

Case Law Update  
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Prepared by  
Richard L. Polin

Eleventh Circuit Court of Appeals

[Senter v. United States](#), 18-11627 (Nov. 13, 2020)

The Eleventh Circuit vacated the district court's order denying a petition for writ of habeas corpus under 28 U.S.C. s. 2255. The district court failed to address Senter's claim that he "no longer qualified as an armed career criminal in light of Johnson v. United States, 576 U.S. 591 (2015), because his prior 1988 Alabama conviction for attempted first-degree robbery has no state law elements."

The district court construed the petition as a collateral attack on the state court conviction and denied the petition on that basis, as section 2255 can not be used to challenge state court convictions. The district court, however, did not construe the petition correctly and therefore did not address the claim that was actually asserted. The case was therefore remanded to the district court for consideration of the above-noted issue under Johnson.

One judge dissented, concluding that the district court did sufficiently address the claim alleged in the petition.

[Tuomi v. State](#), 17-14373 (Nov. 13, 2020)

The Eleventh Circuit affirmed the denial of a habeas corpus petition challenging a state court conviction under 28 U.S.C. s. 2254. The Court addressed three issues: the failure to appoint new counsel when the state trial court denied a motion to withdraw plea; and two claims of ineffective assistance of appellate counsel related to the right to counsel and waiver of counsel in the trial court.

As a matter of federal constitutional law, Tuomi did not demonstrate an actual conflict of interest that would have entitled him to new counsel for purposes of the motion to withdraw plea under Florida Rules of Criminal Procedure 3.170(1). Tuomi alleged what was, at most, a potential conflict of interest. Trial counsel had, in fact, filed a motion to withdraw plea based on an incorrect scoresheet, alleging her own ineffective assistance. There was nothing in the record to demonstrate inconsistent interests between original counsel and Tuomi. After the motion to withdraw the

guilty plea was granted, the trial court did appoint new counsel, but Tuomi subsequently proceeded to trial pro se.

Tuomi argued that appellate counsel should have argued that Tuomi was wrongfully denied new counsel before the guilty plea was withdrawn. As with the prior issue, because there was no showing of an actual conflict of interest, appellate counsel was not ineffective for failing to raise that issue on appeal.

After the guilty plea was withdrawn, and immediately prior to the start of the trial which resulted in the conviction and sentence, Tuomi indicated that he wished to proceed pro se and the trial court conducted an inquiry before permitting him to do so. He argued in the federal habeas proceedings that appellate counsel failed to argue that the trial court did not conduct an adequate Faretta inquiry. A Faretta claim, however, would not have succeeded on appeal, and counsel was therefore not ineffective. Tuomi was made aware of the dangers of self-representation, the nature of the charges, and the potential sentence he was facing. The judge expressly cautioned Tuomi that the judge thought it was a bad idea, but Tuomi persisted with the request to proceed pro se.

### Second District Court of Appeal

[Berry v. State](#), 2D19-2340 (Nov. 13, 2020)

Berry was convicted of insurance fraud and unlawful use of a two-way communications device. The conviction for the communications device was reversed because the State failed to prove that Berry committed the crime in DeSoto County, as alleged in the information.

A collision involving Berry's vehicle occurred in DeSoto County, but Berry was not in the vehicle at the time. Berry called his insurer, located in Miami, stating that he had been in the vehicle at the time of the accident and that he had been injured. There was evidence that Berry was driving while on the phone with the insurer. Berry provided the insurer with a P.O. Box address for DeSoto County and stated that he sought medical care as a result of the accident, on the day of the accident, in DeSoto County. The call to the insurer was made six days after the accident. Berry did not say where he was at the time of the call and there was no other evidence regarding his location at the time of the call.

### Third District Court of Appeal

[Gonzalez v. State](#), 3D20-352 (Nov. 12, 2020)

The Third District affirmed convictions for possession of cocaine with intent to sell, possession of marijuana and unlawful use of a communication device.

In closing argument, the prosecutor argued that the defense theory, that officers fabricated the entire incident, was no more than a “story, a tall tale.” This was not improper, as it constituted a fair reply to the defense’s argument. Additionally, the prosecutor’s argument did not constitute improper bolstering or vouching for the officers who testified. The prosecutor’s argument constituted a summary of the evidence, and argued, on the basis of inferences from the evidence, that the defense’s theory was unreasonable.

[Edgecomb v. State](#), 3D20-1427 (Nov. 12, 2020)

Edgecomb, whose case dated back to the 1970’s, was entitled to have the words “hard labor” stricken from his sentence, as surplusage, which was not authorized at the time of the offense and rendered the sentence, on its face, illegal.

### Fourth District Court of Appeal

[Bailey v. State](#), 4D18-1668 (Nov. 12, 2020)

Bailey appealed from a revocation of probation and argued that the trial court failed to make a competency determination. The Fourth District affirmed, concluding that the issue was procedurally barred.

