Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Gonzalez-Zea, 18-11311 (Apr. 30, 2021)

The Eleventh Circuit affirmed the denial of a suppression motion. ICE agents were staking out a residence based on an ICE fugitive, "whose social security number had been linked to a utility account at the address in question." The agents stopped a car leaving the residence. Gonzalez-Zea was driving. On request, he produced "an ID card issued in Mexico and admitted that he did not have any identification issued by the United States because he was here illegally." He was advised that the agents were looking for an ICE fugitive. He said that he was living alone and gave the officers consent to search his house. The officers found, in plain view, multiple firearms and ammunition and charged him with possession of a firearm and live ammunition by an illegal alien.

The stop of the car was supported by reasonable suspicion based on the social security number that had been associated with a fugitive by the name of Alfaro-Aguilar, who had been living at the residence from which the car departed. The car left the residence at a pre-dawn hour, and the time of the departure contributed to the reasonable suspicion "that any man leaving the house was either the fugitive, or as a resident of the house, may have known the fugitive and his whereabouts."

The stop was not prolonged beyond the time reasonably required to complete the purpose of the stop. The officers immediately asked questions about the identity of the driver. The questions were limited in scope and Gonzalez-Zea then produced a Mexican identification card, and responded that he did not have any United States identification. The question regarding the existence of United States identification was not an "impermissible foray into investigating unrelated criminal activity." It was simply "another identification-related inquiry that was part of the task of verifying Gonzalez-Zea's identity, which was the purpose of the *Terry* stop."

The subsequent search of the house was consensual. As the preceding investigatory stop was not unreasonably prolonged, the subsequent consent was not the product of an illegal seizure. Nor was the consent obtained through coercion. After Gonzalez-Zea stated that he lived alone, "the ICE officers simply asked if they

could search the . . . house. Gonzalez-Zea agreed without any hesitation, drove his own vehicle back to the house, unlocked the house to let the officers in, and cooperated throughout the search. He was neither in custody nor restrained in any manner at the time he gave consent." As officers "routinely carry weapons while on duty," "the mere presence of a weapon on an officer does not render an encounter with an officer unduly coercive and is insufficient to render a defendant's consent involuntary." The activation of red-and-blue police lights on one officers vehicle did not render the consent involuntary. "Leaving police lights on is simply not a display of force or coercive conduct on the part of an officer that could affect an individual's decision to freely and voluntarily consent to search." Although there was no indication in the record that the officers returned the identification prior to the request for consent to search, based on the "friendliness of the encounter, Gonzalez-Zea's lack of any objection to the search, and the absence of any coercive behavior by the officers, under the totality of the circumstances, the failure to return Gonzalez-Zea's identification card is insufficient to render his consent involuntary."

United States v. Pacheco-Ramero, 19-14446 (Apr. 28, 2021)

Two attorneys and their law firm had been representing six defendants in a criminal case prior to their disqualification based on a conflict of interest. The law firm had collected $21,000 from the defendants. As the disqualification arose very early in the case, "questions arose about whether the law firm had earned the entire fee it collected and, if it had not, whether the portion of the fee that did not belong to the law firm should be refunded to the defendants or used to reimburse the fees and expenses of the defendants' appointed replacement counsel." The attorneys refused to provide information the court requested to determine what portion of the fee had not been earned, and the court ordered the firm to pay $15,000 into the court registry. The law firm did so and subsequently provided the requested information. The court proceeded to find that $8,000 was earned by the firm and ordered the remainder to be used as reimbursement for replacement counsel. The attorneys and law firm appealed, and the Eleventh Circuit affirmed in part and dismissed in part.

Because orders directing a party to pay money into a court registry, or directing a court clerk to pay money from the registry to appointed counsel, are administrative in nature, appellate review jurisdiction is generally lacking. One exception exists for orders under 18 U.S.C. s. 3006A(f), to ensure that the "district court complied with the procedural requirements of s. 3006A." Each distinct ground of the appeal was, in turn, reviewed to determine if there was a jurisdictional basis for review. One of four grounds resulted in a lack of jurisdiction - the alleged error in finding a portion of the funds were available to the defendants.

