

Case Law Update  
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Eleventh Circuit Court of Appeals

[United States v. Smith](#), 18-13969 (July 30, 2020)

Smith appealed multiple convictions and sentences for Hobbs Act robbery, carjacking and brandishing a firearm in furtherance of those offenses. He asserted multiple claims on appeal and the Eleventh Circuit affirmed.

Smith challenged the identification testimony of an eyewitness to one of the robberies. Witness Ralston picked Smith out from a photo array about one week after the offense, and also identified Smith at trial. At the time of the photo array, Ralston was 70% certain that the individual he picked was the perpetrator. Smith challenged the suppression testimony, arguing that the photo lineup was unduly suggestive, because Smith “was the only person in the lineup who had two-toned dreadlocks, a distinctive physical characteristic,” making the identification unreliable.

The Eleventh Circuit found that the photo lineup was not unduly suggestive. The six photos were reviewed and found to be similar. It was noted that others had dreadlocks, including one other whose dreadlocks appeared to be more than one color.

The Court also addressed the admissibility of a rap music video that Smith had posted on YouTube. The video showed Smith and others displaying several firearms, including a two-tone semiautomatic pistol displayed by Smith. One victim testified that the jacket Smith wore in the video was the same as the one he wore when he robbed her, and that the firearm was similar to the one he had at the time.

Smith challenged the admissibility of the video on the basis of both First Amendment and relevancy grounds. The use of speech or its equivalent at a trial does not violate the First Amendment when the speech is relevant to issues at trial. Furthermore, the video was relevant, and, although it included prejudicial images and lyrics, including the glorification of violence, it has “significant probative value,” as it corroborated relevant issues at trial, including Smith’s status as an amateur rapper and videographer, as well as a victim’s identification testimony.

On the Hobbs Act robbery, the district court denied the defense request for a special jury instruction on the interstate commerce element of the offense. The victim in one of the robberies was a sole proprietor. Smith argued that this required a different instruction than the ones given for other counts, where the victims were nationwide chains with multiple locations, Subway and Dunkin Donuts.

Smith's proposed instruction was substantively incorrect. It related to a prior decision, United States v. Diaz, 248 F. 3d 1065 (11<sup>th</sup> Cir. 2001). In Diaz, the Court held that the government could prove Hobbs Act robbery in any one of the following three ways: if the crime depletes the assets of an individual who is directly engaged in interstate commerce; if the crime causes the individual to deplete the assets of an entity engaged in interstate commerce; or if the number of individuals victimized are so large that there will be a cumulative impact on interstate commerce. That, however, as clarified in a subsequent decision, was a non-exhaustive list. Smith's requested instruction included language which would have turned that list of three means of committing the offense into a strict limit, prohibiting the possibility of other means of committing the offense.

As to one of the robbery charges, the evidence of interstate commerce was sufficient. Some of the products used in the business "came from other states or from other countries." That was sufficient, in and of itself. And, even though Smith robbed Brown, an individual, "he robbed her of items she used for her business," including a cell phone, wallet, thumb drive and cash. A software item and a license had a combined value of \$1,800, thus establishing the depletion of assets of the victim's business. In response to a related sufficiency-of-evidence challenge, the Court held that there was no requirement that the government prove that the criminal and the victim had a business relationship.

Smith further argued that for sentencing, he was entitled to the benefit of the First Step Act. That Act expressly provided that it applied to sentences imposed after the effective date of the legislation. Smith argued that although he was sentenced prior to that date, the date of sentence should be deemed the date of conclusion of the direct appeal. The Eleventh Circuit joined several other circuits in holding that the date of imposition of sentence is the date on which the sentence was imposed by the district court. The application of the First Step Act would have precluded consecutive mandatory minimum sentences of 25 years on several counts.

[United States v. Melgen](#), 18-10991 (July 31, 2020)

Melgen, an ophthalmologist, appealed convictions and sentences for 67 offenses arising out of a scheme to defraud Medicare, and the Eleventh Circuit affirmed the convictions and sentences.

