

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Abovyan](#), 19-10676 (Feb. 22, 2021)

The Eleventh Circuit affirmed convictions for conspiracy to commit healthcare fraud, conspiracy to possess controlled substances with intent to distribute, and unlawful dispensing of controlled substances.

Abovyan, a primary-care physician and internist, with no experience in substance-abuse medicine, was hired by Chatham, to be the director of a substance-abuse treatment facility. Chatham was a convicted felon with no experience in substance-abuse treatment. The evidence of conspiracy to commit health care fraud was found to be sufficient. Significant evidence included the following:

. . . Abovyan (1) created Smart Lab standing orders so that the Facilities could order expensive and medically unnecessary lab urine tests three times per week per patient; (2) pre-signed requisition forms so that the Facilities could order even more unnecessary testing from other labs, like Ally; (3) forwent lab testing for uninsured patients; (4) reviewed and signed off on certain lab test results without discussing them with the patients; (5) admitted the Facilities would “test for everything,” even non-addictive drugs not ordinarily tested in addiction treatment; (6) provided his medical record log-in and pre-signed prescription pads for his nurses to prescribe drugs to patients without him being present; (7) received a letter alerting him that insurance billing issues existed and did nothing; (8) admitted that he allowed Chatman to make all testing decisions – “what [Chatman] wanted” – even though Chatman had no medical training and the testing was excessive; and (9) admitted that he received \$5,000 per month for Chatman to use his medical license to bill insurance for “treatment” at the Facilities.

The Eleventh Circuit also found the evidence sufficient as to the conspiracy and substantive charges under the Controlled Substances Act. Abovyan prescribed buprenorphine without an “X number,” for “pain/withdrawal when patients did not have pain/withdrawal. Furthermore, he provided no medical addiction treatment and, without accompanying treatment, Abovyan’s buprenorphine prescriptions did not serve a legitimate medical purpose.”

Abovyan challenged the sufficiency of the healthcare fraud conspiracy instructions. The instructions covered the elements of criminal conspiracy. However, the court did not “expressly instruct the jury as to the elements of a healthcare fraud offense.” This issue was reviewed under the plain error standard. Although the jury was not instructed on the elements of healthcare fraud, it was provided a copy of the redacted indictment, which contained the elements of the offense. And, in this case, “there was no dispute that there was a healthcare fraud conspiracy and its object – healthcare fraud – did occur.”

The Court also rejected two other challenges to jury instructions: 1) the denial of a requested instruction distinguishing criminal and civil liability; and 2) the instructions explaining the DEA X-number, which is required to provide a prescription for buprenorphine for detoxification and maintenance treatment. Contrary to Abovyan’s argument, the district court did not instruct the jury that the failure to obtain the X-number was a criminal violation in and of itself.

In one of several sentencing challenges, Abovyan argued that the PSI report erroneously used “intended loss” as opposed to “actual loss” when calculating base offense levels, because that “would cause an unwarranted disparity among similarly situated defendants.” There was no error, as the Guidelines define loss in the alternative – actual or intended. The Eleventh Circuit viewed the disparity argument as one which went to the “reasonableness” of the sentence. Other codefendants were not similarly situated as they all pled guilty and entered into plea agreements providing how loss was to be determined.

[Clark v. Commissioner, Alabama Department of Corrections](#), 19-11443 (Feb. 25, 2021)

The Eleventh Circuit affirmed the district court’s denial of a habeas corpus petition challenging a state court conviction, and addressed a claim of ineffective assistance of trial counsel.

Clark argued that trial counsel was ineffective for failing to object that jurors saw him shackled during trial. In the state postconviction proceeding, the claim was abandoned. The claim was again raised in a federal habeas corpus proceeding, and the district court denied it because it was a procedurally barred claim. The district court also addressed the exception found by the Supreme Court in Martinez v. Ryan, which provides that district courts should entertain procedurally barred claims of ineffective assistance of trial counsel when the claims are “substantial” claims and when the first proceeding in which the claim can be raised in state court is a collateral review proceeding for which counsel was not provided. The federal district court found that Martinez did not apply because the postconviction proceeding in which the claim of ineffective assistance was found to be procedurally barred was not the first proceeding in which an individual convicted in Alabama could raise such a claim.

