

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Bruce](#), 18-10969 (Oct. 8, 2020)

Bruce pled guilty to the charge of unlawful possession of a firearm. After the denial of a suppression motion, he reserved the right to challenge the seizure of the firearm on appeal. The Eleventh Circuit affirmed the conviction, concluding that the officers, on the basis of an anonymous 911 call and surrounding circumstances, had reasonable suspicion to stop Bruce.

The 911 call came in around 3:00 a.m., and reported a disturbance in the front yard of a “drug house,” adding that one man had a gun. Two men were alleged to have been arguing in the front yard. The person holding the gun was a man, who was dressed in black and standing next to a white car in front of the house. The caller warned that shooting might start at “any minute.” Officers arrived within five minutes and observed two men at the address, in the white car in front of the house. The officers approached, with guns drawn, and told the two men to exit. Bruce tried to flee, and when an officer grabbed him, a gun fell from his waistband.

Although the 911 call was anonymous, it was deemed reliable. The caller claimed first-hand knowledge and provided details of events as they were being observed. The officers arrived within minutes and confirmed the presence of two men, in the white car that had been described. The fact of the 911 call was further reliable because it can be traced, and it was recorded, thus diminishing the possibility that the caller would hide behind anonymity. Thus, the tip was reliable, even though the officers did not observe any criminal activity. And, the officers had reasonable suspicion that criminal activity might be afoot. If Bruce had been gesturing with the firearm when the officers arrived, reasonable suspicion would clearly exist. The fact that the reasonable suspicion from the anonymous tip, describing the display of the firearm, dissipated before the officers arrived did not eliminate that reasonable suspicion. Loud arguments, as reported, coupled with a firearm being drawn, are ingredients for violent crime. The argument also occurred in what was a known high-crime area.

One judge dissented, finding that even if the 911 call provided reasonable suspicion, it dissipated by the time the officers arrived. The dissent emphasized that the officers, upon arrival, observed neither an argument nor a firearm, prior to ordering the defendant to exit the vehicle.

[United States v. Amede](#), 18-11172 (Oct. 8, 2020)

Amede appealed a conviction for attempted possession with intent to distribute five kilos of cocaine. He raised multiple issues on appeal, challenging both his conviction and sentence. The Eleventh Circuit affirmed.

Amede sought to exclude recorded phone calls between a co-conspirator, Chang, and an undercover officer, Detective Gandarillas, to arrange the drug deal. The statements were properly admitted under the co-conspirator hearsay exception. It did not matter that Amede was not named in the conversations or that he was not yet known to law enforcement. The co-conspirator exception applies even as to one who may join the conspiracy after the statement was made. Additionally, there was ample evidence of Amede's involvement in the conspiracy prior to the statements at issue, including texts between Amede and co-conspirator Chang.

The jury was instructed that it had to find that Amede "knowingly" attempted to possess the cocaine with intent to distribute. Amede argued that the jury instruction was erroneous, and should have stated "knowingly and willfully," as charged in the indictment. The term "willfully" is not included in the statute under which Amede was charged and the government was not required to prove that Amede acted willfully. The use of that word in the indictment was surplusage and could be ignored, and ignoring it did not constitute an impermissible amendment of the indictment.

Amede argued that limits on cross-examination of government witnesses, and limits on his own testimony, prevented him from presenting a complete duress defense. The district court did not err in its rulings, because Amede had not presented any evidence to satisfy the third element of duress – "that he had 'no reasonable opportunity to . . . inform [the] police' that Chang and his associates were threatening Amede and his family and coercing him to consummate the instant drug deal."

Amede sought new appointed counsel for sentencing. He had a history of disagreements with counsel regarding legal arguments to be made. The court denied the motion for new counsel, finding that counsel had properly declined to make the

meritless arguments Amede sought to advance. The court advised Amede that he was free to hire new counsel of his own choice. Amede responded that he would represent himself pro se, which he felt was his only choice. The court corrected him, advising him of his other choices, to continue with appointed counsel or to represent himself. He was warned of the disadvantages of self-representation. The district court also refused to appoint new counsel because of existing counsel's knowledge of the case.

