

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Smith](#), 19-12686 (Dec. 21, 2020)

The Eleventh Circuit affirmed a conviction and sentence for being a felon in possession of a firearm. Smith's federal conviction and sentence were predicated on a state court conviction. During the federal prosecution, Smith argued that his state court counsel had been ineffective during plea negotiations on state drug offense charges which ultimately resulted in a conviction for one of three initially charged offenses.

State court counsel advised Smith to accept a five-year offer to avoid subsequent federal prosecution that was the being considered. The federal prosecutor had offered Smith a deal under which Smith's acceptance of a state-court plea with five years prison time would avoid the federal prosecution. Smith told his state-court counsel that he did not want the five-year plea deal and that he thought the federal prosecutor was bluffing about obtaining a federal indictment. State-court counsel further told Smith that he was facing a 15-year minimum sentence in federal court if convicted. Smith's problem was not that state-court counsel failed to advise him, "but that Smith failed to heed that advice."

Additionally, Smith did not make the required demonstration that but for the advice of state court counsel, he would have accepted the five-year plea offer in state court.

Smith's federal sentence of 15 years under the Armed Career Criminals Act required proof of a predicate offense that qualified as a "serious drug offense." The district court did not err in concluding that Smith's prior state court convictions for sale of cocaine qualified as serious drug offenses. A "court determining whether an offense qualifies as a serious drug offense need only consider whether the offense's elements 'necessarily entail' the types of conduct identified in the ACCA's definition, rather than engage in a 'generic-offense matching exercise.'" The definition in the ACCA includes offenses for the distribution or possession with intent to distribute, a qualifying controlled substance. Additionally, an argument by

Smith based on the alleged lack of a qualifying mens rea for the state offense was rejected on the basis of the Supreme Court's prior decision Shular v. United States.

Third District Court of Appeal

[Green v. State](#), 3D18-2429 (Dec. 23, 2020)

Green was a juvenile at the time of the commission of the offenses for which he was convicted: first-degree murder, armed sexual battery, armed carjacking and kidnapping with a weapon. These convictions and sentences were affirmed on direct appeal in 2008. The verdict for first-degree murder did not specify whether the jury based its verdict on premeditated murder or felony murder. Green had been sentenced to life in prison on each count. Green had been convicted along with a codefendant, Pestano.

In subsequent post-conviction proceedings, Green obtained a new sentencing hearing, subject to the 2014 juvenile sentencing statutes. A key issue at that resentencing hearing was whether Green actually killed, intended to kill, or attempted to kill the victim. Such a finding affected both the minimum sentence that could be imposed as well as the number of years after which Green would be entitled to judicial review of the imposed sentence. At the resentencing hearing, the State argued that the trial court could consider the evidence adduced at the original trial and conclude that rational juror would find anything other than that Green actually killed or intended to kill the victim.

On appeal, the Third District reversed and remanded for resentencing. A jury is required to make the determination of whether the defendant actually killed or intended to kill. Although an erroneous determination of that finding by a judge is subject to harmless error review on appeal, the Third District concluded that the judge's error was not harmless beyond a reasonable doubt.

The State's evidence at trial included one witness, a friend of Green's, who said that Green told him on several occasions that he and Pestano killed the victim. The State also presented a videotaped conversation between Green and Pestano, in jail, after their arrests, in which Green "actively tried to get Pestano to change his story." Although Green gave multiple accounts of the incident to the police during interviews, in none of them did he admit to killing or intending to kill the victim. Green asserted that he had consensual sex with the victim. The State also relied on photographic evidence suggesting that two individuals would have had to push the victim's car, with her body in the trunk, into a canal.

Green argued that the trial evidence was insufficient to support the State's harmless error argument where there were no eyewitnesses and no forensic evidence linking Green to the killing of the victim. Green contended that with "two competing narratives," the determination of actually killing or intending to kill had to be made by the jury. The Third District agreed. The Court emphasized portions of the prosecutor's closing argument, such as the statement that "we're never going to know the exact details of what happened." And, the prosecutor told the jury that it could convict on the basis of either premeditated murder or felony murder, and that the jury did not have to believe that Green actually killed the victim.

The Third District accepted that the State presented a strong case, but it was still insufficient to sustain its burden on appeal of demonstrating "beyond a reasonable doubt that no rational jury would have concluded that Green did not actually kill or intend to kill the victim. The evidence presented at trial involved two competing narratives, the resolution of which required a credibility determination best suited for the jury and not judicial factfinding."

[A.O.H. v. State](#), 3D20-854 (Dec. 23, 2020)

An adjudication of delinquency for trespass in a conveyance was reversed because the State failed to prove that the juvenile knew that the conveyance was stolen.

The State presented testimony that the victim's vehicle had been stolen, with its keys inside, shortly before A.O.H. and another juvenile were found, in response to a BOLO describing the vehicle and the two juveniles. The two, when found, were about one-half mile away from the vehicle. The second juvenile possessed the key to the vehicle. A.O.H. gave a statement to the police, stating that his companion drove the truck and that he, A.O.H., hopped in. This acknowledgment of having hopped in was insufficient to demonstrate knowledge that the vehicle was stolen. There was no testimony as to when A.O.H. got into the vehicle. There was no damage to the vehicle which might have alerted A.O.H. to the stolen nature of the vehicle. Nor did the fact that the BOLO referenced two juveniles support the contention that both knew that the vehicle was stolen or that they both got in at the time that the car was taken.

[Wurtzel v. State](#), 3D20-1348 and 3D20-1349 (Dec. 23, 2020)

In an appeal from a revocation of probation, Wurtzel did not challenge anything that transpired after the entry of the original order of probation. Rather, he challenged the validity of one of the original conditions of probation. The Third District dismissed the appeal because “in an appeal of a probation revocation, our appellate review is limited to proceedings occurring after the entry of the probation order.”