Case Law Update
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Eleventh Circuit Court of Appeals

Turner v. Secretary, Department of Corrections, 18-12891 (Mar. 25, 2021)

The Eleventh Circuit affirmed the denial of a habeas corpus petition which challenged a state court conviction.

Turner's petition conceded that his petition was untimely. The district court confirmed that by resorting to information provided in online state court dockets and then dismissed the petition, sua sponte. Turner challenged the district court's taking judicial notice of the online dockets. The Eleventh Circuit rejected his argument. Turner, himself, provided the district court with the necessary information, and, he was given an opportunity to argue that the district court erred. The district court, when dismissing the petition as untimely, stated that Turner could move to reopen the action if "he believes that he can show [] that the determination of untimeliness is incorrect."

In the recent decision of Paez v. Secretary, Florida Department of Corrections, 947 F. 3d 649 (11th Cir. 2020), the Court held that the state court online dockets were judicially noticeable facts and that the court could take notice of them if the party adversely affected by reliance on them had an opportunity to be heard. Turner was given the opportunity to reopen the case, but never exercised that opportunity.

Morris v. Secretary, Florida Department of Corrections, 18-14802 (Mar. 25, 2021)

The district court denied a habeas corpus petition challenging a state court conviction as untimely. The Eleventh Circuit reversed.

The one-year limitations period for the filing of the federal petition commences when the state conviction is final, but is tolled during the pendency of a "properly filed" state postconviction proceeding. The timeliness of the petition in this case hinged on whether Morris's amended state-court motion for postconviction relief related back to his initial postconviction motion. If it did, there was continuous tolling during the pendency of both motions, and the petition was timely; if it did not relate back, the tolling of the limitations period expired after the disposition of the

first postconviction motion and did not resume until the filing of the amended motion; that, in turn, would render the habeas petition untimely.

The first postconviction motion was filed under Fla.R.Crim.P. 3.850, and the state court dismissed it without prejudice because it was "difficult to interpret," facts were not "sufficiently developed," and the motion was "interspersed with argument, speculation, and irrelevant comment." The court permitted Morris to refile a "single, comprehensive, legally sufficient motion, if amended claims [could] be made in good faith." Ninety-six days later, Morris filed a Rule 3.800(a) motion to correct an illegal sentence. After that, he filed the amended Rule 3.850 motion referenced in the trial court's earlier order.

The Eleventh Circuit relied on Florida case law for the principle that "when a post-conviction motion is denied with leave to amend and a movant files a proper amended motion, the amended motion relates back to the date of the original filing." The State acknowledged that principle, but argued that Morris took too long to file the amended motion. As the trial court set no deadline, the State argued that the period for the filing of the amended motion had to be within a "reasonable" amount of time, which the State asserted would be no more than 30 days.

The Eleventh Circuit disagreed, finding that "Florida's relation-back rule does not establish a default deadline when a court fails to specify one." While a normal period of time is typically between 10 and 30 days, Florida trial courts have discretion as to that time period.

Florida, in 2013, amended Rule 3.850 to provide a default deadline of 60 days for the filing of an amended motion if the court's order does not specify a deadline. That rule amendment was not applicable in this case, because the original Rule 3.850 motion was filed and disposed of prior to the effective date of the amendment to the rule.

McKiver v. Secretary, Florida Department of Corrections, 18-14857 (Mar. 25, 2021)

McKiver appealed the denial of a federal habeas corpus petition which challenged a state court conviction. The Eleventh Circuit affirmed, concluding that the state appellate court did not unreasonably apply Strickland v. Washington in rejecting a claim of ineffective assistance of counsel for failing to investigate and present "certain witnesses who would cast doubt on the state's case." The Eleventh Circuit further concluded that another claim of ineffective assistance of counsel –

for failing to elicit the criminal history of a key state witness – was procedurally defaulted.

The state appellate court rejected McKiver's claims in a one sentence opinion, finding that McKiver "failed to meet his burden of establishing either prong under *Strickland*." As a preliminary matter, the Eleventh Circuit found that ruling was "on the merits." As it was on the merits, the deferential principles of the federal habeas statutes were applicable.

