Case Law Update
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First District Court of Appeal

Thomas v. State, 1D19-3881 (Jan. 20, 2021)

After the denial of a motion to suppress, Thomas entered a no contest plea and reserved the right to appeal the suppression issue. The First District affirmed.

Thomas "argue[d] that the deputy lacked reasonable suspicion to conduct a traffic stop based solely on the fact that the vehicle had a drug dealer tag that was not assigned to that vehicle." The First District disagreed because of the existence of other factors: "The deputy observed the vehicle at a gas station in Crestview around midnight with three occupants. The vehicle had a dealer tag that was registered to a Betty Kaucher in Holt. There was nothing to indicate that the vehicle was connected to a dealership. Under those circumstances, the deputy had reasonable suspicion that the vehicle with three occupants was not being operated in connection with a motor vehicle dealer's business around midnight, thus warranting an investigatory stop to resolve his suspicion that the dealer license was being misused, in violation of Florida law."

Second District Court of Appeal

Thomas v. State, 2D19-3830 (Jan. 22, 2021)

One subclaim of ineffective assistance of trial counsel was not ruled on by the trial court, and the Rule 3.850 motion was therefore remanded for further proceedings, where the record attachments were insufficient to refute the claim. The relevant portion of the claim was that trial counsel failed to object to deputies testifying as to "general criminal behavior testimony based upon a law enforcement officer's observations and experience in the investigation of other cases," and subsequent testimony that Thomas's behavior was consistent with the general criminal behavior.

While such testimony is generally inadmissible, there is an exception when the police witness qualifies as an expert "and can provide opinion testimony rather than factual testimony on the issue of general criminal behavior." The Second

District did not have sufficient excerpts from the trial transcript to determine whether the testimony in this case satisfied the exception or was inadmissible under the general rule.

Wilson v. State, 2D19-4461, 2D19-4463 (Jan. 22, 2021)

The trial court erred in imposing the statutory public defender's fee of $100 without first notifying the defendant of his right to contest the fee.

Cummings v. State, 2D20-2080 (Jan. 22, 2021)

The Second District granted Cummings' petition for writ of prohibition and found that she was entitled to immunity under the Stand Your Ground law.

Cummings was charged with aggravated battery. "She shot the victim, Mr. Cottrill, after he attacked her boyfriend, Mr. Blankenship, in the trailer home that she and Mr. Blankenship share." Cummings argued that she was "entitled to immunity because the State failed to prove by clear and convincing evidence that Mr. Cottrill was not committing a burglary when she shot him." On the basis of the evidentiary hearing testimony, the Second District agreed with her claim.

The trial court record showed revocation of permission on the part of Cottrill to remain in the premises – both express withdrawal of permission and revocation by virtue of a criminal act being committed against the owner of the premises. It was "undisputed that Mr. Cottrill was told, expressly and repeatedly, to leave the trailer prior to when Ms. Cummings fired the shotgun, twice in warning and once in earnest, at Mr. Cottrill. He did not comply with that demand." "The uncontroverted evidence below also demonstrated that Mr. Cottrill . . . battered Mr. Blankenship in the trailer. Having committed that battery, Mr. Cottrill could not lawfully remain inside to further wrestle and batter Mr. Blankenship because his invitation to remain in the trailer was implicitly withdrawn as a matter of law." The State therefore failed to prove by clear and convincing evidence that "Mr. Cottrill was not committing a forcible felony when Ms. Cummings shot him."

Third District Court of Appeal

Baxter v. State, 3D18-1246 (Jan. 20, 2021)

Baxter was convicted of second-degree murder. The Third District affirmed, and in the direct appeal, the Court addressed and rejected the claim that trial counsel was ineffective for failing to move for a reduction of the charge to manslaughter.

The evidence was sufficient to prove second-degree murder:

> We find, however, that the State presented competent, substantial evidence, in the form of eye-witness testimony, photos, a cell phone camera video and video surveillance from which the jury could find the depraved mind element. The evidence presented to the jury showed that Baxter initially confronted and corralled Meriweather and then ran to his truck to retrieve a gun, loaded it with ammunition, chased Meriweather down and shot him multiple times in the back.

As to the related claim that counsel was ineffective for failing to seek a reduction to manslaughter as a matter of law, as that was not apparent on the face of the record, it was beyond the scope of review in a direct appeal.

Brown v. State, 3D20-0032, et al. (Jan. 20, 2021)

In cases of five different defendants, county court convictions for violations of section 836.12(2), Florida Statutes (2019), were affirmed by the circuit court. The defendants then sought second-tier certiorari review in the Third District, and that Court denied their petitions. The petitioners argued that section 836.12(2) was overbroad under the First Amendment.

Each of the defendants was charged with threatening a law enforcement officer after "uttering certain menacing statements." Section 836.12(2) proscribes the act of "[a]ny person who threatens a law enforcement officer" or other enumerated individuals "with death or serious bodily harm."

