

Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

[United States v. Grow](#), 18-11809 (Oct. 21, 2020)

Grow appealed convictions for healthcare fraud, conspiracy to commit healthcare fraud and other offenses. The Eleventh Circuit affirmed the convictions but reversed the sentence.

Grow peddled pain and skin creams, using representatives to find potential patients for referrals to doctors and urging the doctors to use the creams that he was promoting. Creams that cost less than \$100 to produce were reimbursed through a government insurance program for sums exceeding \$7,000. The creams were not medically necessary. Some of the patients never spoke to a doctor; some received the creams before they had had their appointments with doctors. Several testified that they had no scars and did not need the creams. Challenging the sufficiency of the evidence for fraud, Grow essentially argued that there were valid prescriptions from doctors. The Eleventh Circuit held that the existence of a valid medical prescription did not preclude fraud convictions.

Grow also argued that there was insufficient evidence of his knowledge of fraud. The Court disagreed. Grow and his representatives told telemedicine doctors what to prescribe before the doctors consulted with the recruits that Grow and his representatives sent to the doctors. Grow instructed his representatives to always select the same options, which called for the highest amount of reimbursement from the insurer and the highest commission to Grow. His conduct reflected an indifference to whether the individuals actually needed the creams being prescribed. Grow would get prescriptions changed if they did not provide for the most expensive option. The Court also considered the enormous profits made by Grow. For each patient signing up for the three different creams, he received \$13,900; that same sum repeated each time there was a refill of the prescription. Total profits exceeded \$20 million. The huge profits were deemed circumstantial evidence of intent to defraud.

Other relevant factors included efforts to conceal the scheme and the payment of kickbacks to the recruits who were sent to the doctors' offices. The Court also

considered Grow's own testimony as support for his knowledge of the fraud and the intent to defraud.

As to the sufficiency of the evidence for one specific charge of healthcare fraud, the Court found that it "was clearly fraudulent to bill for creams and vitamins that a recruit didn't need and which he was somehow prescribed without speaking to a doctor."

The Court also rejected an argument that an instruction to the jury was unduly coercive. The trial court, on a Friday afternoon, during deliberations, advised the jury that it "had another trial starting Monday." The trial court also referenced the possibility of a partial verdict. However, the court had repeatedly told the jury that there was no limit on the amount of time it could deliberate. When read in conjunction with the other instructions, the instruction to the jury about the court's schedule was not coercive.

A sentence of 20 years did not exceed the statutory maximum for conspiracy to commit wire fraud, but it did exceed the 10-year maximum for conspiracy to commit healthcare fraud. Count one charged Grow with "dual-object" conspiracy to commit wire fraud or healthcare fraud. As a result of the jury's verdict, with the "dual object," the appellate court could not determine which of the two frauds the guilty verdict was for. As a result of the problem caused by the use of a general verdict, the Court remanded the case to the district court, and gave the government the option of electing between the imposition of the 10-year sentence or a retrial for the count at issue, with a special verdict.

[United States v. Muho](#), 18-11248 (Oct. 22, 2020)

The Eleventh Circuit affirmed convictions and sentences for bank fraud, wire fraud, aggravated identity theft and money laundering.

Muho represented himself at trial. He had had several attorneys prior to trial. Upon request to proceed pro se, after a Faretta inquiry, Muho was permitted to represent himself. The district court reaffirmed Muho's decision on several occasions. On appeal, Muho argued that the district court erred by permitting him to continue representing himself after he vacillated. The Eleventh Circuit disagreed, The initial waiver of counsel was valid and the district court "repeatedly reaffirmed after signs of uncertainty."

The district court denied requests for costs for two of the witness subpoenas sought by Muho and provided no rationale for the denial. The Eleventh Circuit reviewed the record and found no abuse of discretion. As to one, Muho failed to allege specific facts to show the relevancy and necessity of testimony from the witness. Muho referenced only an unrecorded phone call between unidentified individuals about unspecified facts. As to the second, Muho asserted the witness would testify to Muho's state of mind and the absence of an intent to defraud his hedge funds. The Eleventh Circuit noted that the proffer suggested that Muho sought evidence that would have been inadmissible under Rule 704(b), which "forbids expert testimony on the *ultimate* issue in a case." Again, specific facts were not proffered by Muho.

The Eleventh Circuit upheld a two-level sentencing enhancement that applies when "the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense." Addressing an issue of first impression, the Court set forth the requirements for this enhancement, in a case involving "property held by a financial institution for a depositor." The "financial institution (1) must be the *source* of the property, which we interpret as having property rights in the property, and (2) must have been *victimized* by the offense conduct." Additionally, "to establish the financial institution as the source of the derived funds, the sentencing court must find that the relevant property flowed directly indirectly from the possession or control of the financial institution to the defendant."

In this case, "Muho used fraudulent documents to convince the bank that he had control over the account of another, thereby inducing the bank to wire the funds of another to Muho's account without even looking at the third base coach to see if it should swing or not. The bank swung away and made contact. Muho caught the funds and made out of the stadium gates like a bat out of Boston."