The Eleventh Circuit did not address the issue of whether the Alabama proceeding in which the claim was raised was the first such proceeding in which the claim could have been raised. Rather, the Court held that under Martinez, Clark did not raise a “substantial” claim of ineffective assistance of trial counsel, and the procedural bar applied by the state court could therefore not be circumvented. Clark could not show a reasonable probability that without being visibly shackled the jury would not have convicted him. The evidence adduced against Clark was deemed “overwhelming,” including a confession to having stabbed the victim multiple times, as well as Clark’s having led authorities to locations where incriminating physical evidence was found.

[United States v. Goldstein](#), 18-13321 (Feb. 26, 2021)

The Eleventh Circuit affirmed convictions and sentences of Goldstein and codefendant Bercoon, for conspiracy, mail fraud, wire fraud and securities fraud.

Both defendants challenged the admissibility of wiretap evidence, arguing that the wiretap application failed to establish probable cause or satisfy the statutory requirement of necessity. The primary argument as to probable cause was that information in the application was stale, as the wiretap was issued more than one year after the market manipulations for which the defendants conceded the existence of probable cause.

The Eleventh Circuit rejected the staleness challenge. The phone targeted by the wiretap had been used by Bercoon as recently as one month prior to the wiretap. The affidavit for the wiretap also detailed a distinct market manipulation occurring

about three months prior to the wiretap application, with allegations that the conspiracy related to that market manipulation were ongoing.

The affidavit for the wiretap also demonstrated the required necessity. “It exhaustively described numerous investigative techniques that had been tried with only partial success or that would likely not succeed, including analyzing phone records, using confidential informants, surveillance, interviews, grand jury subpoenas, financial records, and search warrants.” The wiretap was needed “to identify all the co-conspirators and reveal the full scope of the conspiracy.”

Even if the wiretap affidavit were deficient, the good-faith exception to the requirement for a warrant was applicable. The defendants challenged reliance on the good-faith exception by relying on Delaware v. Franks, but that argument failed because the defendants “failed to make the required preliminary showing that Taylor’s wiretap affidavit was deliberately or recklessly misleading.”

The defendants also argued that there was a material variance between the crimes charged in the indictment and those for which they were convicted. They asserted that the indictment referenced three specific misrepresentations as to one particular scheme, but that the government introduced evidence as to other misrepresentations at trial. The Eleventh Circuit found that the allegations in the indictment encompassed many of those that the defendants contended created a material variance. Other representations which were adduced by evidence at trial “were consistent” with the scheme referenced in the indictment. “A fatal variance exists only ‘where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegations.’”

Challenges to arguments by the prosecutor in closing argument did not satisfy the plain error standard of review where there were no objections in the district court. Some of the claims alleged that the prosecutor’s argument was misleading, but the Eleventh Circuit went through the comments and evidence and concluded to the contrary.

One of the defendants challenged the admissibility of statements made to an SEC attorney during the early stages of the investigation on the grounds of confidentiality. The SEC attorney testified regarding her standard practice of advising interrogated individuals that, inter alia, “the SEC routinely shares information obtained from witnesses with other authorities for investigation and enforcement purposes.” The Court rejected the defendant’s argument that the SEC

attorney advised him that the interview was confidential because that was inconsistent with the SEC attorney's testimony regarding her general practices.

First District Court of Appeal

[Moore v. State](#), 1D19-2209 (Feb. 26, 2021)

The First District affirmed convictions for sexual battery on a child under the age of 12, lewd and lascivious molestation, and showing pornography to the victim.