There was no error in not appointing new counsel, because good cause was not demonstrated by Amede. He could not rely on his own refusal to communicate or cooperate with counsel. Counsel had not acted improperly by refusing to file meritless pro se motions prepared by Amede. Alternatively, Amede failed to demonstrate prejudice, as the motion for new counsel pertained to sentencing, and he ultimately obtained new private counsel for the sentencing. Although Amede discharged the new counsel, based on disagreements with his new counsel, shortly after the sentencing hearing commenced, that was his own decision. Amede was found to have made a voluntary waiver of counsel at that time. The court had granted his new counsel two continuances. Amede refused to speak to counsel when permitted to and encouraged to during the sentencing hearing. He twice insisted on proceeding on his own. The court had conducted a colloquy of Amede regarding self-representation prior to the appearance of the new counsel for sentencing. The failure to conduct yet another colloquy when counsel was being discharged during sentencing did not affect the validity of the waiver. The court, on several prior occasions, had explained the charges and potential sentences that could be imposed, as well as the sentencing procedures and risks of self-representation. Some of these matters were again discussed during the sentencing hearing, itself. Amede's representations of what he understood, at pretrial hearings, were also relevant. And, his persistent uncooperative conduct, throughout the trial, as well as at sentencing, further evinced the knowing and voluntary nature of his waiver of counsel.

[United States v. Innocent and United States v. Jones](#), 19-10112 and 18-15210 (Oct. 8, 2020)

The two defendants were convicted for possession of firearms as felons. They challenged those convictions, under [Rehaif v. United States](#), 139 S.Ct. 2191 (2019), because their indictments failed to allege that they knew that they were felons. The Eleventh Circuit rejected their arguments and affirmed the convictions because they did not challenge their indictments in the district court and they could not establish that they did not know that they were felons.

[United States v. Gallardo](#), 18-11812 (Oct. 9, 2020)

The Eleventh Circuit affirmed Gallardo's appeal of his conviction for conspiracy to possess with intent to distribute five kilos or more of cocaine. Gallardo raised multiple issues on appeal.

An agent testifying for the government on rebuttal was found by the district court to have provided false testimony. The judge stopped the proceedings and subsequently instructed the jury to disregard the rebuttal testimony from the witness, specifically telling the jury that it "could not use Agent Valenzuela's testimony to determine whether Gallardo met with the CS after December 2016 because Valenzuela did not know when the photos were taken or the location of Gallardo's phone on the time-stamped date. We presume the jury followed the instruction and disregarded the testimony and exhibits introduced therein." Given the curative instruction, there was no abuse of discretion in denying a motion for mistrial based on Valenzuela's testimony.

A Brady-Giglio claim was raised for the first time on appeal and was reviewed under the plain error standard. As to the Brady claim, the government disclosed the evidence at issue during its case-in-chief and the defense then used that evidence to its advantage, both when presenting evidence and in closing argument. The defendant was therefore unable to demonstrate that there was a reasonable probability that the outcome of the trial would have been different absent the Brady violation. The Giglio claim failed because the defendant failed to demonstrate that any trial testimony from a government witness was false or perjured. Rather, the defendant speculated that the late disclosure left the jury with the impression that some of the other evidence was credible and worthy of belief. That, however, is not the correct standard for a Giglio claim.

[United States v. Gayden](#), 18-14182 (Oct. 9, 2020)

The Eleventh Circuit affirmed convictions for seven counts of unlawful distribution of a controlled substance related to the defendant's prior medical practice. The evidence showed that the defendant's practice "attracted an unusually high volume of drug-seeking patients."

The district court did not err in denying a motion to dismiss the indictment on the basis of pre-indictment delay. This requires, *inter alia*, that a defendant "show a deliberate act by the government designed to gain a tactical advantage over him." Gayden merely argued conclusory assertions about "the government's timeline and

never dispute[d] the government’s claim that a two-year delay during the pre-indictment period was at least partially caused by the need to retain a new expert.”

The district court did not err in denying a motion to suppress the seizure of records without a warrant. The Court applied the “third-party doctrine” to conclude that the defendant lacked a reasonable expectation of privacy and that a warrant was therefore not required. “Gayden cannot reasonably assert a privacy interest in his prescribing records that is solely derived from other people’s interest in the confidential nature of their own medical information which they choose to disclose to a pharmacist to get filled.” And, Gayden’s disclosure of the prescribing records to a third party was voluntary. He was not required to participate in the “PDMP system.” (Florida’s Prescription Drug Monitoring Program). PDMP is an electronic database maintained by Florida, collecting prescription information regarding controlled substances from prescribers and pharmacies in a single location. Law enforcement officers are permitted to access the database for criminal pharmaceutical investigations.

