

Case Law Update
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Supreme Court of Florida

[Randolph v. State](#), SC20-287 (Feb. 4, 2021)

The summary denial of a successive Rule 3.851 motion was affirmed. The Supreme Court briefly addressed and rejected Hurst claims that the Court had previously rejected. Hurst did not establish a new offense of “capital first-degree murder,” with new elements, and that assertion could not be used as the basis for applying Hurst retroactively. Arguments challenging the Supreme Court’s decision in State v. Poole, in which the Court partially receded from its prior Hurst decision on jury unanimity, were not reached because Randolph’s Hurst arguments failed even under pre-Poole case law regarding retroactive application of Hurst.

[Harvey v. State](#), SC19-1275 (Feb. 4, 2021)

The Supreme Court affirmed the denial of a successive Rule 3.851 motion. Harvey argued that his counsel was ineffective for conceding guilt to first-degree murder without giving him notice and the opportunity to object.

The Supreme Court rejected the claim on the basis of the Court’s prior decision in Atwater v. State, and the United States Supreme Court’s decision in McCoy v. Louisiana. As explained in Atwater, the McCoy decision ““did not hold that counsel is required to obtain the express consent of a defendant prior to conceding guilt.”” Rather, if a defendant ““expressly asserts that the objective of “*his* defense” is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.”” Harvey did not allege that he expressly objected to counsel’s decision to concede guilt.

Eleventh Circuit Court of Appeals

[United States v. Cannon](#), 16-16194 (Feb. 3, 2021)

Cannon and his codefendant, Holton, appealed convictions for conspiracy to commit Hobbs Act robbery and other offenses. The convictions and sentences were affirmed.

The defendants sought discovery with respect to a claim of selective prosecution. The district court did not abuse its discretion in denying the discovery motion. The “defendants failed to proffer evidence of discriminatory effect. . . . The only evidence that Cannon and Holton proffered in support of the discovery motion was: (1) a USA Today article reporting that ‘[a]t least 91% of the people agents have locked up’ as a result of stash house stings were racial or ethnic minorities and (2) data from the Federal Public Defender’s Miami office showing that out of the 60 cases involving a stash house that the office had handled since 2001, all 87 defendants were either black or Hispanic in 25 cases that employed the same ‘disgruntled drug courier’ scenario as this case.”

The statistical evidence failed “to establish discriminatory effect because it does not demonstrate that similarly situated defendants of other races could have been prosecuted for the same offenses but were not.” Additionally, the focus on cases handled solely by the Federal Public Defender’s Miami office was too narrow, as it represented only a portion of the total number of cases within the federal district.

Under the plain error standard of review, the Eleventh Circuit held that the indictment was not multiplicitous by charging two conspiracies. Conspiracy to commit Hobbs Act robber and conspiracy to possess cocaine with intent to distribute both had different elements.

The Court also rejected the argument that the Government’s creation of the stash house robbery scheme constituted outrageous government conduct and a due process violation. The outrageous conduct defense has not yet been accepted in either the Supreme Court or Eleventh Circuit, and the Eleventh Circuit did not reach the question of whether it was a viable defense in the Eleventh Circuit; the conduct at issue was not deemed outrageous regardless of whether such a defense existed. “Although the government presented Cannon and Holton with the opportunity to rob a stash house, it did not provide the entire means of executing the plan, and defendants offered much more than their ‘meager assistance.’ . . . The government did not initially recruit Cannon or Holton, and it was Cannon who offered to assist the CI in the future if the CI needed. Later, it was Cannon who offered the UC detective a ‘team’ that could assist with the robbery. Notably, Cannon brought Holton into the scheme.”

There was no error in denying a requested instruction on the defense of entrapment. Neither defendant presented “sufficient evidence to create a jury issue on inducement. As explained above, Cannon and Holton without hesitation agreed

to rob the stash house and declined multiple opportunities to withdraw. Cannon and Holton planned and informed the UC detective what would happen at each stage of the robbery – from blind waiting in a blind spot as the UC went to the door, to typing up the guards and searching the house, to Holton dumping his gun when it was all over. On their own, they involved a third person. . . .”