Melgen challenged the pattern jury instruction on materiality. The pattern instruction is “based on the rule that a ‘false statement is material if it has a natural tendency to influence,’ or is ‘capable of influencing,’ the ‘decision of the decisionmaking body to which it is addressed.’” Melgen argued that materiality “looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.” The Eleventh Circuit disagreed. The Court thought the phrasing to be similar. Additionally, the Court did not see a factual basis for the requested instruction.

Melgen billed for certain services, and Medicare paid for certain services in reliance on those bills. Melgen did not put forward evidence that Medicare routinely pays for treatment based on an incorrect diagnosis, if only it is possible that the patient had some other condition that the treatment would have aided – far from it.

Therefore, the Supreme Court case law that Melgen interpreted to support his requested instruction was not deemed to have supported his request.

Charts comparing Melgen’s billing to that of peer physicians were properly admitted. Due to the voluminous nature of the data, summaries were permitted under Federal Rule of Evidence 1006. The charts were also admissible under the business records exception to the hearsay rule. A Confrontation Clause challenge to the charts failed because the summaries were drawn from non-testimonial Medicare records, and the Confrontation Clause applies only to “testimonial” statements.

The Court also rejected a challenge to the sufficiency of the evidence. The jury heard extensive evidence of Melgen’s motive and means for “fraudulently billing Medicare for an expensive drug.” Melgen’s arguments were alternative explanations for the billings, but those explanations were for the jury to weigh and make credibility determinations.

A Brady claim was asserted as a result of testimony from a doctor during sentencing. The claim was properly denied because it was not based on evidence

that could not have been obtained prior to trial. The doctor’s statement “was the medical fact that the use of an anti-VEGF drug could control leakage of wet ARMD, hiding signs of the disease.” That was medical testimony that Melgen could have introduced himself with a variety of medical witnesses.”

The Court’s opinion also includes cursory one-paragraph discussions addressing and rejecting about five other evidentiary issues asserted by Melgen.

### Second District Court of Appeal

[Patterson v. State](#), 2D19-2495 (July 29, 2020)

Patterson appealed the summary denial of multiple claims of a Rule 3.850 motion. The Second District reversed for further proceedings in the trial court – either attaching documents from the court file that conclusively refute the claim, or conducting an evidentiary hearing.

The defendant entered a no contest plea to the charges. A motion to withdraw plea was subsequently denied and the convictions and sentences were then affirmed on direct appeal.

The claim at issue in the subsequent Rule 3.850 motion alleged ineffective assistance of counsel for failing to advise the defendant “of a possible coerced consent defense and/or to file a motion to suppress.” Patterson had been arrested on an unrelated charge. His motion alleged that while he was handcuffed and being taken to the sheriff’s office, a deputy began scrolling through his cell phone. He alleged that he was asked for consent for the search “only after he had been arrested on the unrelated charge, after he had observed the deputy looking through his phone, and after being told he was being investigated for the other crimes.” Through the search of the phone, the deputy obtained contact information for the defendant’s girlfriend and then proceeded to obtain incriminating evidence that was used in this prosecution.

The State responded that the court could not go behind representations made at the plea colloquy. The Second District stated, however, that that was distinct from a claim of ineffective assistance of counsel for failing to investigate. The trial court’s denial of the claim focused on the deputy’s lack of an overbearing manner. That, however, did not address the claim: that the defendant had already been arrested on an unrelated charge and the deputy had already begun scrolling through the phone. Additionally, Patterson was a juvenile at the time, and the totality of the facts

suggested to the Second District that the consent to the search was mere acquiescence.

The facts upon which the trial court relied appeared to have been taken from an affidavit in support of a search warrant; there was no evidentiary hearing in the trial court.

### Third District Court of Appeal

[J.J. v. State](#), 3D18-0398 (July 29, 2020) (on rehearing en banc)

The Third District granted the State's motion for rehearing en banc and withdrew its prior opinion. The denial of a trial court suppression motion was affirmed.