A separate challenge regarding records that Gayden stored in his mother’s home failed. Even when information challenged in the federal warrant was excised, the warrant was still supported by probable cause. And, alternatively, the good-faith exception to the warrant requirement was applicable.

A government expert testified that Gayden “overprescribed controlled substances” and Gayden argued that that should have been excluded because the expert reviewed inflammatory information about Gayden before forming his opinion. That was a matter for cross-examination, not for exclusion of the evidence.

[United States v. Iriele](#), 17-13455 (Oct. 9, 2020)

Iriele, who ran a pharmacy, was convicted for conspiring with a pill mill (AMARC) to illegally dispense controlled substances and other related offenses. The Eleventh Circuit affirmed and addressed multiple arguments raised on appeal.

A law enforcement officer was permitted to testify that handwriting in a ledger was Irele’s. Rule of Evidence 901(b)(2) permits a nonexpert to testify “that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.” Irele argued that because the officer was involved in the investigation leading to the prosecution, that barred the officer from giving such testimony. The Court disagreed: “An investigator who becomes familiar with the

defendant's handwriting for the purpose of solving a crime is different from a lay witness who makes a handwriting comparison so he can testify about it at trial."

The Court addressed challenges to the sufficiency of the evidence. Although there was no direct evidence "that AMARC doctors and employees had agreed to run the clinic in a way that unlawfully distributed or dispensed drugs," the government established the existence of the conspiracy through circumstantial evidence. The knowledge element of the offense was established by the following facts: 1) "Iriele was well aware of the kinds of prescriptions that AMARC was issuing;" 2) he was at the pharmacy much of the time, he handled its paperwork, he rang up prescriptions, and he had access to relevant computer programs; 3) he had to have known that the vast majority of prescriptions at issue were filled by AMARC. Thus, he "had to know that AMARC's doctors were issuing an enormous number of prescriptions for large quantities of opioids, Xanax, and Soma, often in combination for a patient."

Iriele challenged jury instructions on the charge of dispensing a controlled substance. The district court instructed the jury that a pharmacist violates s. 841(a)(1), when he or she "dispenses a controlled substance either outside the usual course of professional practice or without a legitimate purpose." He argued that the court should have instructed that the jury had to find "that he filled the prescription knowing that a physician issued the prescription without a legitimate medical purpose or outside the usual course of professional practice." This argument was not preserved in the district court through an objection. Although Iriele's argument regarding the word "knowing" was correct, under the plain error standard of review, he was not entitled to relief. Based on what the Eleventh Circuit viewed as overwhelming evidence of such knowledge, Iriele could not demonstrate that the omitted language was probably responsible for an incorrect verdict.

Iriele also challenged the instructions on the conspiracy to commit money laundering. Once again, absent objection, this claim was reviewed for plain error. Iriele was again correct that the district court's instructions omitted elements of the offense. The Eleventh Circuit looked, however, to the instructions in their entirety, including instructions that were given on other charges, and found that conspiracy instructions on other offenses would have enabled the jury to infer the conspiracy elements as to money laundering. One element was found not to have been covered, but, once again, based on the evidence, Iriele could not demonstrate the probability that the error affected the outcome of the trial.

First District Court of Appeal

[Carter v. State](#), 1D19-1856 (Oct. 9, 2020)

The First District affirmed convictions on three charges of attempted first-degree murder and addressed the sufficiency of the evidence.

With respect to the issue of premeditation, the Court emphasized statements that Carter made in a bank, that “he did not want to ‘take it out’ on the employees,” which indicated “his desire to channel this [sinister] purpose specifically against any deputies who would respond as he requested.” Carter had walked into the bank and demanded that employees call the police and have officers meet him in back of the bank. And, the “fact that he fired his gun after drawing it without any additional movements on his part reasonably indicates that Mr. Carter had planned for the moment by loading and chambering a round to make his gun ready to fire.”

The evidence was also sufficient as to the element of the offense that Carter intended to cause death. Carter argued that the shot was an involuntary reflex after he had been tasered. One officer testified that a person could retain bodily control after having been tasered. There was evidence that the taser probes could “only form an effective connection for a fraction of a second, and that they failed to deliver any charge to Mr. Carter otherwise.” The Court also relied on its review of a video of the incident.

Second District Court of Appeal

[Vandawalker v. State](#), 2D18-4977 (Oct. 9, 2020)

The imposition of costs for the prosecution in the amount of \$100 was reversed because such costs, under section 938.27(1), Florida Statutes, are authorized only upon request. Additionally, a lien of \$100 for the Public Defender’s Office, was reversed because the defendant was not provided an opportunity to contest it.

