Case Law Update
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Eleventh Circuit Court of Appeals

Senter v. United States, 18-11627 (Dec. 30, 2021)

The Eleventh Circuit affirmed the denial of a motion to vacate sentence under 28 U.S.C. s. 2255. Senter claimed in the Eleventh Circuit that as a result of Johnson v. United States, 576 U.S. 591 (2015), he no longer qualified as an armed career criminal, because a 1988 Alabama state-court conviction for attempted armed robbery did not qualify as a predicate offense. The Eleventh Circuit granted a certificate of appealability to determine whether the district court misapprehended and thus failed to address the claim raised by Senter.

Under the Eleventh Circuit's decision in Clisby v. Jones, the federal district court must address and rule on all claims raised in section 2255 motions. A failure to do so will result in a remand for further proceedings.

The district court's order construed Senter's claim as asserting that the Alabama conviction was not a violent crime because attempted armed robbery had not been a crime in Alabama since 1979, which the court concluded was a state law claim, and an impermissible challenge to the state court conviction in a section 2255 motion. The claim, as asserted in the section 2255 motion, was that the Alabama offense was not a violent offense under the ACCA because it was "a non-existent offense and therefore does not have any elements." The Eleventh Circuit thus concluded that the district court correctly understood the claim as asserted in the motion and properly addressed it.

First District Court of Appeal

Hart v. State, 1D13-1754, 1D13-1810 (Dec. 31, 2020)

On remand from the Florida Supreme Court for reconsideration in light of Pedroza v. State, 291 So. 3d 541 (Fla. 2020), which addressed juvenile life sentences, the First District held that an aggregate prison sentence of 50 years did not constitute a life sentence or its functional equivalent.

Pearce v. State, 1D19-1106 (Dec. 31, 2020)

The First District, in a prior appeal, reversed and remanded for a retroactive determination of competency to stand trial, if possible. On remand, the trial court found that the defendant had been competent at the time of his trial, but ordered a new competency evaluation before proceeding to resentencing. The trial court then orally found the defendant to be competent, but did not enter a written order to that effect.

Based on the First District's own recent case law, the Court concluded that the failure to reduce the oral pronouncement to a written order is subject to error under the fundamental error standard, applicable to unpreserved claims. As the trial court had reviewed the evaluation, entertained evidence, and made an oral pronouncement, the error was not fundamental and the conviction and sentence were affirmed.

Mills v. State, 1D20-18, et al. (Dec. 31, 2020)

The First District addressed the certiorari petitions of multiple petitioners who sought second-tier review of circuit court orders denying their prohibition petitions. The county court had denied motions to disqualify the judge based on allegations that the judge had engaged in ex parte communications with the State Attorney's Office in another DUI case. The First District denied the certiorari petitions.

The petitioners argued that the judge had prejudged their cases and limited the prosecutors' discretion to negotiate pleas with them. The circuit court disagreed, concluding that "the county court judge did not establish a policy governing which pleas he would accept in pending or prospective cases." The First District found, based on the narrow standard or review applicable to certiorari second-tier review, that the county court "afforded due process and violated no clearly established principle of law."

While the petitioners' DUI cases were pending, the county court judge "emailed the State Attorney's Office, offering his interpretation of a statute governing pleas in DUI cases." That email addressed section 316.656, Florida Statutes, which pertains to mandatory adjudications and prohibits certain pleas to lesser included offenses.

The circuit court concluded that the county court judge did not "convey a policy that would apply in pending and future DUI cases. Rather, the circuit court

found that the email merely offered the judge's legal interpretation." The First District concluded that the county court judge's email was subject to multiple interpretations, and therefore it could not say "that the circuit court failed to apply the correct law or violated any clearly established principle of law." As a result, there was no entitlement to certiorari relief.

The county court's email stated, in part: "If the State intends to offer a 'breakdown' to reckless driving on a DUI, either while impaired or a BAL > .08 and < .15, the DUI citation/Information must be dismissed, and a new citation/Information for reckless driving must be filed. I would expect that in such case, probation would be required with the standard DUI conditions, except the driver's license suspension." The email then continued to assert that there could not be any "breakdowns" in other enumerated situations.

One First District judge dissented, concluding that the county court judge had engaged in an ex parte communication regarding a judicial policy, further finding that this was not the situation of a judge making an erroneous legal ruling in a pending case.