McKiver had been granted an evidentiary hearing in state court, at which he had the burden of proving prejudice from counsel's alleged deficiencies. The question in the federal habeas proceeding was whether "the state appellate court was unreasonable in concluding that McKiver failed to carry his evidentiary burden to establish prejudice." McKiver was represented by counsel at the state court evidentiary hearing and "did not call or submit written testimony from any of the witnesses who he argues that [counsel] should have investigated and called at trial." The state court had only "McKiver's own conclusory testimony about what the witnesses would have said and whether they would have been available and willing to testify. This testimony is precisely the kind of evidence that we – and other courts – have held to be 'simply inadequate to undermine confidence in the outcome of the proceeding."

The claim regarding counsel's failure to investigate a prosecution witness's criminal history and use relevant information for impeachment of the witness was procedurally defaulted because it was not timely raised in state court. A procedurally defaulted claim of ineffective assistance of trial counsel may still be entertained in a federal habeas corpus proceeding if the habeas petition can demonstrate that the claim of ineffective assistance of trial counsel was a "substantial" claim; that he either had no counsel, or ineffective counsel, during the state postconviction proceeding; that the state postconviction proceeding was the "initial" review proceeding with respect to the claim of ineffective assistance of counsel; and state law requires such a claim to be raised in an initial-review collateral proceeding.

The Eleventh Circuit concluded that the permissible exceptions for entertaining the defaulted claim were not satisfied because the claim of ineffective assistance was not a "substantial claim." McKiver could not establish prejudice from his counsel's failure to raise the claim of ineffective assistance of trial counsel in a prior postconviction motion. The evidence regarding the prosecution witness's prior conviction could not be used at trial as the convictions were too remote. One was a 35-yer old conviction for selling marijuana; the other a 26-year old conviction

for issuing worthless checks. Additionally, even if such impeachment testimony had been admitted, it would not have been sufficient to affect the outcome of the proceeding. McKiver's guilt was established by testimony of other witnesses, including a pharmacist who testified regarding the number of oxycodone pills in the prescription bottle that had been filled for witness Sneed, two days prior to the burglary and taking of the pill bottle by McKiver. McKiver testified, admitting the burglary and the taking of the pill bottle, but claimed he did not know how many he had taken because he was too high at the time. Finally, to convict for trafficking, the State had to prove that the bottle contained at least 53 pills when McKiver took it. Sneed, the prosecution witness, testified that he had consumed no more than eight of the pills, leaving 110. McKiver did not "explain how undermining Sneed's credibility with felony convictions would have helped him show this kind of discrepancy."

One judge dissented in part. As to the first issue, the dissenting judge viewed the issue as one of McKiver's credibility at the evidentiary hearing, and the state court expressly found that McKiver was credible. As to that state-court finding, which appeared to have been adopted by the state appellate court, the state, in the federal proceedings, had the statutory burden of showing clear and convincing evidence to overcome the state court's own factual finding. The dissenting opinion also asserted that the Court's majority shifted the burden of proving the trafficking amount from the prosecution to the accused, who, according to the majority, had the burden of proving that he did not reach the threshold amount for trafficking.

First District Court of Appeal

Perry v. State, 1D20-891 (Mar. 26, 2021)

The First District agreed with the State's cross-appeal, which challenged a sentence. The jury found Perry guilty of aggravated battery, finding that Perry "did use a deadly weapon to intentionally or knowingly cause great bodily harm." Under section 775.087(1), Florida Statutes, an offense may not be reclassified to a higher degree if the weapon or firearm is an essential element of the offense. Although a deadly weapon is an essential weapon of aggravated battery, when charged solely on the basis of the use of a deadly weapon, when the offense is charged in the alternative – based on a deadly weapon or great bodily harm – and the evidence supports both forms of aggravated battery, and the jury makes findings as to both forms of aggravated battery, the offense may then be reclassified to the higher degree.