The Court held that the district court did not lack "the authority to raise *sua sponte* the question of whether a portion of the fees paid to the appellants were 'available for payment from or on behalf of' the defendants." The Court also rejected the argument that "the district court failed to perform an appropriate inquiry before ordering [the attorneys], under the threat of contempt, to pay $15,000 into the court registry." The issue had been raised within days of the disqualification and the attorneys were on notice that the court was considering the apportionment of the fees. The attorneys were given an opportunity to be heard, and the order to pay the funds into the court registry was issued only after the attorneys refused to provide requested information. Finally, the district court did not err in ordering the funds paid over prior to appointed counsel having submitted CJA vouchers.

Raheem v. GDCP Warden, 16-12866 (Apr. 26, 2021)

The Eleventh Circuit affirmed the denial of a habeas corpus petition which challenged a conviction for first-degree murder and a sentence of death.

Trial counsel were not ineffective for "failing to further investigate and present to the jury evidence of [Raheem's] mental illness, cognitive deficits, and brain damage, and by failing to investigate and present evidence of additional mitigating family background and social history." Counsel had conducted an extensive investigation into both mental health and family background; the investigation conducted by counsel is detailed in the Court's opinion.

In a state-court evidentiary hearing, Raheem presented new evidence, including an opinion from a neuropsychologist, who reviewed testing done prior to the original penalty phase proceeding, as well as subsequent tests. This doctor opined that Raheem's "temporal lobe exhibited severe abnormality." Later analysis of a post-trial MRI uncovered evidence of brain damage. This led to opinions regarding impaired ability to perceive and interpret events or to exercise suitable judgment. Additionally, the doctor concluded that Raheem suffered from "schizophrenia or schizophrenic-like psychosis." Evidence was also presented as to a seizure disorder. This was based, in part, on affidavits from family members regarding Raheem's behavior as a child. The neuropsychologist was unable to provide an opinion as to whether either of the murders at issue were caused by a seizure. At the evidentiary hearing, trial counsel testified that they never had any expert telling them that Raheem was incompetent.

Two mental health experts testified at the original trial, providing an explanation for Raheem's admissions, and "providing the jury with ample mitigating evidence of his troubled mental health, including major depressive disorder, multiple suicide attempts, borderline personality disorder, and narcissistic and antisocial features. Further, over Raheem's initial objection, trial counsel succeeded in calling Raheem's mother and father as well. They described his unusual behavior as a child and pleaded with the jury to spare his life." The attorneys testified that there were no further tests at the time of the investigation that experts suggested that were not conducted, with the exception of a PET scan that Raheem refused to take.

Some of the social history information now posited by Raheem was found to be contrary to that which the attorneys elicited during the pretrial investigation. And, even if counsel had elicited this new information, "they might have strategically chosen not to present it because it would have been powerfully contradicted at trial" and it was largely cumulative to what was uncovered during the original investigation.

The Court also reviewed the totality of the circumstances in concluding that the newly proffered evidence would not have affected the outcome of the case. The evidence in aggravation was "very substantial." Raheem committed a brutal double homicide. There were six statutory aggravators. And, substantial evidence of mental health was already presented in mitigation. The new social history and background evidence came "nowhere near the extreme abuse and deprivation elicited in cases where the Supreme Court has found prejudice as a result of counsel's failure to offer mitigating evidence. The additional evidence about his background was largely that his parents were unwilling or unable to help in his mental health treatment, and the allegation that Raheem's father was physically abusive to him."

The failure of the state trial court to sua sponte hold a competency hearing was not raised in state court on direct review and was procedurally barred in federal habeas review. Raheem could not overcome the procedural bar as he failed to demonstrate cause for the procedural default (i.e., counsel was not deficient for failing to seek a competency hearing) or prejudice arising from the procedural default. At an evidentiary hearing, the state court heard conflicting evidence as to whether an expert gave counsel an opinion as to Raheem being incompetent. As the state court, based on the conflicting evidence, found that no such opinion was given to counsel, the state court's finding was entitled to deference.