There was no error in dismissing a juror who knew defendant Holton’s wife. That juror styled the wife’s hair on a regular basis, and, even though the juror stated that she would be impartial, the district court could conclude that the relationship was sufficient to conclude that an implied bias existed.

Under the Court Reporter Act, the court reporter did not err by failing to transcribe audio and video recordings, when those recording themselves were introduced into evidence along with previously prepared transcripts of those recordings.

The jury was improperly instructed that it could consider Hobbs Act robbery as one of the predicates for the offense of using or carrying a firearm during a crime of violence. There was no dispute that another predicate offense existed, but the jury returned a general verdict and did not indicate which predicate or predicates it relied upon. The Eleventh Circuit found that the error was harmless, however. The trial record made it “clear that the two predicate conspiracy crimes were so inextricably intertwined that no rational juror could have found that Cannon and Holton carried a firearm in relation to one predicate but not the other.”

[United States v. Isaac](#), 19-11239 (Feb. 5, 2021)

The defendant provided shelter to a homeless woman and her daughter. He then began sexually abusing the child and was convicted two counts of producing child pornography and one count of possessing child pornography. The Eleventh Circuit affirmed the convictions and sentence.

With respect to a motion to suppress evidence found on the defendant’s cell phone, the phone was found in the defendant’s car, which was impounded. That impoundment was found to be in accordance with the police department’s standard operating procedures for post-arrest situations, where alternatives to impoundment have either been unsuccessful or are impractical. The SOP then requires, for impounded vehicles, that they be searched and inventoried. Isaac argued that the officers did not follow SOP because they did not permit him to call someone to get the car. There was no testimony that Isaac made such a request or that the person

was available to come. Furthermore, the officer testified that he needed to interview Isaac promptly and waiting for someone was not an option. Additionally, the vehicle was partially blocking another vehicle.

A two-level sentencing enhancement was properly applied based on the minor victim being in the custody, care or control of the defendant. The defendant was looking after the 13-year old child at the time of the offenses. He had been providing shelter and food for the family. He was the only adult with the child when the offenses were committed.

An enhancement based on a pattern of conduct were also properly applied. This was for a pattern of abuse based on sexual abuse or exploitation of a minor. A pattern is defined as “at least two separate occasions.” Isaac stipulated to producing the child pornography on two different dates, two days apart. There were also other intervening events.

[United States v. Morales](#), 19-11934 (Feb. 5, 2021)

The Eleventh Circuit affirmed convictions for possession of marijuana with intent to distribute and unlawful possession of a firearm and ammunition.

The Court did not reach the claim that the affidavit supporting the search warrant failed to establish probable cause. The good-faith exception to the exclusionary rule was applicable. The probable cause affidavit had been based on searches of trash cans on two separate days, yielding discoveries of a plastic bag containing small amounts of marijuana, multiple burnt marijuana blunts, and multiple cut vacuum-sealed plastic bags.

“This case sits at the core of the good faith exception. The officers did everything they should have. They obtained and relied on a warrant from a neutral magistrate and had no reason to think that probable cause was absent despite the magistrate’s authorization. They did not mislead the magistrate or withhold material information.” One related claim, asserting that the affidavit was based on stale information, as the trash pulls occurred two weeks earlier, was reviewed under the plain error standard of review, and rejected, because there were no Supreme Court or Eleventh Circuit cases holding that such information became stale after two weeks.

Morales also challenged the sufficiency of the indictment to establish jurisdiction as to the felon-in-possession charge. The “indictment did not allege that

he knew of his status as a member of a class of persons prohibited from possessing firearms and ammunition (that is, that he knew he had been convicted of a crime punishable by a term of imprisonment for a term greater than one year).” The Eleventh Circuit, based on prior case law, distinguished between cases in which the “indictment affirmatively alleges conduct that is not a crime” and cases, such as the instant one, in which “the indictment merely omits an element of the offense.” “A defective indictment only affects jurisdiction when it fails to allege an offense against the United States.” In this case, the indictment tracked the statutory language, and that sufficed to establish jurisdiction because the statute had been construed as including an implied element of knowledge.

[Armstrong v. United States](#), 18-13041 (Feb. 5, 2021)

The Eleventh Circuit affirmed an order dismissing a successive habeas corpus petition under 28 U.S.C. s. 2255. A sentence reduction under 18 U.S.C. s. 3582(c), did not constitute a “new, intervening judgment” for the purpose of avoiding the successive petition bar.