Pierce v. State, 1D19-2829 (Mar. 24, 2021)

Pierce was convicted on two counts of vehicular homicide. The court imposed consecutive sentences of 10 and 11 years in prison. Pierce argued, and the First District agreed, that the trial court should have imposed concurrent sentences of 19.8 years for both counts.

The offenses were second-degree felonies, which have a maximum statutory sentence of 15 years. The Criminal Punishment Code scoresheet, however, produced a score under which the lowest permissible sentence was 19.8 years in prison. When the CPC scoresheet results in a score in excess of the statutory maximum for the offense, the court must impose the lowest permissible sentence under the scoresheet.

Florida appellate courts have disagreed as to whether the lowest permissible sentence refers to each individual felony or the collective statutory maximum of the multiple offenses for which the defendant is being sentenced. That issue is currently pending review in the Florida Supreme Court, in Gabriel v. State, SC19-2155. The First District, in accordance with its own prior decision on the issue, held that the lowest permissible sentence "is an individual minimum sentence that applies to each felony at sentencing for which the lowest permissible sentence exceeds that felony's statutory maximum sentence."

The Court certified the conflict with the Fifth District's decision in Gabriel, and further certified the issue as being one of great public importance.

Carter v. State, 1D20-74 (Mar. 24, 2021)

The First District affirmed the lower court's order denying a motion to suppress.

Reasonable suspicion for the traffic stop existed. A deputy stopped Carter for doing 87 miles per hour in a 70 mile-per-hour zone. Carter was the sole occupant of the vehicle and was driving with a learner's license and did not have a valid license. Carter stated that the vehicle was a rental, but did not have any documents for it and did not know who rented it. Upon request, she was unable to provide the name of the person she said she was traveling to meet.

After preparing the speeding citation and returning the learner's license, the officer requested consent to search the vehicle. The request was not accompanied

by any aggressive or coercive conduct by the officer, and the officer explained that Carter would be placed in his patrol vehicle during the search, but was not under arrest. Carter consented. A second officer arrived and the search was conducted and drugs were found in the trunk of the vehicle.

Articulable facts supported a reasonable suspicion of ongoing criminal activity. In addition to the above facts, one deputy "noticed that there was no luggage inside Appellant's vehicle despite Appellant's assertion that she was traveling extensively. These facts created reasonable suspicion that Appellant was engaging in drug trafficking." Based on that reasonable suspicion, the deputy did not "unlawfully prolong the traffic stop."

Second District Court of Appeal

Marron v. State, 2D19-1335 (Mar. 26, 2021)

The Second District partially reversed a sentence imposed after a plea agreement. Marron was sentenced as follows:

Count I – 150 months in prison plus 150 months of probation
Count II - 126 months in prison plus two years of probation
Count III - 150 months in prison plus 150 months of probation
Count IV - 60 months in prison

All sentences were concurrent. The sentence on count II was illegal because Marron would "still be incarcerated and serving her prison sentence under counts I and III when the probationary period began on count II." A defendant cannot be sentenced "to serve probation while that defendant would still be serving a separate sentence in prison."

Gordon v. State, 2D19-2291 (Mar. 24, 2021)

Gordon had previously been civilly committed as a sexually violent predator. In an annual review proceeding, the trial court found that probable cause did not exist to show that Gordon's mental condition had changed so as to justify terminating the civil commitment. The Second District reversed for a full trial on the issue of whether Gordon was now entitled to release. Gordon presented two recent progress reports and additional expert testimony, "all of which supported Mr. Gordon's request for release." The Second District's opinion does not provide details as to these reports or testimony.

Marshall v. State, 2D19-3692 (Mar. 24, 2021)

During a pending direct appeal, Marshall filed a Rule 3.800(b)(2) motion, arguing that the did not qualify for drug offender probation because he was not convicted of an enumerated chapter 893 offense and he did not agree to drug offender probation in a plea agreement. The Second District affirmed the sentence.