There was also no clear error in the federal district court's alternative finding that Raheem failed to establish that he was incompetent. Even if it were accepted that Raheem suffered brief seizures during the trial, his attorneys spent a great amount of time with him and both believed him to be competent at the time of trial. Raheem was also colloquied by the court on several occasions prior to trial.

A due process claim based on Raheem having to wear a stun belt during the trial was rejected based on the state court's findings that the stun belt was not visible to the jury. During closing argument at sentencing, defense counsel did reference the wearing of a stun belt, but the comment in question was one which the state court concluded "was not unreasonable in light of counsel's theory of no future dangerousness." Counsel noted that an electric shock belt was worn everywhere Raheem went, including the trial.

Claims addressed in federal habeas corpus proceedings which review state court convictions apply highly deferential standards of review, as to both factual findings and legal conclusions, when the state court adjudicated the claims on the merits.

United States v. Riley, 19-14013 (Apr. 28, 2021)

In an appeal of a sentence, Riley argued that the "amount of the upward variance is substantively unreasonable because the court gave his criminal history too much weight." The recommended guidelines range was 12 – 18 months. The court imposed a 70-month sentence, which was 50 months below the 10-year statutory maximum.

Riley argued that the sentencing court "focused almost exclusively on his criminal history and didn't consider what he asserts is the 'fairly ordinary' nature of his offense and his positive personal characteristics, including strong family support and his involvement in his children's lives." Discretion "in weighing sentencing factors is particularly pronounced when it comes to weighing criminal history." "When considering the prior convictions of a defendant who has repeatedly engaged in violence and crimes involving firearms, it is eminently reasonable for a district court to weigh that criminal history heavily in the sentencing decision." Riley's current offense involved possession of a firearm – felon in possession; and a prior offense, albeit almost 20 years earlier, at the age of 16, was for a drive-by shooting. Other offenses, during Riley's 20's, included simple assault, resisting arrest, possession of drug paraphernalia, DUI, reckless driving, simple assault with a weapon or meaning to produce death, multiple drug dealing offenses, possession of

a stolen firearm and firearm in possession as a state law offense. Riley previously had convictions for at least five separate violent crimes and he never went more than five years without being convicted of one.

First District Court of Appeal

Haim v. State, 1D19-2094 (Apr. 30, 2021)

The First District affirmed Haim's conviction and sentence for the second-degree murder of his wife. The Court addressed three evidentiary issues.

The trial court did not err in admitting statements of identification made by Haim's son to a Child Protection Team. The trial court concluded that the son's statements qualified as statements of identification; that the son, Aaron, made the statements "after he witnessed or perceived his father commit an act that hurt or harmed his mother," and that Aaron "identified his father as the person who committed that act when the CPT interviewed Aaron within forty-eight hours of the victim's disappearance." With respect to the argument that the State "did not present non-hearsay testimony to show that Aaron witnessed the murder," the Court found that this argument was not preserved as it was not raised in the trial court. Alternatively, it lacked merit, as "there is no requirement in the [hearsay] statute for the State to present independent, non-hearsay evidence for a statement of identification to be admissible."

An argument that the statement was inadmissible because it was "an accusatory narrative" was likewise not preserved in the lower court through an objection on this ground. Finally, although the trial court characterized Aaron's statement as being that "daddy hurt mommy," and Aaron did not "precisely state that," the exchange between the interviewer and Aaron recounted what Aaron said and Aaron did use words to the same effect.