A new, intervening judgment of conviction or sentence will suffice to permit a second habeas corpus petition, without authorization of a circuit court of appeals. Armstrong was originally sentenced to 190 months on two counts and 120 months on a third count, all running concurrently, followed by five years of supervised release. As a result of subsequent amendments to the Sentencing Guidelines, the sentences on the two drug counts were reduced to 152 months. The amendments reduced relevant base levels of offenses.

Sentencing reductions under section 3582(c) are not part of de novo resentencing proceedings. The Court distinguished between resentencing and sentence “modifications” under section 3582(c). Thus, a sentence “modification” does not constitute a new judgment for purposes of the Supreme Court’s case law permitting a second habeas petition when it addresses a new sentence.

[First District Court of Appeal](#)

[Boldridge v. State](#), 1D19-3153 (Feb. 4, 2021)

The First District affirmed convictions for attempted second-degree murder and other offenses. The introduction into evidence of the victim’s conversation with the police violated the Confrontation Clause, but the error was harmless.

Under the Supreme Court’s decision of Crawford v. Washington, the Confrontation Clause is implicated if the out-of-court statements are “testimonial” in nature, meaning that there is no ongoing emergency, and “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.” In this case, any emergency had ended, as the defendant had already been arrested prior to the police talking to the victim. The questions to the victim inquired as to what had happened. Even though some of the questions could be construed as assuring how the victim was, and others were unrelated to the incident at issue, that did not negate the primary purpose being the inquiry as to the facts of the offense.

The conclusion that the error was harmless was based on the facts that the identity of the shooter was not in doubt, and the victim’s statement that the perpetrator was wearing a hoodie was irrelevant to the jury’s decision. Boldridge “admitted that he had gone too far and that he never should have shot again, even if he believed the first time was justified.” But for this admission, other statements made by the victim might have undermined Boldridge’s claim of self-defense.

[Hartfield v. State](#), 1D20-1240 (Feb. 4, 2021)

The First District affirmed the denial of a Rule 3.850 motion. The motion was denied after an evidentiary hearing.

The trial court did not err in denying a request for counsel. The decision of whether to appoint counsel for proceedings under Rule 3.850 rests within the discretion of the trial court. In this case, the issues were purely “factual.” They were not complex, and they did not require much legal research. The motion alleged that counsel was ineffective for failing to convey a plea offer of 36 months. At the evidentiary hearing, trial counsel testified that the prosecution never made such an offer.

Second District Court of Appeal

[Livingston v. State](#), 2D20-65 (Feb. 3, 2021)

The Second District affirmed convictions for grand theft and unlawful filing of false documents against real property. The Court wrote its opinion “to explain why we reject Mr. Livingston’s contention that a criminal restitution award that includes attorney’s fees is subject to the requirements of Florida Patient’s

Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla.1985), for determining reasonable attorney’s fees.”

During a real estate closing, Livingston grabbed the original deed and promissory note and fled. He later recorded the stolen deed, which now had additional false information written on it. The restitution award included attorney’s fees of more than \$18,000, related to the seller’s need to clear the title so as to be able to sell the property after the filing of the stolen deed by Livingston.

The Rowe decision addressed attorney’s fees awarded for medical malpractice actions and required specific findings regarding hourly rates, hours expended, and the appropriateness of reduction or enhancement factors. Rowe was based on language in the medical malpractice language, and comparable language does not exist in the restitution statute applicable to criminal cases.

Third District Court of Appeal

[Martinez-Rivero v. State](#), 3D20-149 (Feb. 3, 2021)

The Third District affirmed a conviction for possession of an antishoplifting device.

The defendant challenged the sufficiency of evidence, arguing that “the magnetic block and metallic hook recovered during his arrest do not fall within the clear proscription of the statute.” At trial, a store security officer testified that he observed the defendant enter a fitting room “and heard a sound consistent with that emitted by the removal of anti-theft security tag sensors.” After the defendant exited the room, the officer observed several sensors on the floor. The clothing possessed by the defendant lacked sensors.