J.J. appealed the denial of his motion to suppress baggies of marijuana found in his clothing as part of a search incident to arrest. "J.J. was arrested for possession of cocaine when he was found seated with two others next to a stove being used to cook crack cocaine in the small kitchen of a private house."

The legal argument revolved around the scope of the decision in Maryland v. Pringle, 540 U.S. 366 (2003). That case involved multiple occupants of a vehicle, with contraband found inside the vehicle. The Supreme Court had concluded that it would have been unlikely that a drug dealer would have admitted an innocent person into the vehicle with the potential for furnishing evidence against the dealer. The en banc majority of the Third District found that the rationale of Pringle extended to the facts of this case.

Three judges dissented on the basis of the Third District's original opinion in this case.

[Ward v. State](#), 3D18-2530, 3D18-2534 (July 29, 2020)

The Third District affirmed convictions and sentences for second-degree murder and other offenses and found that the trial court did not abuse its discretion in denying a motion for mistrial "after one of the State's fact witnesses violated the court's pre-trial ruling. The trial court's pre-trial ruling directed that witnesses not refer to the firearm seen in Ward's possession prior to the shootings as an AK-47 assault rifle." That firearm, although seen in Ward's possession, was not the weapon used in the murder.

The testimony at trial came from a witness who related having heard her granddaughter scream for help, that he “has a full-power KKK47.” After the motion for mistrial, the trial court determined that the prosecutor had instructed the witness not to refer to the weapon as an AK-47, and that a curative instruction would be sufficient. Defense counsel declined the offer of a curative instruction.

“The denial of a motion for mistrial is not error where an inadvertent remark is isolated and does not become the focus of the trial.” The witness had been asked what her granddaughter had said. Although she was not asked about the nature of the weapon, the witness responded with a verbatim quote from her granddaughter, something the Third District said was “understandable.”

[Brown v. State](#), 3D19-542 (July 29, 2020)

The Third District reversed the trial court’s determination that Brown violated probation/community control by possessing marijuana and/or resisting arrest. An arrest report and Brown’s testimony, without more, were insufficient evidence. Brown corroborated the time and place of the arrest but denied the basis for the arrest.

[Ferguson v. State](#), 3D19-2286 (July 29, 2020)

The Third District affirmed the denial of multiple postconviction motions. The Court’s opinion, as to most of the motions, cites prior decisions noting various procedural bars.

A claim of newly discovered evidence in one of the motions was addressed with greater specificity. Ferguson had entered a negotiated plea in 2003. In 2005, he was charged with violating probation by committing new offenses. After a revocation hearing, he was then sentenced as an habitual offender to 30 years in prison. In 2016, a witness recanted her statements to the police from the 2005 proceedings. At an evidentiary hearing on the claim of newly discovered evidence that witness abided by her recantation. At the conclusion of the evidentiary hearing, the trial court judge made an express finding that he did not find the testimony from this witness regarding the recantation to be credible. This was based, in part, on the inconsistent physical evidence adduced at the original revocation hearing.

Furthermore, for a claim of newly discovered evidence, the movant must demonstrate a likelihood that he would prevail in new proceedings in the trial court.

In a new revocation proceeding, the recanting witness would be impeached with her own prior inconsistent statements – the original testimony from the first revocation proceeding.

[Cason v. State](#), 3D20-0280 (July 29, 2020)

An appeal from the denial of a Rule 3.800(a) motion to correct illegal sentence was dismissed, as the order was not appealable. The order did not deny relief, either in whole or in part.

Fourth District Court of Appeal

[Evans v. State](#), 4D18-3811, et al. (July 29, 2020)

Evans was prosecuted as an adult for offenses committed as a juvenile. After his convictions, he received juvenile sanctions. He then was found to have violated the terms of conditional release, and when those sanctions were revoked, he was sentenced to prison as a violent felony offender of special concerns (VFOSC). On appeal, the Fourth District agreed with Evans’ argument that the trial court erred in designating him as a VFOSC.