Mills v. State, 1D20-798 (Dec. 31, 2020)

The summary denial of a Rule 3.850 motion, asserting two claims of ineffective assistance of counsel, was affirmed in part and reversed in part; as to one of the two claims, the trial court's order failed to attach court records conclusively refuting the claim.

In the claim that was reversed for further proceedings, the motion alleged that in conjunction with a plea offer of 36 months in prison, counsel failed to advise the defendant that the charge could be supported by possession of ammunition and further failed to advise him of a 15-year maximum penalty. The charge was for possession of a firearm or ammunition. The trial court's denial was based on the finding that the defendant's motion failed to establish that the State would not have withdrawn the 36-month plea offer. In support of this, the trial court relied on "Mills' acknowledgment that the State's offer was 'contingent upon his expeditious acceptance' and 'would be withdrawn if it was not timely accepted.'" This did not conclusively refute the claim; whether the State would withdraw the plea offer was a factual question not resolved by the record before the appellate court.

Richardson v. State, 1D18-4775 (Dec. 31, 2020)

In an appeal from multiple convictions, Richardson sought a new sentencing hearing, arguing that the trial court failed to conduct a new Faretta inquiry before the sentencing hearing and that standby counsel was absent from a three-minute segment at the conclusion of the sentencing hearing. The First District disagreed and affirmed the convictions and sentences.

Richardson discharged counsel after the trial and the court conducted a Faretta inquiry, with the result that Richardson represented himself at sentencing, and standby counsel was appointed. This occurred at the commencement of the previously scheduled sentencing hearing; post-trial motions were pending at the time. The trial court continued the hearing until the next day, at which time an offer of counsel was renewed. Richardson still wanted to represent himself. The hearing was again continued until the next day. The court again renewed the offer of counsel and Richardson declined. He then argued his post-trial motion, which was denied, and the sentencing hearing proceeded. The court again offered counsel to Richardson at that time and he still wanted to represent himself. The judge then imposed the sentence, and Richardson accepted the court's offer of counsel for an appeal. When the sentence had been pronounced, the judge stated that the 40-year sentence for the primary offense was "day-for-day." The next day, the case was on calendar again, for a three-minute proceeding regarding the "day-for-day" aspect of the sentence, and the court explained it to the defendant and it was again pronounced in court. The court records did not indicate whether standby counsel was present for this proceeding.

The First District went through the history of the sentencing proceedings and noted that there were repeated Faretta inquiries. Richardson's argument focuses on the final three-minute proceeding, arguing that there should have been another offer of counsel at that time. The constant inquiries and reminders on the preceding days were sufficient. Additionally, there was no objection at the time, and this did not constitute fundamental error, where the defendant was aware of his rights from the preceding hearings, and the final three-minute proceeding was not a "critical phase" of the proceedings.

With respect to the alleged absence of standby counsel, the trial transcript and court docket notes were in conflict as to whether standby counsel was present. The sentence had already been imposed the preceding day; the issue regarding "day-for-day" had been discussed the preceding day, as well.

Calhoun v. State, 1D19-524 (Dec. 30, 2020)

Calhoun pled no contest to charges of possession of a firearm by a convicted felon, resisting an officer without violence, and possession of a controlled substance. He reserved the right to appeal the denial of a motion to suppress. The First District affirmed the conviction and sentence.

The issue addressed was whether there was reasonable suspicion for an investigative stop. Two deputies responded to a 911 call from a convenience store clerk about a possible drug deal at an adjacent car wash. When the officers arrived, they observed the SUV that had been described, but no one was washing it, and Calhoun, who had been described as the passenger, was leaning against the vehicle. One officer observed a bulge in Calhoun's pocket and he kept putting his hand over it. He appeared nervous. Two officers surrounded Calhoun and the driver of the SUV tried to pull away. A third deputy pulled up with a cruiser but did not block the SUV from leaving; Calhoun did not try to leave. The deputies questioned Calhoun about weapons, and Calhoun looked nervous. One deputy thought he could see the shape of a gun in Calhoun's pocket. Calhoun was then told to put his hands on the hood of the car, which he did. When a deputy tried to do a patdown, Calhoun tried to move his hand to his pocket. When the deputy tried to put Calhoun's hand back on the hood of the car, Calhoun resisted.

