Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Kushmaul, 20-10924 (Jan. 6, 2021)

Kushmaul pled guilty to charges of possessing and distributing child pornography. On appeal, he challenged his sentence. His sentence was enhanced pursuant to 18 U.S.C. ss. 2252(A)(b)(1) and (b)(2). The enhancement was based on a prior Florida state court conviction for promoting the sexual performance of a child under s. 827.071(3), Fla. Stat. Kushmaul argued that the Florida offense did not qualify for the statutory enhancement because the state offense was broader than its federal counterpart – i.e., the Florida statute applied to offenses involving clothed body parts, whereas the federal statute applied only to unclothed body parts. The Eleventh Circuit disagreed and concluded that under the plain meanings of the state and federal statutes, the Florida offense qualified as a predicate under the federal enhancing statute. As Kushmaul did not object in the district court, this issue was reviewed under the plain error standard.

The federal statutory enhancement applied to a state court conviction "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." The Florida offense of promoting the sexual performance of a child applied to the production or direction of a performance "which includes sexual conduct by a child less than 18 years of age." "Sexual conduct" was defined in the statute as including "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party."

The offenses referenced in the federal enhancement statute – aggravated sexual abuse, sexual abuse, and abusive sexual conduct involving a minor – were "non-traditional" offenses, and were therefore defined based on the "ordinary, contemporary, and common meaning" of their terms. Even without regard to the Eleventh Circuit's prior precedent, the Court observed that "abusive sexual conduct" does not require that a person be "unclothed," or that there be physical contact. And, even if Florida's statute was broader than the federal statute, this was a "close call," and a "close call" would not suffice to satisfy the plain error standard of review for an unpreserved claim. Furthermore, there was no direct precedent determining

whether the Florida offense was a qualifying predicate. Accordingly, Kushmaul could not establish plain error.

Garcia v. United States, 19-14374 (Jan. 8, 2021)

The Court vacated its prior opinion of November 19, 2020 and substituted a new opinion in its place.

Garcia challenged the denial of a motion to vacate under 28 U.S.C. s. 2255 and the district court denied a certificate of appealability. The Eleventh Circuit declined to issue a COA.

18 U.S.C. s. 924(o) prohibits a conspiracy to commit an offense under 18 U.S.C. s. 924(c) and 18 U.S.C. s. 924(c) prohibits the use or carrying of a firearm in furtherance of "any crime of violence or drug trafficking crime." In United States v. Davis, the Supreme Court held unconstitutional part of the statutory definition of "any crime of violence." The residual clause of 18 U.S.C. s. 924(c) was invalidated. It did not affect drug trafficking crimes.

Two of Garcia's convictions were for drug trafficking offenses. One charge, Hobbs Act robbery, was not a crime of violence after Davis. If the robbery conviction had been the only predicate for 18 U.S.C. s. 924(c), the conviction under 18 U.S.C. s. 924(o) would have been vacated. Due to the drug trafficking predicates, however, the conviction under s. 924(o) remained valid.

The jury returned a general verdict and it was therefore impossible to determine which predicate offense or offenses it relied on for the guilty verdict under s. 924(o). Because Garcia had previously sought authorization for a successive section 2255 motion, he had a very high burden. Once he was granted leave for that motion, he had to prove that he actually was entitled to relief. There was nothing in the federal court record indicating that the section 924(o) verdict was based on the non-qualifying offense as a predicate.

Amodeo v. FCC Coleman, Warden, 17-15456 (Jan. 8, 2021)

Amodeo appealed the denial of a habeas corpus petition under 28 U.S.C. s. 2241. The petition alleged that he was actually innocent of the crimes to which he pleaded guilty.

Collateral attacks on federal convictions must be made through 28 U.S.C. s. 2255. The savings clause of section 2255 provides that a section 2241 petition "shall not be entertained" "if the prisoner has either failed to apply for the relief he seeks by s. 2255 motion in the sentencing court, or has applied and been denied it, 'unless it also appears that the remedy by [s. 2255] motion is inadequate or ineffective to test the legality of his detention. . . . It rarely is. . . . A claim of actual innocence is not one of the rare ones for which a s. 2255 motion is an inadequate or ineffective remedy. For that reason, the district court properly dismissed Amodeo's s. 2241 petition for lack of jurisdiction."