The revocation of probation was entered as part of an open plea to the court. The court colloquied the defendant, and included questions regarding medications and mental health issues that might affect the current plea. No issue was raised regarding competency. Furthermore, Bailey indicated that neither his bipolar disorder, depression, ADHD nor medications for those issues interfered with his decision-making ability. He therefore could not argue on appeal that the trial court should have ordered a competency evaluation and conducted a hearing sua sponte based on those issues.

[Taylor v. State](#), 4D19-950 (Nov. 12, 2020)

A 65-year sentence imposed at a resentencing hearing was reversed because it violated the defendant's double jeopardy rights.

Taylor was originally sentenced to 11 concurrent terms of life imprisonment. On two additional counts, he was sentenced to 818 days based on credit for time that had been served. The sentences were subsequently vacated pursuant to Graham v. Florida. He was resentenced in 2011 to concurrent terms of 60 years with ten-year mandatory minimum requirements. A twelfth count resulted in a sentence of 30 years and the last count, five years; all were concurrent. These sentences were subsequently overturned by the Florida Supreme Court, based on its then-controlling case law regarding juvenile life sentences.

At the final sentencing, Taylor was sentenced to 60 years for 11 counts, with 4,235 days credit for time served, and 10-year mandatory minimums. Count 12 resulted in a 30-year sentence, with a 10-year mandatory minimum and the same credit, to run concurrently. Count 13 received a five-year sentence, with the same credit, but it ran consecutive to the first 11 counts.

The sentences on counts 12 and 13 violated double jeopardy principles because those sentences had already been fully served prior to the final resentencing, as the original sentences for those offenses were for 818 days credit for time that had already been served.

[Valentine v. State](#), 4D19-1448 (Nov. 12, 202) (on motion for rehearing)

On appeal from a conviction for first-degree murder, the Fourth District affirmed. Although one error was committed in the trial court, it was deemed harmless. Other issues were addressed and errors were not found; the Court made alternative findings that any errors on those issues would likewise be deemed harmless based on the totality of the facts of the case.

A photo lineup was not unnecessarily suggestive. The defendant's photo was not the only one with a black bar above the photo. There were no indications that the witness was influenced by that black bar. The witness, a store manager, recognized the defendant from prior visits to the store and was 100% certain about the identification.

Valentine also challenged the lineup as not being “double blind,” because the detective who administered it was the lead detective. The Court reviewed section 92.70, Florida Statutes, and held that it did not require “double blind” administration of the lineup. The requirements of the statute were complied with. Although the lead detective administered the lineup, he had no part in preparing it; another detective assembled it on a computer program. The lead detective did not know whose photos were included before administering the lineup.

The trial court did not err in admitting a prior inconsistent statement of the store manager on redirect examination. On cross-examination, defense counsel engaged in impeachment of the witness with respect to the witness’s prior denials of having read newspaper articles about the case. On redirect, the State asked if the manager recalled “telling defense counsel the shooter had tattoos on his face and neck during his deposition.”

On cross-examination, defense counsel “had the manager admit he had seen the news and watched the surveillance video since the crime. As the State suggests, a reasonable interpretation of the cross-examination here implied the manager gave one description at the crime scene, and another after watching the news and surveillance video.”

The admission of a childhood friend’s identification of the defendant in a picture from the surveillance video was inadmissible hearsay, but the error was deemed harmless. The State conceded error as to this issue. The childhood friend had identified the defendant in court and from the surveillance video. Additionally, detectives had testified that the friend had commented at the scene that “they know him.” That statement had been admitted over defense objection.

[B.W. v. State](#), 4D19-1524 (Nov. 12, 2020)

The trial court erred by ordering restitution without hearing evidence as to B.W.’s employment prospects. On remand, the trial court was directed to make such a determination before ordering restitution.

[Walding v. State](#), 4D19-1900 (Nov. 12, 2020)

The Fourth District affirmed convictions for sexual battery and other offenses.

The State’s cross-examination of the defendant did not constitute an improper comment on his right to remain silent. The State did not comment on what the

defendant did not say in his post-arrest statement. Rather, the State challenged inconsistencies between the trial testimony and the post-arrest statement.

The incident occurred in the victim's home. After arrest, the defendant told the police that he had been home all night. At trial, he testified that he and the victim had consensual sex on the night of the alleged attack. On cross-examination, the State asked whether the defendant's trial testimony was the first time "we're hearing that it was consensual sex."

Additionally, that same questioning did not constitute impermissible burden shifting. The "State did not imply the defendant had the burden of providing an exculpatory statement prior to trial. Rather, the State attacked the defendant's credibility by demonstrating the inconsistencies in the defendant's initial statement and his trial testimony."

Testimony regarding the defendant's possession of a gun and a suicide note, hours after the alleged crime, were relevant, notwithstanding that a gun was not used in the offense. The testimony was indicative of consciousness of guilt.