Marshall was convicted of felony battery, bribery and resisting an officer without violence. Drug offender probation is permissible where, inter alia, the offender committed a nonviolent felony. Neither felony battery nor bribery are violent felonies under Florida law, and they therefore qualified for drug offender probation.

Qualification for drug offender probation also requires a Criminal Punishment Code scoresheet score of 60 points or less. Marshall argued that his 63.3 points on the scoresheet made him ineligible. This claim was not raised in the Rule 3.800(b) motion and was therefore not preserved for appellate review.

Queen v. State, 2D19-3890 (Mar. 24, 2021)

The Second District reversed one of more than 300 convictions for possession of child pornography and affirmed the rest. As to the one conviction that was reversed, the court erred in admitting hearsay testimony from a digital forensic technician "regarding the hash values associated with the images found on [the defendant's] devices."

The technician testified that he used the Griffeye program, which "facilitate[s] identification of contraband files on devices containing large volumes of images and video files." The program "relies on hash values to identify contraband files." "[H]ash values are unique alphanumeric values that are permanently associated with computer files." They "are remarkably accurate and virtually impossible to duplicate." The program compares "hash values associated with image and video files on an individual's devices to hash values of files containing child pornography from a database developed by" the Department of Homeland Security's child pornography division. Queen argued that reliance on the hash values constituted inadmissible hearsay.

As to most of the images, the technician determined that the images displayed children engaging in sexual activity "without reference to the hash values associated

with the images." The one remaining image did rely on hearsay for the conclusion that it was child pornography because "it was not the digital forensic technician who made the determination that the image of which exhibit 47 was an identical copy depicted a child; it was an unknown individual who worked for the law enforcement agency that submitted the image to the database or one who worked for NCEC or Project who independently verified that the image was of a child." "Someone, somewhere had to have made a determination that the image of which Exhibit 47 is an identical copy was an image depicting a child." Furthermore, comparisons to fingerprint and DNA databases were not valid because the record in this case was "devoid of any explanation of how an image in the NCMEC and Project VIC database is determined to be an image depicting child pornography."

Third District Court of Appeal

State v. Hester, 3D19-1642 (Mar. 24, 2021)

After the trial court found that trial counsel was ineffective, the State appealed and the Third District reversed, concluding that defense counsel was not ineffective.

Defense counsel agreed with the trial court's suggestion that a stand-your-ground immunity hearing be conducted concurrently with the trial. Immediately prior to the scheduled immunity hearing, defense counsel withdrew the motion. In a postconviction evidentiary hearing, defense counsel testified that he "believed that there was a split of opinion between the District Courts of Appeal as to whether testimony taken during a SYG hearing could be used by the State as substantive evidence against that defendant in the State's case-in-chief." At the time of the defense's decision in this case, the law still required the defense to bear the burden at the immunity hearing, which would have required the testimony of the defendant. Defense counsel did not intend to call the defendant to testify at trial: "it was just because I didn't want him to testify and have his prior convictions come out. . . . I just didn't think it was worth the risk sullying Mr. Hester's image in front of the jury, knowing that there was a good chance that [the judge] was going to send it to the jury anyway."

The trial court found counsel was ineffective because counsel was misinformed – there was no conflict between the district courts of appeal on the issue of the use of a defendant's hearing testimony at the subsequent trial.

Reviewing the case law in effect at the time of the defense's decision to waive the SYG immunity hearing, the Third District, relying on State v. Palmore, 510 So.

2d 1152 (Fla. 3d DCA 1987), held that when a defendant testifies in a hearing on a motion to dismiss, that pre-trial testimony may be used in the State's case-in-chief at trial. Neither a motion to dismiss, which was at issue in Palmore, nor an SYG immunity hearing, which was at issue in this case, is a constitutionally protected right.

Defense counsel's decision in this case "was strategic and not a product of ineffective assistance of counsel."