It has previously been held that a s. 2255 motion is "'inadequate or ineffective to test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim' if that claim were meritorious and not barred by a procedural or other defense." Amodeo further argued that the section 2255 motion was inadequate because a claim of actual innocence was not cognizable in such a motion. The Eleventh Circuit stated that Amodeo confused merit with cognizability. "A meritless claim can be just as cognizable as a non-meritless one."

First District Court of Appeal

Maxwell v. State 1D19-3314 (Jan. 6, 2021)

The trial court failed to make a proper competency determination prior to trial. The trial court's finding was made pursuant to the stipulation of both parties, which is insufficient. On remand, the trial court was directed to conduct a competency hearing and make a determination nunc pro tunc, if possible.

Second District Court of Appeal

Tanner v. State, 2D18-3053 (Jan. 8, 2021)

The Second District reversed convictions for kidnapping, arson and resisting an officer without violence. The trial court erred in denying Tanner's motion to suppress statements.

Although Tanner waived his right to remain silent prior to being interviewed by the police, he subsequently asserted it during trial and the officer nevertheless continued with the interrogation. First, he responded negatively to the question of whether he "could . . . explain to me why law enforcement's out here today." Shortly after that, he said, "I don't got nothing to say to y'all." And, seconds after that, he

was asked, "Would you like to give me your side of the story?" He responded, "No, sir." These statements constituted an unequivocal and clear assertion of his invocation of the right to remain silent and cease questioning.

Additionally, the trial court erred in permitting a detective to be called by the State for the sole purpose of "creating an inference that Tanner had hidden incriminating evidence from law enforcement by failing to give them the correct code to unlock his phone." The State did not thereafter prove that the phone analyzed by the detective was relevant. Absent any link between he phone and the charged offenses, the detective's testimony was not relevant.

A detective also testified about text messages on the victim's phone, adding that from what the victim told him, the messages came from Tanner. The statements were offered to prove the truth of the matter asserted in them, i.e., that the sender intended to harm the victim. The phone itself was not introduced into evidence; or were the text messages themselves. The testimony, as presented by the State, was inadmissible hearsay.

Schwoerer v. State, 2D19-2010 (Jan. 8, 2021)

The defendant was convicted on multiple sex offenses. The Second District held that the convictions for two – the use of a computer to seduce a child and unlawful use of a two-way communications device – resulted in a double jeopardy violation because "it was not clear from the information that different conduct underlay each charge."

The case involved text communications occurring over a four-day period. The information alleged that all of the charged offenses were committed "on or about October 7, 2018." Therefore, the information charged only a single criminal episode.

Holder v. State, 2D19-2071 (Jan. 8, 2021)

One violation of community control was reversed on appeal because it was based solely on hearsay. The condition required that Holder "promptly and truthfully answer all inquiries directed to [him] by the court or the officer." The officer testified at trial that Holder told him that he would be working for Heartland Coating between October 9th and 17th. On the 10th, the community control officer called Heartland and spoke to the owner who told him that Holder had done a little work there, but had not worked there in more than three weeks.

Flint v. State, 2D18-2742 (Jan. 8, 2021)

Flint was sentenced as a habitual felony offender to concurrent terms of seven years in prison on counts 1-3, with a consecutive five-year PRR sentence on count 3. The sentence for count three was for resisting an officer with violence and exceeded the statutory maximum of five years under the HFO statute.

A single HFO/PRR sentence may be imposed, but only if the HFO portion of the sentence is longer than the PRR portion. The combined PRR and HFO sentences here were 12 years, in excess of the 10-year maximum for a third-degree felony under the HFO statute.

Williams v. State, 2D19-1144 (Jan.6, 2021)

The Court withdrew its prior opinion of August 9, 2020 and issued a new opinion.

Williams had been sentenced in 1980, as a juvenile, to prison terms of life and lesser sentences, with parole eligibility. He filed a Rule 3.800(a) motion to correct sentence and argued on appeal from its denial that the trial court erred when it reconsidered its original ruling to grant the motion. Williams argued that once the motion had been granted, the trial court lacked jurisdiction to reconsider when the State failed to appeal from the order granting the motion.

The Second District noted a split of decisions among Florida's district courts of appeal on the issue of whether an order granting a Rule 3.800(a) motion is appealable prior to the ensuing resentencing. Williams' case, however, did not implicate those decisions because the trial court had not yet ruled on the Rule 3.800(a) motion. As a result, the trial court was bound by the intervening decisions of the Florida Supreme Court regarding the constitutionality of the sentences.