Evans first argued that the trial court violated due process by revoking juvenile sanctions for reasons not listed in the Department of Juvenile Justice’s affidavit of unsuitability for juvenile sanctions. He argued that he was not given proper notice that the trial court would consider anything other than the new crime referenced in the DJJ affidavit. The trial court took into consideration Evans’ prior record. The Fourth District concluded that this was a due process violation, and, even though the issue was not preserved in the trial court, a due process violation constitutes fundamental error. The trial court was further found to have mixed “evidence relevant to the suitability determination with evidence relevant to the danger determination and sentencing.” And, when the court inquired if there was any reason why sentencing should not proceed, while the State responded, there was no response from defense counsel and no further inquiry by the trial court.

With respect to the VFOSC sentence, the issue was whether that statute applied to offenders who, at the time of committing their new offenses, were on juvenile conditional release as opposed to adult probation or community control. The Fourth District conclude that the “VFOSC designation does not apply to a juvenile prosecuted as an adult who violates supervision conditions after juvenile sanctions are imposed by the adult court.”

[Pittman v. State](#), 4D19-995 (July 29, 2020)

In a prior appeal, the Fourth District remanded for a nunc pro tunc determination of competency. On remand, the trial court made that determination, but did not reinstate the conviction or sentence. Pittman appealed, and the Fourth District dismissed the appeal, as the nunc pro tunc order determining competency was not independently appealable without a judgment of conviction or sentence.

[Joseph v. State](#), 4D19-1888 (July 29, 2020)

In an appeal from the summary denial of a Rule 3.850 motion, the Fourth District reversed the denial of one of the claims for an evidentiary hearing.

The defendant was convicted for manslaughter – the stabbing of the victim, who had learned that the defendant’s former girlfriend and their children were living with the defendant. The defendant presented a claim of self-defense at trial. In the 3.850 motion, the defendant alleged that trial counsel was ineffective for failing to “(1) object when the court warned the former girlfriend against testifying about the victim’s history of domestic violence; and (2) introduce evidence of the victim’s reputation for violence and specific prior acts of violence.”

The claim about the failure to object related to the court’s ruling on a pretrial motion in limine and was procedurally barred because it could have been raised on direct appeal. The failure to introduce the evidence about the reputation for violence required an evidentiary hearing, however, as it was not conclusively refuted by the record.

[Randolph v. State](#), 4D19-3185, 4D19-3209 (July 29, 2020)

The trial court’s order revoking probation was insufficient, as it failed to note which conditions of probation had been violated. The trial court was directed to amend the written order on remand.

Fifth District Court of Appeal

[Johns v. State](#), 5D19-2883 (July 31, 2020)

When ruling on a 3.850 motion which alleged ineffective assistance of counsel, the trial court erred by evaluating counsel’s performance based on counsel’s

“subjective performance that the [trial] court’s comments were not a basis for John’s sentence.” The trial court’s analysis was erroneous, as the test for deficient performance of counsel is based on an objective standard. The case was remanded for a de novo evidentiary hearing. And, because the trial court failed to comply with the Fifth District’s mandate for a ruling on this issue in a prior appeal, the de novo evidentiary hearing was ordered to be conducted by a new judge.

[Annicchiarco v. State](#), 5D19-3033 (July 31, 2020)

The Fifth District affirmed the denial of a Rule 3.850 motion after an evidentiary hearing on some of the claims.

A claim of ineffective assistance of counsel for failing to raise a competency issue based on involuntary intoxication due to medication by the medical staff of the jail was conclusively refuted by the plea colloquy. The defendant indicated that he was not under the influence of any drug. The mere fact of a prescription for psychotropic drugs does not equate to involuntary intoxication.

The trial court conducted the evidentiary hearing on a claim of misadvice with respect to a plea offer, which had been rejected. The trial court’s ruling was based on express determinations of credibility of witnesses. One letter from counsel advised the defendant that the final decision was his and that his wishes controlled. Counsel expressly advised the defendant that counsel was prepared to go to trial if the defendant wished to proceed to trial.