The First District initially disagreed with the trial court's conclusion that the encounter started as a consensual encounter. Calhoun was seized when the deputies first confronted him in the car wash. He was surrounded by two officers, the SUV was in front of him, and he was immediately questioned about weapons. A third deputy pulled up while the first two were questioning him. However, multiple "seemingly innocent factors, when analyzed collectively," provided reasonable suspicion. The convenience store clerk called in a suspected drug deal at 5:30 a.m. The area was known for criminal activity, including drug activity. The officers responded within minutes and observed the SUV that had been described. A bulge was observed in Calhoun's pocket, and Calhoun appeared to be nervous and looking for a way out.

One judge dissented in part. The dissent concluded that reasonable suspicion of criminal activity did not exist.

Schmidt v. State, 1D20-882 (Dec. 30, 2020)

In an appeal from a revocation of probation, Schmidt argued that the trial court had to modify or continue his probation under section 948.06(2)(f), Florida Statutes. The First District disagreed because Schmidt did not qualify under that statutory provision. That statute is applicable only to probationers who satisfy all four conditions: the existence of probation; the offender does not qualify as a violent felony offender of special concern; the violation is a "low-risk" technical violation; and the "court has not previously found the probationer in violation of his or her probation pursuant to a filed violation of probation affidavit during the current term of supervision."

Schmidt did not meet the requirement of a low-risk technical violation. That phrase is defined in the statute, and references a "violation," in the singular. Schmidt violated three conditions of probation. As his violations exceeded a single low-risk technical violation, the statute did not apply to him.

Smith v. State, 1D20-3181 (Dec. 30, 2020)

Smith filed a prohibition petition, arguing that the Florida Supreme Court's administrative orders regarding Covid-19, suspending speedy trial time periods, "limit only the time in which the State must try a defendant, and not the time in which the State must file an amended charge." The First District disagreed and denied the petition.

Smith was arrested on December 30, 2019. An information was filed on January 28, 2020 and an amended information, adding the charge of possession of a firearm by a convicted felon, was filed on August 31, 2020. On September 21, 2020, Smith filed a notice of expiration regarding the charge filed in the amended information.

The Supreme Court's orders regarding the pandemic suspended "[a]ll time periods involving the speedy trial procedure." One of the initial orders suspended the time periods from March 13, 2020 through March 30, 2020, and subsequent orders extended that period of suspension. One of the suspension orders referenced the manner described in two decisions of the Third and Fifth District Courts of Appeal. Smith argued that the reference to these decisions compelled the conclusion that the suspension did not apply to the time for the filing of an amended charge. The First District disagreed. The Supreme Court's suspension order referenced "all time periods." Rule 3.191, the speedy trial rule, has been interpreted by the Florida

Supreme Court as controlling when an amended charge may be filed. And, the Supreme Court's suspension order stated that the time periods should be tolled "in the same manner" as in the two referenced appellate court decisions; the suspension order did not state that suspension was "limited to the same issues addressed in those cases."

Second District Court of Appeal

Kelley v. State, 2D18-525 (Dec. 30, 2020)

The Second District affirmed Kelley's revocation of probation and sentence. On appeal, Kelley sought to challenge her original convictions. That was beyond the scope of the appeal, as an appeal from an order revoking probation is limited to challenging the revocation proceeding and subsequent sentence.

An exception could exist if Kelley could show that a defect in the original proceedings meant that the trial court lacked jurisdiction to place her on probation in the first place. Kelley, however, did not demonstrate that the original judgment and sentence were void. She had "simply shown that the court mistakenly conducted her plea colloquy twice and that the State mistakenly made her sign two plea forms. The fact that there were two plea colloquies does not constitute a violation of double jeopardy because Kelley was not subject to multiple prosecutions, convictions, or sentences for the same offense."

In 2013, Kelley had entered into a substantial assistance agreement and the State agreed to a three-year sentence. The plea agreement was sealed. Kelley provided the assistance, and two years later, sentencing was scheduled before a different judge who was unaware of the prior plea agreement, and thus conducted a second plea colloquy before imposing the agreed upon sentence.

Henry v. State, 2D18-3462 (Dec. 30, 2020)

Henry appealed an order revoking probation. The evidence was sufficient as to one of the two alleged violations, but insufficient as to the other. The revocation itself was affirmed on the basis of the one sufficient violation.

The two alleged violations were for failing to complete or remain in a drug treatment program, and failing to remain confined to a residence. Henry was not at his residence when the probation officer checked, and Henry provided no explanation for the absence. The evidence for this violation was sufficient. As to

the other, although Henry was discharged from the treatment program, he provided uncontradicted testimony that he suffered from epilepsy, that his absence was the result of a hospitalization, and that the discharged was based on an absence from the program. He later tried gaining readmittance, but the readmission was denied due to his arrest for violating probation.

