a defendant post-arrest release from custody in violation of the plain language contained in a statute." Second, the allegation of failure to comply with the condition of electronic monitoring can be willful and substantial, and the sufficiency of evidence of that is for the revocation hearing.