State v. Lowery, 3D19-2409, 3D19-2108 (Mar. 24, 2021)

The trial court erred in striking an indictment under the speedy trial rule. Lowery was arrested on March 26, 2019. On April 15, 2019, the State filed its information, charging second-degree murder. On September 17, 2019, 175 days after the arrest, Lowery filed a notice of expiration of the speedy trial period, and a motion for discharge was filed the next day. A three-count indictment was filed on September 18, 2019.

This case revolved around Supreme Court Administrative Order 19-43, which pertained to court proceedings "in the wake of Hurricane Dorian." This Order "extended" "all time limits prescribed or allowed by rule of procedure, court order statutes applicable to court proceedings, or otherwise pertaining to court proceedings," from "the close of business on Thursday, August 29, 2019,until the close of business on Wednesday, September 4, 2019." The order further "suspended" "all time limits involving the speedy trial procedure" for the same time period.

The order then distinguished the method of calculating extensions and suspensions: "The extension of time under this order shall apply only when the last day of those periods falls within the time extended. The suspension of time limits under the speedy trial procedure restores additional days equal to the number stated herein. Speedy trial limits are suspended, not extended, and the trial court failed to add six days to the speedy trial time limits, as required under the Administrative Order. The order striking the indictment was reversed and remanded for further proceedings.

Alvarez-Hernandez v. State, 3D20-302 (Mar. 24, 2021)

The Third District affirmed the defendant's sentence and rejected the argument that the sentence imposed was vindictive.

At a pretrial conference, the judge inquired as to the status of plea discussions or offers. The State referenced the most recent offer of 11 years in prison, which had been rejected. The State renewed the offer and it was again rejected. Defense counsel then stated that a predecessor judge had offered the defendant six years in prison plus five years of probation, in chambers and off the record, but that was rejected by the defendant at that time. The current judge asked if there were any objections to re-extending that offer. Absent any objection, the offer was extended again, and rejected again. After the convictions at trial, the lowest permissible sentence pursuant to the scoresheet under the Criminal Punishment Code was 137.25 months. The maximum sentences for two of the offenses were 30 years each; the third offense carried a five-year maximum. The judge imposed a total sentence of 25 years in prison, followed by 10 years of probation.

The Third District found "dubious" the Appellant's proposition that "the trial due initiated the plea discussion with the defendant." Rather, the Third District viewed the judge's statements as an inquiry about prior plea offers. Absent the initiation of plea discussions by the current judge, there was no basis for finding any presumption of vindictiveness. Additional factors emphasized by the Third District included: the judge "was not aware of any details of the case"; "she was merely renewing an offer extended by the predecessor judge"; "she extended the offer in a neutral, non-advocating manner, merely advising the defendant this would be the last plea offer extended to him and that if he rejected it, the case would proceed to trial"; she did not urge the defendant "to accept the plea offer by implying or stating that any sentence imposed would hinge on future procedural choices such as proceeding to trial." And, although there was a significant disparity between the pretrial offer and the post-trial sentence, the judge explained it in terms of the evidence introduced at trial.

The Third District did express concern about the use of in-chambers, off-the-record plea discussions, especially in light of the provisions of the 2018 Marsy's Law.

Fourth District Court of Appeal

Symonette v. State, 4D19-1007 (Mar. 24, 2021)

The offenses for which Symonette was convicted, possession of burglary tools and grand theft of a firearm, were not qualifying offenses for sentencing as a prison releasee reoffender.

Thomas v. State, 4D19-2548 (Mar. 24, 2021)

The trial court was ordered to correct a scrivener's error on the judgment of conviction. Conspiracy to commit grand theft is a second-degree felony, not a first-degree felony.

Reynolds v. State, 4D19-3207 (Mar. 24, 2021)

The Fourth District reversed and remanded for resentencing. The defendant failed to attend his sentencing because he was in the emergency room. Rule 3.180(c)(2), as amended in 2006, provides for sentencing a defendant in absentia if the defendant was present at the beginning of the trial "and thereafter absents himself or herself. . . ." Based on the language of the rule, its history and the committee note addressing the amendment, the Fourth District held that the rule permits sentencing in absentia only if the defendant voluntarily absents himself. As the defendant's absence was involuntary, the defendant had the right to attend his sentencing.