The trial court did not err by excluding evidence under the Rape Shield law. The defense sought to introduce evidence regarding the victim's consensual sexual activity with a classmate. The defense asserted two theories: "the victim lied to her mother so her mother would not be upset, or the victim lied to 'avoid having Appellant learn that [she] was sexually active with a boyfriend and that her mother knew that to be true.'" The defendant was the biological father of the victim. The defense was able to develop these theories without "delving into the victim's prior sexual relations." On cross-examination of the victim, the defense had been able to elicit acknowledgments of the victim's fear of telling her mother about the issues involving the defendant. A defense witness also testified that the victim's mother instructed the victim to fabricate the allegations against the defendant.

The trial court did not err in admitting collateral offense evidence regarding sexual acts the defendant committed with his two other daughters. All of the victims were biological children of the defendant and all of the acts occurred while they were asleep in his bed. They all testified that he touched their vaginas. "That the acts against the victim also involved penile penetration is not dispositive." The acts with all victims also had a lack of frequency.

[Roberts v. State](#), 1D19-4137 (Feb. 25, 2021)

The First District reversed a conviction for possession of a controlled substance due to insufficient evidence.

During a traffic stop, the driver ran away. A passenger remained at the scene of the stop. Cocaine and drug paraphernalia were found in a search of the car. An officer testified that Roberts fled the scene after the car was stopped. There was no testimony about where the cocaine was found in the car. Although the evidence may have been sufficient "to raise a jury question as to Roberts' knowledge of the cocaine in the vehicle," "the evidence failed to show that Roberts could exercise dominion

and control over the substance.” There was no evidence as to who owned the vehicle, how long Roberts had been in the car, or evidence tying the cocaine to Roberts as opposed to the passenger.

Second District Court of Appeal

[Vonlydick v. State](#), 2D18-4227 (Feb. 26, 2021)

The defendant pled guilty to the charges of giving a false name by a person detained or under arrest, resisting an officer without violence, and multiple drug charges; he reserved the right to appeal the denial of a suppression motion. The Second District reversed in part.

Around 12:30 – 1:00 a.m., in a business area known to be used by homeless persons, who would go through dumpsters looking for items discarded by an adjacent Salvation Army, a detective observed a woman near the back doors of the Salvation Army, looking at a couch in the area where items were discarded. She observed the detective, returned to an SUV, and started driving away. The detective blocked the path of the SUV and activated lights. The detective testified that there was no traffic violation and the stop was solely based on suspicion of criminal activity. The defendant was a passenger in the SUV. The driver exited and told the detective that she was looking at the couch and had previously spoken to someone about it, but could not provide further details as that person.

Another officer arrived and the defendant was asked to exit the SUV and complied. The detective maneuvered himself so that the defendant could not leave. The defendant identified himself as “John Holland,” provided a date of birth, and corroborated the driver’s explanation. A records search did not come up with a match for the name and date of birth. The detective started reading Miranda warnings to the defendant and the defendant then fled on foot, but was tasered and apprehended after ignoring orders to stop.

The defendant then provided his correct name and date of birth and told the detective about outstanding warrants. He also referenced a container of cocaine under the front passenger seat of the SUV. The drugs were found during a subsequent inventory search.

At the time of the stop of the defendant, the detective lacked reasonable suspicion of criminal activity. The Second District rejected the detective’s assertion of reasonable suspicion as to loitering and prowling; apart from the hour of the night,

the driver had simply been looking at a couch in an area known for “dumpster diving.”

However, the drugs were discovered in a subsequent inventory search and the SUV was going to be impounded because neither the driver nor the passenger/defendant had a valid license.

As a result, the suppression of the drugs was upheld; the suppression of the statements was reversed.

[Aldamas-Gonzalez v. State](#), 2D20-294 (Feb. 24, 2021)

The Second District affirmed an order revoking probation. The order placing the defendant on probation included condition 11, prohibiting association with “____,” but no name was filled in and that condition was not checked off by the judge on the written order. Two other conditions, 35 and 37, prohibited organizing bike rides or going on bike rides with more than two other people. The affidavit alleged a violation of condition 11, by “associating with an organized bike group (riding a bike with more than two people).”