The Third District looked to common definitions and judicial definitions of "threat" before concluding that they all contained "a common thread of some element of volition, namely a communicated intent to 'inflict harm,' consistent with

the body of law governing true threats." The word "threaten," as used in the statute, therefore had to be construed narrowly "as encompassing only true threats, defined as 'those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual.'" When read in that manner, the statute was not overbroad, as that reading "supplies the omitted mens rea element, separating wrongful from innocent conduct and shielding otherwise-protected speech, including mere hyperbole, exaggeration, or humor, from criminal liability."

Woods v. State, 3D20-254 (Jan. 20, 2021)

In an appeal from a revocation of probation, Woods challenged the imposition of a three-year mandatory minimum sentence for the possession of a firearm during the commission of the felony for which he had been convicted. He argued that the State's use of the word "possession" in the original information was insufficient to charge the "actual possession" that is required to support the mandatory minimum sentence for the firearm. The Third District affirmed the revocation of probation.

The Third District held that "[t]he word 'possession,' when unaccompanied by any qualifying adjective, encompasses both actual and constructive possession." Additionally, Woods "was afforded concrete notice that the State intended to seek the enhancement." Notwithstanding having been put on notice on several occasions, Woods never challenged the sufficiency of the information as deficient; rather, he accepted a favorable plea offer and waited until after a probation violation to assert the challenge to the information.

Fourth District Court of Appeal

Sols v. State, 4D19-763 (Jan. 20, 2021)

The Fourth District affirmed a conviction for second-degree murder, but reversed the life sentence that had been imposed under the 10-20-Life statute. The judge, during the sentencing proceeding, stated his belief that the sentence of life, to be imposed for the discharge of the firearm, was not discretionary. However, under the statutory language, the mandatory sentence is for a range, from 25 years up to life. The statute permits, but does not mandate, a life sentence. The case was remanded for resentencing.

Washington v. State, 4D19-2794 (Jan. 20, 2021)

The Fourth District affirmed a sentence and rejected the defendant's argument that the sentencing judge made findings that should have been made by the jury. The Court cited a recent First District decision for the point that "the trial court did not violate a defendant's Sixth Amendment rights in departing from the statutory maximum sentence, because section 775.084, Florida Statutes, authorized the court to impose an enhanced sentence on the basis of the defendant's prior felony conviction, and not based on findings of fact."

Varsam v. State, 4D19-2935 (Jan. 20, 2021)

The Fourth District affirmed the defendant's convictions, noting that there were improper arguments by the prosecutor in closing argument, but that they did not rise to the level of fundamental error, either individually or collectively. The Court did not set forth the actual comments and wrote only to "warn the State – and specifically the prosecuting attorney – that certain statements made during closing argument were improper."

Burkeen v. State, 4D20-1646 (Jan. 20, 2021)

On direct appeal, the State conceded, and the Fourth District agreed, that a sentencing scoresheet error required resentencing because "the record does not conclusively show that the same sentence would have been imposed using a correctly computed scoresheet."

Fifth District Court of Appeal

Bryant v. State, 5D19-3397 (Jan. 22, 2021)

On appeal from a revocation of probation, Bryant argued that his violations were "technical" and "low risk," and that the trial court therefore failed to consider alternative sanctions to prison under section 948.06(9), Florida Statutes. That section was inapplicable, however, because the probation officer chose to file an affidavit of violation of probation rather than recommending alternative sanctioning.

Harvey v. State, 5D20-166 (Jan. 22, 2021)

Harvey appealed convictions for first-degree premeditated murder and armed robbery. The Fifth District affirmed.

Two claims of insufficient evidence were not preserved through a motion for judgment of acquittal, did not constitute fundamental error, and could not be asserted and reviewed on direct appeal. In one of the claims, Harvey argued that while the evidence was sufficient as to the lesser included offense of manslaughter, it was not sufficient to support the conviction for murder. In the other claim, he asserted that while the evidence may have shown a theft, it did not support a conviction for robbery.

The Fifth District also disagreed with the argument that the trial court abused its discretion in denying a defense request for a continuance after both sides had rested and closing arguments were about to begin. Defense counsel wanted to meet with a potential witness whose identity had just been disclosed by one of the defendant's family members. Counsel had not yet spoken to the potential witness. The defense failed to demonstrate any of the four requirements for a continuance related to an additional witness: "1) prior due diligence in securing the witness's presence, 2) substantially favorable testimony would have been forthcoming, 3) the witness is available and willing to testify, and 4) the denial of the continuance caused material prejudice."

An alternative claim of ineffective assistance of trial counsel was rejected because such claims cannot be asserted on direct appeal unless clear from the record. The denial of this claim was without prejudice to raise it in a subsequent Rule 3.850 motion.