[Sears v. State](#), 4D19-1977 (Nov. 12, 2020)

The Fourth District affirmed the defendant's convictions for burglary and attempted sexual battery. The trial court did not abuse its discretion in dismissing a potential juror based on concerns about the juror's impartiality.

In response to a series of questions by the court to the venire regarding fairness, Juror K volunteered answers. She spoke about her belief that the country was engaging in discrimination against minorities and that she did not "feel good about the law in this country, not right now." Her comments also referenced the White House, which, the court advised her had nothing to do with the case being tried. When directly asked by the judge if she could be a fair and impartial juror, she responded that she was not good, "emotionally." She got very frustrated "about everything." She used to be proud to be here, but not anymore.

On the basis of these and other similar comments, the trial court did not abuse its discretion in dismissing Juror K.

[Tedford v. State](#), 4D19-2184 (Nov. 12, 2020)

The Fourth District addressed an issue of first impression: “the impropriety of using a drug dog to sniff the passenger of a vehicle during a traffic stop based on a reasonable and articulable suspicion the passenger possesses drugs, where the sniff itself is not based on a warrant or probable cause.” The Court held that there was no Fourth Amendment violation and affirmed the denial of a motion to suppress evidence.

The dog was trained to detect marijuana and other substances within one foot of the exact location, but was not trained to detect synthetic marijuana. The narcotics officer was called to the scene of the traffic stop and the vehicle had two occupants. The detective had them both exit the vehicle and stand near the detective’s vehicle, about eight feet away. The dog promptly alerted to the passenger area of the vehicle involved in the traffic stop. Narcotics were not found during a search of the vehicle. The dog did not alert to the driver, but did alert to the passenger’s pocket. The detective searched the pocket, but did not discover any drugs. The detective then removed the passenger’s shoe and found the synthetic marijuana. In a subsequent search of the backseat area of the vehicle, marijuana was found. The defense conceded that there was probable cause for the traffic stop and for the search of the vehicle. The defense contended, however, that once drugs were not found during the search of the vehicle, probable cause no longer existed, and the remainder of the search was invalid.

The Court’s opinion includes a lengthy discussion of the decisions of the United States Supreme Court that have addressed dog sniff issues. The Fourth District then found that the dog sniff “was conducted as a result of a legal traffic stop, and there is no issue as to the length of the stop or whether the sniff of the Defendant’s person was conducted after the procedures for a routine traffic stop concluded.” Based on the dog’s alert to the passenger area, articulable suspicion existed as to the Defendant’s possession of illegal drugs, especially when the search of the vehicle did not result in the discovery of drugs. The reasonableness of the dog sniff of the passenger was found on the basis of the prior alert to the passenger area and the failure to find drugs during the search of the vehicle preceding the sniff of the passenger. Once the dog alerted, the detective had probable cause to search the defendant for drugs. The forced removal of the defendant’s shoe was a lawful search.

[V.R.J. v. State](#), 4D20-414 (Nov. 12, 2020)

After being ordered into secure detention, and while waiting to be transported from the courtroom, the juvenile absconded the courtroom without permission. The Court addressed the issue of whether the juvenile could be found guilty of an escape from a juvenile facility. The Fourth District held that he could and found that the pretrial motion to dismiss, and in-trial motion for judgment of acquittal, were both properly denied.

Section 985.721(3), Florida Statutes (2018), refers to an escape from lawful “transportation to or from any . . . secure detention facility. . . .” The Fourth District relied on a dictionary definition of “transportation,” meaning travel “from one place to another,” and concluded that the transport started in the courtroom, even though physical moving of the juvenile had not actually commenced.

#### Fifth District Court of Appeal

[Fuller v. State](#), 5D16-2646 (Nov. 13, 2020)

On remand from the Florida Supreme Court, the Fifth District reversed and remanded for a new trial for reasons stated in its prior opinion. Fuller was not, however, entitled to a new stand your ground immunity hearing. The hearing that he was accorded had been held prior to the effective date of the 2017 statutory amendment which changed the burden of proof from the defendant to the State. As that hearing preceded the statutory amendment, Fuller was not entitled to the benefit of the change as to the burden of proof at the SYG hearing.

[Thomas v. State](#), 5D20-209 (Nov. 13, 2020)

The Fifth District reversed the summary denial of a Rule 3.850 motion because the trial court’s order did not attach court records which conclusively refuted the claims. Although the State’s characterization of the plea colloquy would, if accurate, have sufficed to refute two of the claims, the court’s order did not attach the transcript of the plea colloquy.

Another claim, which the trial court dismissed as speculative, was found to have been facially sufficient. Thomas alleged that counsel was ineffective for failing to depose a witness who could have impeached one of the State’s main witnesses and that a deposition of the witness would have resulted in the suppression of critical evidence.