Haim challenged the admissibility of a .22-caliber shell casing found near the victim's remains, arguing that there was no link between the casing and the murder or any weapon owned by Haim. The Court disagreed: "The evidence shows that the casing was found in the area where the victim's skeletal remains were discovered. A forensic anthropologist testified that the victim's hip bone had a circular defect consistent with being shot. And investigators recovered a .22-caliber firearm from Haim's home during the initial investigation of the victim's disappearance. Because of the twenty-one years that passed between the murder and the discovery of the victim's remains, the medical examiner was unable to determine the victim's cause

of death. The victim may have died from strangulation, a gunshot, or another cause. Even so, no evidence contradicted the State's theory that the .22-caliber casing found with the victim's remains in 2014 – at the home where the victim lived with Haim in 1993 – was fired by the .22-caliber firearm recovered from that same home twenty-one years earlier."

An upward departure sentence was imposed under the 1992 guidelines that were in effect at the time of the offense. Both departure reasons were supported by evidence. First, Aaron suffered severe emotional trauma from his mother's murder. He witnessed the murder and he was then "separated from his entire biological murder." He was adopted by non-family members and was in continuous therapy since the murder, and still suffered from depression. Second, there was sufficient evidence to support the finding that Aaron was present during the murder. Two days after his mother's disappearance, he reported that his father had hurt her at night; and, that night was the last time anyone had spoken to his mother.

Louis v. State, 1D19-3958 (Apr. 30, 2021)

The First District affirmed convictions and sentences for burglary of a dwelling, kidnapping and robbery. The jury's verdicts did not find that Louis used a firearm in any of the offenses. On appeal, Louis challenged the trial court's instructions on lesser included offenses.

Louis wanted to proceed without any instructions on lesser included offenses; the prosecutor took no issue with that position. During subsequent discussions regarding firearms, a dispute arose. "The instructions and verdict forms required the jury to determine whether Louis 'carried, displayed, used, threatened to use, or attempted to use' a firearm during the commission of each of the" charged offenses. The information alleged that they had been committed with a firearm. The instructions and verdict forms also required a determination as to "actual possession" of a firearm.

The instructions also permitted the jury to find Louis guilty of "burglary of a dwelling if he did not possess a firearm, a lesser included offense of a dwelling with a firearm, and were therefore inconsistent with" the waiver of lesser included offenses. The trial court agreed with the State's position that "the use of a firearm was an enhancement and as such, the crimes charged without use of a firearm were not lesser included offenses."

The First District disagreed with the State's position with respect to the offense of burglary with a dwelling. The firearm is an element of that offense and not merely an enhancement under a reclassification statute. The burglary statute itself refers to burglary of a dwelling with a dangerous weapon. As to the armed kidnapping, the firearm was only a sentence enhancement and not an element of the kidnapping offense. With respect to the armed robbery, here, too, the firearm is an element of the statutory offense and not a mere sentencing enhancement.

Although the instructions for "unarmed burglary and unarmed robbery were inconsistent with Louis' waiver of lesser included offenses," Louis was not entitled to relief. A "defendant may waive lesser included offenses only to the extent that the State consents. While the State gave an incorrect argument for permitting instruction on unarmed burglary and unarmed robbery, it is clear that the State did not consent to Louis' waiver of instruction on these offenses. Because the State had a right to withhold consent, Louis suffered no prejudice from the State's incorrect argument for permitting instruction on the two lesser included offenses."

Bracht v. State, 1D20-147 (Apr. 30, 2021)

The summary denial of a motion for return of seized property was affirmed. The lower court correctly concluded that the motion was untimely, as it was filed more than 60 days after "the conclusion of the proceeding."

The statutory 60-day period arising out of the conclusion of the proceeding refers to the finality of the judgment and sentence. In a case such as this, where there was a guilty plea and no direct appeal, that 60-day period commenced 30 days after the filing of the judgment and sentence. Bracht argued that the 60-days commenced upon the denial of his postconviction motion to correct illegal sentence under Rule 3.800(a). That was an incorrect argument.

Ferguson v. State, 1D20-1726 (Apr. 30, 2021)

The First District affirmed the denial of a Rule 3.850 motion, after an evidentiary hearing. The motion alleged two claims of ineffective assistance of counsel.