A proscribed device under the state statute is defined as “a mechanism or other device designed and operated for the purpose of detecting the removal from a mercantile establishment or similar enclosure, or from a protected area within such an enclosure, of specially marked or tagged merchandise.” The defendant argued that the device possessed was a common item and therefore did not qualify under the statute. However, the lack of any qualifying adverbs in the statutory definition did not lend support to that argument. And, the devices recovered in this case “were far from garden-variety.” Witnesses testified that they were designed for removing sensors. An in-court demonstration was conducted to show that the devices

possessed were “virtually indistinguishable from a device used to remove security tags within the retail community.”

[Brown v. State](#), 3D21-156 (Feb. 3, 2021)

The Third District treated a certiorari petition as an appeal from the denial of a Rule 3.850 motion and affirmed the trial court’s order. Brown alleged that an arrest warrant “was defective because it was not stamped with a court seal for verification” and that he was entitled to immediate release. Not only was the warrant properly signed, dated and stamped, but, any failure in that regard would have been subject to the application of the good-faith exception to the warrant requirement. Furthermore, an illegal arrest would not void a subsequent conviction.

Fourth District Court of Appeal

[I.K.P. v. State](#), 4D19-3581, 4D19-20-211 (Feb. 3, 2021)

The State conceded, and the Fourth District agreed, that an award of restitution was improper, as the State “failed to prove a causal connection between the damages awarded and the criminal act charged.” The facts of the case are not set forth in the opinion. The opinion cites one case for the proposition that a causal connection was not established for the offense of burglary of a conveyance “and damages for towing and re-keying the car.”

[Levine v. State](#), 4D20-118 (Feb. 3, 2021)

A conviction for indirect criminal contempt was reversed because “the charging document, the order to show cause, failed to state the essential facts constituting the criminal contempt.”

During the course of civil litigation, attorney Levine failed to attend a case management conference, did not conduct discovery, and did not comply with mediation orders. He attributed these shortcomings to health issues and depression. The order to show cause referred to the failure to comply with court orders and recited the titles of four orders without “setting forth any ‘essential facts’ constituting the contempt.”

Fifth District Court of Appeal

[Bova v. State](#), 5D19-3199 (Feb. 5, 2021)

The Fifth District reversed a conviction for first-degree murder. Bova sought to represent himself at trial. The trial court denied an unequivocal request, with the stated reason being the defendant's "capacity to successfully represent himself." The trial court used an incorrect standard; the correct standard for ruling on such requests for self-representation is the "capacity to make a knowing waiver" of the right to counsel.

During jury selection, the defendant and trial counsel had a disagreement regarding the anticipated questioning of an expert witness as to the insanity defense. That triggered the request for self-representation. When denying the defendant's motion, the judge recognized that the defendant was competent and was not currently suffering from any mental illness. "The reason I'm not letting you represent yourself in this case is your disagreement with your attorney is basically over one question on one witness." The "likelihood that a defendant would inadequately represent himself is not a valid reason to deny an unequivocal request for self-representation."

[Manago v. State](#), 5D20-632 (Feb. 5, 2021)

In 2004, Manago was sentenced to life in prison, with no possibility of parole, for a first-degree murder committed while he was a juvenile. He was subsequently resentenced, but he challenged the new sentence, arguing that the trial court relied upon the wrong juvenile sentencing provision. The Fifth District agreed.

At trial, the State presented evidence that the defendant and two other co-defendants committed a carjacking which resulted in the ultimate murder. There was evidence that the defendant was the shooter, but the jury was instructed as to the law of principals and could convict the defendant even if he was not found to be the shooter.

At the resentencing proceeding, the State and court relied on the provision applicable to juvenile defendants who actually killed, attempted to kill or intended to kill. That statutory provision is applicable when the jury makes the determination regarding actually killing, etc. In this case, the judge, at the resentencing, engaged in the factual analysis of that issue, finding, on the basis of the trial transcript, that no rational juror would have found to the contrary.

The sentencing judge thus made a determination that the error with respect to the absence of a finding by the jury during the original proceedings was harmless error. Agreeing with the Third District, the Fifth District held that the harmless error standard of review is a standard to be employed by appellate courts, not trial courts during resentencing.

The Fifth District mandated a de novo resentencing hearing, but did not provide for the option of empaneling a new jury. As to that option, the Fifth District certified conflict with a Third District decision.