The defendant argued that the court erred by revoking probation for a violation not charged in the affidavit, claiming that he was not on notice that condition 11 applied to him. The issue was not preserved for appellate review and was reviewed under the fundamental error standard. Fundamental error did not exist. Although the affidavit referenced condition 11, the conduct described was the conduct of conditions 35 and 37, both of which were checked off on the written order of probation.

Third District Court of Appeal

[Symonette v. State](#), 3D19-1170 (Feb. 24, 2021)

The defendant’s conviction was affirmed and the Third District concluded that the trial court did not abuse its discretion in excluding evidence in support of an alibi defense because the defendant “failed to properly authenticate and lay the foundation required by the Florida Evidence Code for the documents he sought to introduce.”

The defendant represented himself at trial and filed a notice of alibi; he did not intend to call any witnesses in support of the alibi defense. During opening argument, the defendant referenced documents that he claimed would show that he

was living in Texas at the time of the charged offenses. These included a driver's license, a W-2 form, bank statements, and home security system billing records. Regardless of admissibility, none of these documents would have proved that the defendant was not in Florida at the time of the offenses.

Most of the Third District's ensuing opinion addresses the point that a pro se defendant is held to the same standards as counsel. The Court ultimately addressed the admissibility of the documents in a concluding paragraph and noted the three alternative means available for admitting such documents as business records: through a records custodian; with a certification that the requirements for business records were satisfied; or by stipulation. None of those were satisfied.

[State v. Marin](#), 3D19-2179 (Feb. 24, 2021) (on rehearing)

The Third District reversed “the trial court’s order granting Herman Marin’s motion to exclude the audio-video recording of a controlled call with the victim in the underlying case.”

Marin was charged with aggravated assault and felony battery. While the crimes were being investigated, detectives had the victim engage in a controlled call with Marin, and it was audio-video recorded on a detective’s body-worn camera. After an evidentiary hearing, the trial court excluded the recording due to inaudibility. The Third District disagreed. First, an officer testified for the State regarding what he heard on the tape when the tape was played in open court. Second, the court reporter’s transcription was able to transcribe the “majority” of the recording.

[Phelps v. State](#), 3D20-557 (Feb. 24, 2021)

The Third District granted a petition for writ of habeas corpus which alleged ineffective assistance of appellate counsel. The Court reversed convictions for first-degree felony murder and armed robbery for a new trial.

The trial court failed to read standard jury instruction 3.7, which addresses a plea of not guilty; reasonable doubt; and the burden of proof. Although counsel did not object in the trial court, the failure to give the instruction constituted fundamental error. And, appellate counsel was ineffective for not raising the claim on direct appeal because the Third District, in an earlier decision, had already held that the failure to give this instruction constituted fundamental error.

Fourth District Court of Appeal

Daniels v. State, 4D19-822 (Feb. 24, 2021)

The Fourth District affirmed convictions for first-degree murder with a firearm and armed robbery. The Court addressed an issue of first impression in Florida involving “the admissibility of expert evidence of a probabilistic genotype software program used to analyze DNA samples collected while investigating a crime that contains mixtures of genetic material from multiple people.”

The DNA analysis was done by the lab Cybergenetics, which specializes in DNA mixtures; the company developed TrueAllele, “a computer software designed to analyze complex data to determine the individual profiles of genetic material in DNA mixtures.” The trial court held a pretrial evidentiary hearing on the admissibility of the evidence.

The Fourth District analyzed the admissibility under the Daubert test. Daniels’ argument was based on “the failure to internally validate the TrueAllele software using a test sample of PSBO [Palm Beach Sheriff’s Office]-generated DNA data prior to using the program for case work.” Daniels argued that this failure rendered the results unreliable. In rejecting Daniels’ argument, the Court relied on the evidentiary hearing, noting that the defense expert “was not sufficiently familiar with the TrueAllele software to effectively opine as to how the failure to internally validate the software using PBSO-generated test data compromised the reliability of the analysis.” It was also significant that Daniels was unable to cite an appellate court opinion from any jurisdiction in support of the argument.