The record in this case reflected that the trial court's concern was "almost exclusively" with the absence from the residence. It was therefore clear that the trial court would have revoked probation based solely on the one remaining violation.

State v. Dixon, 2D20-490 (Dec. 30, 2020)

After the entry of a plea of no contest to a charge of scheme to defraud, the trial court refused the State's request to conduct an evidentiary hearing as to restitution, and the court entered an amount of restitution less than that which the State was seeking. The State appealed the restitution order and the Second District reversed for a new restitution hearing.

During a pretrial hearing, the State had advised the court that a loss prevention officer had reviewed two weeks of surveillance footage and determined that the defendant took $1,839.56 over that time period. The State had previously advised the court, during plea discussions, that the victim/employer stated that losses exceeded $20,000, and that the victim would not accept $3,000 in restitution. The case involved allegations that the victim had been accepting cash payments but had not been entering them into a computer system.

Both the State and defense counsel had requested an evidentiary hearing. The judge refused, saying that $1,839.56 was all that the State could prove. The prosecutor's comments in the pretrial hearing, however, were not evidence. And, the prosecutor also stated that the loss prevention officer was willing to review four months' worth of surveillance footage, as opposed to the two weeks previously done, to determine the amount taken during the relevant four-month period.

State v. Michaud, 2D20-1287 (Dec. 30, 2020)

Michaud, a juvenile at the time of the 1983 murder he committed, had been sentenced to life in prison with parole eligibility after 25 years. In a postconviction proceeding under Fla.R.Crim.P. 3.802, appearing to have been conducted between 2019 and 2020, Michaud sought a sentencing review proceeding under the juvenile sentencing statutes, s. 921.1401. The trial court granted the request for such judicial

review and the State sought certiorari review. The Second District granted the State's petition because the trial court lacked jurisdiction to grant relief when the existing sentence of life with parole eligibility after 25 years was not unconstitutional.

Fifth District Court of Appeal

Smithey v. State, 5D19-880 (Dec. 31, 2020)

Smithey's conviction for second-degree murder had previously been affirmed. After an evidentiary hearing on a Rule 3.850 motion alleging ineffective assistance of counsel, the trial court denied the motion, the Fifth District reversed for a new trial.

The victim was Smithey's then-estranged husband, and the incident occurred during a sexual encounter between them. The victim came over to the defendant's residence after she declined his request to come over. The subsequent sexual encounter commenced as a consensual encounter. Smithey asserted that at one point, the victim wanted to continue and she did not, and that the victim sexually assaulted her and stabbed her with a knife, at which point she shot him in self-defense. In pretrial questioning, Smithey gave differing versions of the incident, including one in which she inflicted stab wounds to herself after having shot the victim. That admission had been excluded from trial testimony because it came after Smithey's invocation of the right to counsel. Testimony from a defense expert at trial contradicted that of the State's medical examiner regarding the self-inflicted nature of the wounds to Smithey.

After trial counsel succeeded in excluding Smithey's admission regarding self-inflicted stab wounds, trial counsel introduced into evidence the tape of a 911 call in which Smithey advised the operator that the victim had stabbed her in the torso and that she shot him in self-defense. The State then sought to introduce the pretrial admission of self-inflicted wounds, and the trial court agreed with the State that the defense had opened the door to the admission of the previously excluded statements by Smithey.

Defense counsel's tactic of using the 911 call was the basis for the claim of ineffective assistance of counsel, as it resulted in the introduction of the previously excluded statements about self-inflicted wounds. Lead counsel was not available for an evidentiary hearing, but provided an affidavit stating that he did not think that the 911 call would open the door, and that the 911 call was not essential to the

defense's case. Co-counsel testified that the trial strategy had been to keep out the pretrial statements of Smithey once they had been suppressed. Co-counsel also had not believed that the 911 call would open the door. Co-counsel also stated that he did not recall at the time that Smithey, in the 911 call, had said that the victim had stabbed her.

The Fifth District had that counsel was ineffective. Because counsel did not believe the door would be opened to the use of the pretrial statements, this case did not involve a strategic decision of counsel which would otherwise defeat a claim of ineffective assistance of counsel. As the trial strategy was to keep the pretrial admission of self-inflicted wounds out, the admission of testimony that would open the door to that was contrary to trial strategy. Furthermore, the introduction of the 911 call was prejudicial, as it "eviscerated" the self-defense claim.