[Bowers v. State](#), 2D19-3482 (Oct. 9, 2020) (on motion for rehearing)

The trial court dismissed a motion for the return of property as untimely. The Second District reversed for further proceedings.

The statutory provision vesting title in the property to the clerk of the court which had custody within 60 days after the conclusion of the proceeding, applies to “property lawfully seized pursuant to a lawful investigation.” The trial court’s order did not attach documents demonstrating the lawful seizure pursuant to a lawful investigation; nor was such a finding made. Beyond that, the defendant’s motion was facially insufficient, as it failed to identify the cell phone at issue with the requisite specificity, and it did not allege that the phone “was not the fruit of criminal activity.” On remand, the defendant was given leave to file an amended motion.

Fourth District Court of Appeal

[Joseph v. State](#), 4D19-1888 (Oct. 7, 2020) (on motion for rehearing)

The denial of one of multiple claims in a Rule 3.850 motion was reversed and remanded for further proceedings.

The defendant argued that counsel was ineffective for failing to introduce evidence “of the victim’s reputation for violence and specific acts of prior violence other than domestic violence.” The claim was sufficiently pled, and the State agreed that that type of evidence was generally admissible to support a claim of self-defense.

Another claim asserted on appeal was procedurally barred. The claim that counsel was ineffective for failing to object “when the court warned the estranged wife against testifying about the victim’s history of domestic violence.” This was viewed as a challenge to the trial court’s prior rulings on the State’s motion in limine and trial counsel’s argument about the State having opened the door to such evidence. The claims could have and should have been raised on direct appeal.

[J.B. v. State](#), 4D19-2634 (Oct. 7, 2020)

J.B. was charged with making a false report, with intent to deceive or mislead any person concerning the use of a firearm in a violent manner. The Fourth District reversed because J.B. was found guilty as to an offense with which he was not charged.

The evidence showed that J.B., apparently having been suspended from school, returned to retrieve property that he left at the school. A witness who worked in school security testified that J.B. became verbally abusive and threatened to shoot the witness and shoot up his house. Days later, J.B. apologized.

The Fourth District held that J.B.'s words, that he would shoot the witness and the witness's house, did not constitute a false report under the statute. J.B. was not trying to make something known to an officer. Rather, he was conveying a threat as to future conduct.

Although J.B. had not preserved this issue through a properly argued motion for judgment of acquittal in the trial court, on appeal, he established fundamental error.

[State v. Torres](#), 4D20-225 (Oct. 7, 2020)

The defendant was charged with multiple sex offenses. Prior to trial, the court excluded "screenshots of text messages received by a sexual assault victim based upon a lack of proper authentication." The State appealed, and the Fourth District reversed, concluding that there was proper authentication.

In this case, the victim identified the Defendant as the sender of the messages based on his extensive history of texting the victim through the Kik application, the nickname he used as his screen name and the content of the messages which referenced facts known only to the defendant and the victim, such as the pool incident and the gifted watch. Further, the sender of the text messages repeatedly referred to his age as an issue, consistent with the Defendant being around 30 years old while the victim was 11 or 12. The victim also asked the Defendant whether he was moving to California with "Suzette" and he replied "of course." The victim also testified that "Suzette" is the mother of the Defendant's child.

These facts constituted a prima facie showing that the defendant authored the text messages.

Fifth District Court of Appeal

[Wright v. State](#), 5D13-1327 (Oct. 9, 2020)

In a 3.850 appeal, the State conceded that dual convictions under the facts of the case for dealing in stolen property and petit theft were improper. The remedy was to vacate the conviction for petit theft.

[Rogers v. State](#), 5D19-1792 (Oct. 9, 2020) (corrected opinion)

The trial court erred in denying a motion to dismiss under the Stand Your Ground law. The trial court erroneously found that the defendant failed to establish a prima facie case of self-defense.

At the evidentiary hearing, several witnesses testified that the defendant grabbed the victim's arm from behind and that the defendant was the aggressor. "Appellant testified that he initially asked the victim to release her arm. Although the victim released her arm, the hearing described the victim immediately attempting to punch Appellant two or three times. Appellant responded by punching the victim in the eye once."

As the Appellant's testimony established that the victim was the first one to use force, a prima facie case of self-defense was established. The Fifth District directed the trial court, on remand, to determine whether the State overcame the claim of self-defense by clear and convincing evidence.