First District Court of Appeal

[Lynch v. State](#), 1D18-5064 (Oct. 23, 2020)

The First District affirmed convictions for lewd or lascivious molestation and lewd or lascivious battery. The Court addressed claims that several comments by the prosecutor, for which there were no objections, constituted fundamental error. Lynch argued that the comments improperly appealed to the sympathy of the jury.

The first comment was that it was “difficult for a twelve-year-old girl to keep this dark secret.” This was in response to “the defense’s argument that it was difficult to defend against the claim when the victim had waited years before coming forward.”

A comment “that the victim remembered Appellant as the first man to kiss and touch her was in response to the defense’s challenge to the victim’s memory.” Although this included a misstatement of fact regarding the first kiss, it did not inflame the passions of the jury to the point of affecting the verdict.

A comment that “Appellant was an authority figure who broke the victim and her trust was a comment on the evidence. The victim testified that she and others looked up to the Appellant as an older-brother figure and that the victim ‘was having a really hard time.’”

A comment that the Appellant never said “it didn’t happen,” did not improperly shift the burden of proof. When viewed in context, “the prosecutor was commenting on the recorded interview and stating his contention relative to what conclusions may be drawn from Appellant’s statements.”

The prosecutor did make an improper strawman argument “because it raised an assertion made by the defense in order to easily rebut the assertion,” but the comment did not rise to the level of fundamental error. The prosecutor had stated that the defense “would like to submit to you that a psych major can’t be molested. So I guess a police officer couldn’t be molested as a kid either, because then they go into law enforcement. Maybe a lawyer [] couldn’t be molested, because you go into the law.”

The prosecutor also asked an officer whether the defense had “requested a video of the back of the sheriff’s office.” This resulted in a motion for mistrial and its denial. The officer never responded to the question. Where the question was not answered, any error was not sufficiently prejudicial to vitiate the entire trial.

[Sutherland v. State](#), 1D19-3263 (Oct. 23, 2020)

Sutherland appealed the summary denial of a Rule 3.850 motion which set forth multiple claims, and the First District affirmed the lower court’s denial of the motion.

As to several of the claims from the motion, Sutherland simply relied on the arguments made in the trial court motion. That was insufficient on appeal, and the First District treated that reliance by Sutherland as an abandonment of the issues on appeal.

A claim of ineffective assistance for counsel's failure to seek a statement of particulars was without merit, in part, because "the record indicates that neither party could specify the exact date on which the crimes occurred. Therefore, the Appellant did not have the right to a statement of particulars," and he could not establish prejudice due to counsel's failure. There is no entitlement to a statement of particulars regarding the exact date of an offense if that date is not known. The offenses charged were sexual batteries on a child, and the information alleged that they occurred within ranges of four months for one charge and nine months for the other.

Counsel was not ineffective for failing to object to the prosecutor's closing argument that the victim was telling the truth. This did not constitute improper vouching, as the argument was based on the testimony of the victim and her mother. As the comment was not improper, counsel was not ineffective for failing to object to it.

[Felten v. State](#), 1D18-5001 (Oct. 21, 2020)

The defendant's request for a mental health examination was requested. The record on appeal lacked documentation showing that a competency hearing was thereafter held, or that a finding of competency was made. The conviction and sentence were reversed and remanded for further proceedings, including the opportunity to provide any missing order of competency or a nunc pro tunc determination of competency, if possible.

[Horn v. State](#), 1D19-4659 (Oct. 21, 2020)

The First District affirmed the denial of a Rule 3.850 motion.

Horn argued that the failure of the State to disclose records from the Department of Children and Families constituted a Brady violation. Horn argued that the records would have helped the defense undermine the credibility of the victim of the sex offenses that were at issue. DCF investigators, Horn argued, found that the victim's allegations were not "particularly credible." The trial court denied the Brady claim, finding that the opinions of the caseworkers would not have been

admissible. The First District agreed, as experts cannot vouch for the truthfulness of a witness. Nor could the records be used for the purpose of impeaching the victim “where the opinion testimony regarding previous behavior was to be used to undermine the credibility of the victim’s new and distinct accusations.” Horn intended to use the records to “discredit the victim’s testimony based on past behavior unrelated to the instant case.”

As to the reports themselves, the First District agreed with the trial court that the record showed that the defense had received other documentation which would have made the defense aware of the existence of these reports.

Second District Court of Appeal

[State v. Watlington](#), 2D19-3366 (Oct. 23, 2020)

The Second District reversed the imposition of a youthful offender sentence. Watlington entered an open plea to several offenses, including armed burglary of a dwelling with an assault or battery. That offense, a first-degree felony, was reclassified under section 775.087(1) on the basis of the firearm, and constituted a life felony; it was also subject to a 25-year mandatory minimum sentence for the firearm.

The Youthful Offender Act precludes sentencing as a youthful offender for capital or life felonies. Although the State did not preserve this issue in the trial court, the Second District held that the claim could be raised on appeal, as the imposition of an illegal sentence constitutes fundamental error.