One judge concurred as to the reversal for resentencing, but would have ordered resentencing by a different judge.

Dorsey v. State, 4D19-3368 (Mar. 24, 2021)

The Fourth District affirmed a mandatory life sentence for a nonhomicide offense, attempted felony murder, and reiterated its prior holding that the Supreme Court's rulings in Graham v. Florida and Miller v. Florida would not be extended to offenders who were 20-years old at the time of commission of the offense.

Roberts v. State, 4D20-608 (Mar. 24, 2021)

In an appeal from convictions for harassing a victim and trespass, the Fourth District reversed for a new trial because the trial court failed to conduct a *Richardson* hearing where "the state did not disclose that a detective would be testifying as an expert."

The case involved the use of jailhouse phone calls made by the defendant to his brother, asking "his brother to perform a 'peter roll' at the victim's address." The detective was asked what "peter roll" meant, and, over objection that the detective was not listed as an expert, the detective was permitted to explain that the phrase referred to "the use of force to take something or to intimidate."

The State, on appeal, conceded error; the failure to list the detective as an expert witness was a discovery violation, and a hearing should have been conducted by the trial court regarding the materiality, willfulness and prejudice regarding the discovery violation. The Fourth District rejected the State's argument on appeal that the failure to conduct a *Richardson* hearing was harmless error. The State's failure to list the detective as an expert deprived the defense of the opportunity to obtain its own expert to rebut the State's expert.

Zelaya v. State, 4D20-2545, 4D21-576 (Mar. 24, 2021)

In one of two cases on appeal, the Fourth District granted Zelaya a new appeal on the issue of the trial court's failure to make an independent determination of competency and to enter a written order. Such relief was denied in the second case because counsel never sought a competency evaluation.

The reason for granting a new appeal in the one case was that the Fourth District did not have all of the potentially relevant transcripts. A status hearing was never transcribed, and further relief hinged on what that transcript showed.

Fifth District Court of Appeal

Washington v. State, 5D20-725 (Mar. 26, 2021)

The Fifth District reversed and remanded the case for an evidentiary hearing on two claims of a Rule 3.850 motion.

Ground 12 of the motion alleged that counsel was ineffective for failing to secure telephone records and a voice mail message that the defendant left for the murder victim. The defendant claimed the records "would demonstrate that he was at home during the home invasion, rather than standing close to the subject house." Records attached to the order denying the motion did not refute the claim.

Ground 14 alleged that counsel was ineffective for failing to question a witness who testified at trial "about her being with Appellant during the phone calls described above." Once again, the documents attached to the lower court's order did not conclusively refute the claim.

Broy v. State, 5D20-943 (Mar. 26, 2021)

The Fifth District affirmed the sentence imposed after a plea to burglary of a dwelling, grand theft and battery.

On appeal, Broy argued that the "trial court improperly considered uncharged conduct because during the sentencing hearing, it inquired as to why he was not charged with a more serious offense than simple battery." There was no objection to this in the trial court, and the Fifth District rejected the contention that fundamental error occurred. The trial court did not punish Broy for conduct unrelated to the charged offenses. "While the trial court inquired as to why the State pursued only a simple battery charge, as opposed to a sexually motivated offense, the State explained that Broy neither exposed himself nor touched the victim in an overtly sexual manner. The trial court appeared to accept the State's explanation and did not mention the topic again during the sentencing hearing. Broy was sentenced to time served on the battery charge and was sentenced well below the statutory maximum for the other charges."

Broy also sought a downward departure sentence, and challenged the trial court's "finding that he failed to establish that his capacity to conform his conduct to the requirements of law was substantially impaired." "Even assuming that Broy presented sufficient evidence . . . the record suggests that the trial court would not have exercised its discretion to impose a downward departure sentence. The trial court found that Broy had presented sufficient evidence establishing a need for specialized treatment unrelated to substance abuse for which Broy was amenable to treatment, but nonetheless determined that a downward departure sentence was inappropriate."