Parrish v. State, 4D19-1991 (Feb. 24, 2021)

Parrish appealed multiple convictions, including three for kidnappings which arose out of a robbery at an auto parts store. The Fourth District reversed one of the several kidnapping convictions under the Faison test.

Under the Faison test, the confinement required for kidnapping “must not be slight, inconsequential and merely incidental to the other crime;” it “must not be of the kind inherent in the nature of the other crime;” and it “must have some significance independent of the other crime that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.”

The Faison elements were satisfied as to all three victims. One employee “had been dragged on the floor by his belt before he was made to crawl to the room in the back of the store, and the two customers . . . were forced to crawl to the room in the back of the store or face the prospect of either being shot or violently dragged like the employee.” The movement of these individuals was not incidental to the robbery, as a store manager had been forced to go to the store’s safe and these three individuals were not involved in that capacity.

The kidnapping conviction for the store manager failed the Faison test, however. “The manager was never made to crawl at gunpoint and under violent threat to the back of the store independent of the robbery. The manager was moved to the back of the store to facilitate the robbery of the money in the safe and black box in the back room. The manager was also moved from the back of the store to the front of the store during the robbery to facilitate the robbery of the cash registers.” The confinement and movement of the manager were incidental to the robbery. The remedy for the kidnapping conviction as to the store manager was to reduce the conviction to the necessarily lesser included offense of false imprisonment. The Faison test is not applicable to the offense of false imprisonment; only kidnapping.

One judge concurred in part and dissented in part, and would have found that all of the kidnapping convictions failed under the Faison test.

[Lacey v. State](#), 4D20-0202 (Feb. 24, 2021)

The Fourth District reversed the sentence imposed upon revocation of probation because the trial court considered impermissible factors: the failure to pay restitution and the length of the term of incarceration.

The defendant admitted the charges of violation of probation, which did not include the failure to pay restitution. At the revocation hearing, when determining the sentence to impose, the court emphasized the failure to pay any restitution. In addition to the failure to pay restitution not having been charged in the affidavit of violation of probation, the defendant was not delinquent because under the terms of the order of probation, the defendant had “until the end of her probationary terms to pay” the restitution. The resentencing was mandated to be conducted by a different judge.

One judge dissented as to the mandate for resentencing before a different judge.

[Rocque v. State](#), 4D21-354 (Feb. 24, 2021)

The Fourth District reversed an order holding an attorney in contempt of court. The attorney had been representing his client in a DUI case.

During defense counsel's cross-examination of a witness at a suppression hearing, the judge was sustaining the prosecutor's objections and then sua sponte instructed the witness to step down. Defense counsel protested the termination of cross-examination and said that he would be filing a motion for disqualification of the judge, which motion was immediately denied. A request for time to file a written motion was denied.

When defense counsel started addressing legal issues, the judge instructed counsel to "be quiet now" and to "stand up please." Counsel responded, "when you say I need to be quiet, what does that mean?" The judge "the directed the bailiff to take defense counsel into custody." The judge announced that a contempt hearing was being held and that counsel was being taken into custody, which included handcuffing by the bailiff.

When the judge inquired why counsel should not be held in contempt for disruptive behavior, counsel invoked the Fifth Amendment. A short recess was granted and upon return, defense counsel was represented by an attorney. The attorney requested a postponement, which the judge denied. The new attorney objected to the handcuffing of defense counsel, who had been handcuffed and in custody for 45 minutes.

The Fourth District agreed with the appellant's argument that the trial court "erred in taking him into custody before entering a judgment on direct criminal contempt." The State conceded this error on appeal. The original trial judge has since recused herself, so the Fourth District did not reach the issue of the motion for disqualification. Nor did the Court address the sufficiency of evidence claim raised on appeal