One judge dissented and concluded that there was a colorable legal argument supporting trial counsel's trial strategy, even though it proved unsuccessful.

Elias v. State, 5D19-2370 (Dec. 31, 2020)

Elias appealed convictions for 30 counts of possession of sexual performance by a child "in the form of thirty photographic or video image files." Each count referred to a distinct image file. The Fifth District reversed the convictions as to seven of the counts. The State failed to prove that the defendant viewed those seven or knew that images of child sexual performances were contained on the DVD's. The Court reversed the remaining convictions for a new trial. Police offers provided inadmissible testimony about a tip identifying the defendant as the perpetrator.

Police seized the defendant's computer and CD's from his residence. About 20 of the 30 images at issue were copied from the CD's onto the laptop computer. Other similar images were found on a desktop computer in the defendant's bedroom closet. The defendant claimed that he inherited the CD's from his father. Seven of the images were only on the CD's and not on either computer.

As to the seven charges for which the evidence as insufficient, the "State failed to present any evidence proving that Appellant ever viewed those specific images or otherwise knew those seven images were of sexual conduct by children."

The Fifth District detailed the evidence of the inadmissible tip. Detective Gonzalez testified that "the sheriff's office had received a cybertip from the National Center for Missing and Exploited Children stating that an individual identified as

'Paul L' had uploaded several images suspected of being child pornography onto the Flickr platform. Detective Gonzalez added that his cybertip included a phone number and email address that were associated with the Flickr account. The State offered evidence tying Appellant to the email address, phone number, and Flickr account."

The tip was inadmissible as it was an out-of-court statement indicating the defendant's guilt. The trial court erred in accepting the State's argument that this was needed to show the effect that this had on how the detective began his investigation.

One alleged discovery violation was not preserved for appellate review absent a timely objection. While the claim may otherwise have had merit, the Fifth District did not address it, noting that it was not necessary to do so because a new trial had been ordered on other grounds.

One detective, at trial, testified about two additional files that contained "child exploitive terms." This was improper testimony of uncharged collateral offenses, and the trial court, although denying a motion for mistrial, instructed the witness not to refer to these images again. The Fifth District directed the State to comply with that prior admonition on retrial.

To prove that the children in the images were under the age of five, the State intended to use the photos and obtain a doctor's expert testimony based on the images. The photos had already been admitted into evidence. The defense offered to stipulate to the children's ages in order to avoid the republication of the images during the doctor's testimony. The State declined that offer. No error was committed. The State was not obligated to accept the stipulation and had the burden of proving the age of the children beyond a reasonable doubt.

Jones v. State, 5D19-2771 (Dec. 31, 2020)

It was improper for the prosecutor, in closing argument, to urge the jury to consider whether the victim "deserved to die" or "needed to die." No further facts of the case are provided, and the Fifth District held that the comments, as to which there were no objections, did not rise to the level of fundamental error.

Barron v. State, 5D20-332 (Dec. 31, 2020)

Barron was charged with violating conditions of probation. An amended affidavit was filed by the probation officer. When arrested, Barron was served with the first of the affidavits. At the subsequent arraignment, defense counsel stated that Barron wanted to admit to the violations alleged in the first affidavit. No one advised the defendant, on the record, of the alleged violations that were at issue. The court had the amended affidavit, but the record suggested that defense counsel and the prosecutor did not. The judge expressed some confusion as to whether the court had the right defendant before it. A plea was nevertheless accepted at that time.

The failure to advise the defendant of the charges was a due process violation and Barron was entitled to a new revocation proceeding.

Borders v. State, 5D20-1331 (Dec. 31, 2020)

The Fifth District reversed the summary denial of a Rule 3.850 motion for further proceedings because the court records attached to the order denying the motion did not conclusively show that Borders was not entitled to relief.

The motion was filed more than 20 years after the finality of the convictions and alleged newly discovered evidence in the form of a recantation from one of two codefendants. A second codefendant's recantation had been the subject of a prior postconviction motion that had been denied three years earlier. The trial court denied the current motion, concluding that the recantation of codefendant Robinson would not have been unknown at the time of the prior postconviction evidentiary hearing on the other codefendant's recantation.

The Fifth District rejected the trial court's rationale. The affidavit of recantation from the second codefendant was executed 1 ½ months after the order denying the prior postconviction motion.

One judge dissented in part. The dissent interpreted the affidavit of the second codefendant, Richardson, in a different manner and did not view it as a recantation in which Richardson admitted having previously provided false testimony.