[Garner v. State](#), 2D19-176 (Oct. 23, 2020)

The trial court granted Garner’s Rule 3.850 motion and ordered resentencing based on then-existing case law regarding juvenile life sentences. While the resentencing hearing was pending, the Florida Supreme Court receded from some of its prior decisions and the trial court, on the State’s motion, withdrew the order granting the resentencing.

The Second District reversed. Once the resentencing hearing had been granted pursuant to a Rule 3.850 motion, and the State failed to seek review, the trial court lacked jurisdiction to vacate its own order, which had become final.

Third District Court of Appeal

[Gomez v. State](#), 3D18-1193 (Oct. 21, 2020)

The trial court erred by failing to abide by mandates of the Third District from prior appeals.

In the prior appeals, the Third District had reversed and remanded for resentencing based on a properly calculated scoresheet, after some of the convictions had been vacated based on double jeopardy principles. On remand, the trial court, after recalculating the scoresheet, reimposed the same aggregate sentence without conducting a full de novo sentencing hearing. Gomez was not allowed to present new mitigating evidence and was permitted only to present additional argument.

[Johnson v. State](#), 3D19-2357 (Oct. 21, 2020)

A sexual predator designation under section 775.21, Florida Statutes, was correctly imposed even though the designation order was entered “after Johnson served his sentence for the qualifying offense and was released from custody.”

Fourth District Court of Appeal

[Mitchell v. State](#), 4D20-860 (Oct. 21, 2020)

The Fourth District affirmed the denial of a Rule 3.800 motion to correct illegal sentence.

For two counts of attempted first-degree murder, Mitchell was sentenced to life in prison. For armed robbery, he was sentenced to 23 years. All terms were concurrent. In the Rule 3.800 motion, he argued that the sentencing court should have imposed the applicable mandatory minimum for the attempted murders, and the State agreed. The trial court dismissed the motion as moot, because Mitchell had already served in excess of the applicable mandatory minimum. The Fourth District agreed with the trial court’s disposition.

The Court further wrote to express its agreement with a First District decision which held that a defendant may use Rule 3.800(a) only to challenge an adverse sentence. The First District had certified conflict on that issue with the Third and Fifth Districts. Review of the issue is currently pending in the Florida Supreme Court in [Earl v. State](#), SC19-1506.

[Brown v. State](#), 4D20-1068 (Oct. 21, 2020)

The Fourth District affirmed the denial of a motion for a downward departure sentence, but reversed for resentencing as a result of scoresheet errors.

The case involved a resentencing hearing. Brown had been on probation in cases for which he was convicted in 2014. After finishing those sentences, he violated probation with the commission of new offenses. He was sentenced for those in 2018, and an appeal resulted in a remand for resentencing, which was held in 2020.

The 2014 offenses were listed as “additional offenses” on the Criminal Punishment Code scoresheet. The 2018 offenses were listed as the “primary offenses.” Only one offense, typically the most severe, may be designated as the primary offense. Here, the trial court erred by treating the 2014 offenses as “additional offenses.” Those sentences had already been served. Those offenses were no longer before the sentencing court and should have been designated as “prior offenses,” not “additional offenses” at the time of resentencing. Another resentencing was required, with a recalculated scoresheet.

Fifth District Court of Appeal

[State v. Brown](#), 5D19-792 (Oct. 23, 2020)

After an acquittal by the jury for the charge of possession of a firearm by a convicted felon, the trial court dismissed two severed charges – aggravated assault with a firearm and willful discharge of a firearm from a vehicle – based on the collateral estoppel doctrine. The State appealed and the Fifth District reversed.

At the first trial, the parties stipulated that the defendant was a convicted felon, and the only issue was whether the firearm was possessed. “Brown’s consent to separate trials obviated any double jeopardy or collateral estoppel concerns.” The Court cited one of its own decisions from July 2020 for the same proposition, as well as one Third District decision and a decision of the United States Supreme Court – Currier v. Virginia, 138 S.Ct. 2144 (2018).

[Burton v. State](#), 5D20-1500 (Oct. 23, 2020)

The Fifth District reversed the denial of a Rule 3.800(a) motion to correct illegal sentence and remanded for resentencing.

One of Burton's two convictions was reversed on direct appeal. As a result, he sought a resentencing, based on a corrected scoresheet, eliminating the points previously included for the conviction that had been reversed. While the trial court correctly noted the general rule that such a situation requires a resentencing proceeding, that court found there was no entitlement to the resentencing because the vacating of the points for the overturned conviction was harmless. The trial court concluded that for the remaining offense, it was still obligated to impose a mandatory term of 25 years, based on the discharge of a firearm causing serious injury to the victim.

The Fifth District reversed, based on Burton's argument that the trial court would have had discretion on resentencing based on the Youthful Offender Act. Mandatory minimum sentences of the 10-20-Life statute do not prohibit sentencing as a Youthful Offender. Such sentencing was not mandated, but it was within the trial court's discretion. On remand, the trial court must consider whether to exercise its discretion to resentence the defendant as a Youthful Offender. If not, it must reimpose the 25-year mandatory minimum sentence.