Algiere v. State, 2D19-3576 (Jan. 6, 2021)

The Second District affirmed Algiere's revocation of probation. The affidavit of violation alleged that the defendant had unsupervised contact with a 13-year old child. The affidavit alleged the wrong condition of violation, however. At the revocation hearing, the probation officer referenced the correct condition and the trial court found that the defendant was in violation for unsupervised contact with a

child. Although the affidavit alleged the wrong number of the condition of violation, the defendant was on notice of the nature of the alleged violation.

Fourth District Court of Appeal

Lawson v. State, 4D17-3671 (Jan. 6, 2021)

On remand from the Florida Supreme Court, for reconsideration in light of Pedroza v. State, 291 So. 3d 541 (Fla. 2020), the Fourth District concluded that a 30-year sentence imposed on a juvenile was not the functional equivalent of a life sentence and was therefore not unconstitutional under Graham v. Florida.

The Court issued similar one-paragraph opinions in three other decisions on the same date: Corbett v. State, 4D18-1654; Seays v. State, 4D18-1827; and Donahue v. State, 4D18-2148. All involved sentences of 25-30 years.

Cuevas v. State, 4D19-266 (Jan. 7, 2021)

Cuevas appealed convictions for multiple sex offenses and the Fourth District affirmed.

Cuevas argued that the trial court erred in admitting testimony of a church pastor and a church volunteer because it was privileged under the clergy communications privilege. The testimony was introduced through the defendant's mother.

With respect to the statements made by the defendant to the pastor, the conversation was not private. This was a phone conversation and the pastor testified that he could hear the defendant's mother over the phone during the conversation. The defendant argued that this did not result in a waiver of the privilege because the mother's presence was "in furtherance of the communication," as set forth in the evidence code. The mother testified that she was not present during the conversation. Even if she was present, the defendant did not establish that her presence was necessary to the furtherance of the communication. She was not a clergyman and was not asked to pray with the pastor. The purpose of the call was to solicit the pastor's prayers for the defendant's family. The pastor did not make any inquiries of her. Thus, the trial court did not err in finding that the privilege did not apply.

The issue related to the church volunteer was not preserved for review in the trial court. It was, however, without merit. The record did not establish that the defendant reasonably believed the volunteer was a member of the clergy. The volunteer testified that he did not work in the church; he worked for a food company. And, the defendant had no prior knowledge of the volunteer, as the defendant never attended that church. And, even if a privilege could have existed, it was waived, as the meeting and conversation occurred in a public area at a Dunkin' Donuts.

Brown v. State, 4D19-397 (Jan. 6, 2021)

After entering a plea, Brown reserved the right to appeal the denial of a suppression motion. The Fourth District agreed that the lack of a transcript of the suppression hearing prevented the Court from addressing the merits of the suppression motion and that a reversal was therefore warranted.

The trial court had engaged in efforts with the parties to reconstruct the record in the absence of the transcripts. The trial court was unable to do so, however. That court further found that the testimony and objections would have served as legitimate grounds for an appeal.

The success of this appeal would have hinged on whether the initial stop and arrest of the defendant was based solely on an unassigned tag, for which the Fourth District's precedent would have required reversal; such a violation is a misdemeanor, for which an officer may arrest without a warrant only if the offense is committed in the presence of the officer. The State conceded that the officer did not witness the defendant affixing the tag to the license plate. The facts of the case also raised the possibility that the stop was based on the alteration or misuse of tag, which might have been in the presence of the officer. Absent the transcript with the testimony, the appellate court could not review these issues and make the necessary determinations regarding the trial court's findings and conclusions.

Saffold v. State, 4D19-1879 (Jan. 6, 2021)

Saffold pled no contest to multiple charges of armed sexual battery, kidnapping and aggravated battery. He then appealed the sentences that were imposed after the no contest plea. The Fourth District reversed as to two sentencing issues and affirmed in all other respects.

The sentencing scoresheet erroneously included 18 firearm points. The section providing for those 18 points applies only to a defendant convicted of a

felony other than those enumerated in section 775.087(2), while having a firearm in his possession. All of the defendant's convictions in this case were for offenses enumerated in that statutory provision. The error was deemed harmless, however, but the Court did not explain the reason for finding the error to be harmless.

Saffold also challenged the scoring of sexual penetration points on three charges. This challenge was based on the factual basis for the plea. The Court agreed as to two and remanded for resentencing with a corrected scoresheet for those counts. "Penetration" requires some entry into the relevant part of the anatomy as charged, however slight. Absent such penetration, the points should be scored as sexual contact points.

The denial of a motion for downward departure was reversed for reconsideration. The motion alleged amenability to treatment due to Saffold's bipolar disorder. The trial court did not believe Saffold was amenable to treatment and concluded he had done nothing to obtain such treatment. The record, however, included substantial uncontroverted evidence of Saffold's efforts to obtain such treatment.

Vasata v. State, 4D19-2274 (Jan. 6, 2021)

The Fourth District affirmed convictions for first-degree murder, attempted murder and grand theft.

The only issue addressed by the Court was the sufficiency of evidence for theft of an automobile. The defendant argued that the State failed to prove the element of specific intent because there was a reasonable hypothesis that the perpetrators "felt compelled to take the car after the defendant was unexpectedly shot." The Court disagreed. The defendant's car had been parked a mile from the scene of the shooting. The defendant "would have known they would need to steal a car to make a quick get-away."

State v. Huntley, 4D19-2332 (Jan. 6, 2021)

The State appealed a post-verdict order granting a motion for judgment of acquittal on the charge of child abuse. The Fourth District affirmed. The facts of the case are not provided. The Court concluded that "[o]n the entirely circumstantial evidence before us as to the commission of the act, we cannot conclude that the defendant committed an *intentional* act without impermissibly stacking inferences."

The Court noted the recent decision of Bush v. State, 295 So. 3d 179 (Fla. 2020), in which the Supreme Court abandoned the special standard of review for circumstantial evidence cases. However, the Fourth District, while noting that "the jurisprudence regarding inference stacking may evolve" in the aftermath of Bush, at the current time, "we are bound to follow the dictates of precedent" regarding impermissible inference stacking.

Hunter v. State, 4D19-2436 (Jan. 6, 2021)

Hunter appealed convictions for assault with a deadly weapon, battery on a law enforcement officer, resisting arrest with violence, and misdemeanor criminal mischief.

The State conceded the evidence was insufficient as to criminal mischief because there was no evidence as to the cost of damage to the postal truck that was the subject of the incident. The Court agreed with the concession. The defendant struck the truck several times with a wood plank measuring two by four inches. The conviction for criminal mischief therefore had to be reduced from a first-degree misdemeanor to a second-degree misdemeanor.

Harris v. State, 4D19-3777 (Jan. 6, 2021)

A $200 assessment imposed for the FDLE Operating Trust Fund was reversed because it was not orally pronounced at sentencing. Additionally, under the relevant statute, the assessment that must be imposed is $100 when the State uses a crime lab in its investigation. That is mandatory; costs above that are discretionary and must be pronounced at sentencing. The excess costs were therefore stricken.

Fifth District Court of Appeal

Calabrese v. State, 5D19-2858 (Jan. 8, 2021)

Calabrese was resentenced for the first-degree murders he committed in 1995 as a juvenile. He was resentenced to life without parole, with judicial review after 25 years.

In an appeal from the resentencing, the Fifth District addressed several arguments of Calabrese. First, the sentencing court properly applied the juvenile sentencing statute. The court's written order included extensive findings regarding

ten non-exclusive statutory factors relevant to the issues of "youth and attendant circumstances."

Calabrese further argued in the lower court that the court failed to consider first whether the crimes reflected "transient immaturity" or "irreparable corruption." On appeal, Calabrese argued that the Supreme Court's decision of Miller v. Alabama requires more than Florida's current juvenile sentencing scheme under section 921.1401, Florida Statutes. He argued on appeal that Miller, in conjunction with Montgomery v. Louisiana, requires proof of "irreparable corruption" in order to support a life sentence on a juvenile.

Florida law does not require a determination of "irreparable corruption." The proper consideration of the enumerated factors in section 921.1401, with the opportunity for statutory judicial review of the sentence after 25 years, is sufficient to render the sentence constitutional.

Calabrese also argued that the judge, rather than the jury, made the determination that Calabrese intended to kill, attempted to kill, or actually killed the victim. The Court did not review this issue because there was no objection to this effect in the trial court and Calabrese did not raise a claim of fundamental error in the initial brief on appeal.

Tolliver v. State, 5D20-438 (Jan. 6, 2021)

The denial of a Rule 3.850 motion was affirmed. Tolliver argued that trial counsel was ineffective in presenting a motion to suppress evidence. His argument hinged on the accuracy of a tip. That, however, was irrelevant, as the search was conducted with consent.