Counsel was not ineffective for failing to move for a mistrial based on the jury's observation of Ferguson in shackles. Although such a motion would have been granted had it been made, counsel's decision not to move for mistrial was a strategic decision. When the prosecutor noted the jury's observations and called for

a sidebar, and further stated that the State would not object to a mistrial, defense counsel asked the court to reserve ruling until the end of the trial. The judge refused to do so. Counsel then conferred with the defendant, and announced that the defense was not moving for a mistrial. The judge noted on the record that counsel and client had conferred and were willing to go ahead. At the evidentiary hearing on the Rule 3.850 motion, defense counsel stated that one reason for not objecting was that "he did not want to try the case again." Counsel did not recall his conversation with the defendant, but said that he would have "explained the pros and cons of the decision on whether to seek a mistrial," and said that "one disadvantage of a mistrial as that it would allow the State to shore up any problems in its case." Counsel was concerned that witnesses would be more "polished" the second time around.

Counsel was not ineffective for failing to seek the suppression of the victim's identification of Ferguson from a photographic lineup. Although the trial court concluded that counsel was deficient, Ferguson failed to show that there was a reasonable probability that the outcome of the trial would have been different. Even without the photo identification, the police would have had enough information from the victim to obtain a search warrant for Ferguson's cell phones and the search of the cell phones resulted in extensive incriminating evidence.

Abney v. State, 1D20-2837 (Apr. 30, 2021)

The First District affirmed the summary denial of a Rule 3.850 motion in which Abney claimed that counsel was ineffective for failing to call two witnesses to testify. He argued that the two witnesses would have testified "that the victims made similar allegations in an earlier investigation and later recanted and that, had counsel introduced evidence of the prior allegations, the jury would have had reasonable doubt." The claim was without merit because the testimony was deemed cumulative to other evidence presented at trial, and, the claim was "entirely speculative." The jury heard about recantations from one of the victims and from one police officer.

Davenport v. State, 1D19-3100 (Apr. 29, 2021)

Davenport, who was found guilty of lewd or lascivious molestation of a victim under the age of 12 by an adult was sentenced to life as a prison releasee reoffender (PRR). The PRR sentence was reversed because Davenport was ineligible for such sentencing.

Davenport was convicted under section 800.04, Florida Statutes. In 2005, section 800.04(5)(b) was amended to make the offense a life felony, "punishable as provided in s. 775.082(3)(a)4." Section 775.082(3)(a)4, in term, provided for a sentence of life, or a split sentence with a prison term between 25 years and life, followed by probation or community control for the remainder of the person's natural life. The statute, as amended in 2005, "no longer permits sentencing under any of the provisions in 775.082, except subparagraph 3(a)4., including the PRR subsection. The deletion of other alternatives from the punishment authorized by subsection 800.04(5)(b), cannot be ignored."

Houk v. State, 1D20-1816 (Apr. 29, 2021)

The First District reversed a conviction for animal cruelty. Houk was convicted of both animal cruelty under s. 828.12(2), Florida Statutes, and animal cruelty under s. 828.12(1), Florida Statutes. Houk left his dog in her car, on a hot day, with the windows closed and without any water, for over an hour. A PVC pipe was pressed "against the gas pedal to keep the car accelerating, knowing there was a problem with the air conditioner." The air conditioner was discovered to have been blowing hot air. The dog passed away. The dual convictions resulted in a double jeopardy violation.

Section 828.12(1) applies to a person who "unnecessarily . . . torments, deprives of necessary sustenance or shelter, or . . . kills any animal . . . in a cruel or inhumane manner. . . ." Section 828.12(2) applies to a person "who intentionally commit an act to any animal . . . which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering. . . ." Subsection (1) is a first degree misdemeanor. Subsection (2) is a third degree felony.

Each of the two offenses has one or more different elements and therefore does not constitute a double jeopardy violation under the Blockburger same-elements test. However, the two offenses were degree variants of the same offense. They are found in the same statute, they share a name – animal cruelty and aggravated animal cruelty – and one carries a more serious penalty than the other. Because they were degree variants of the same offense, under section 775.021(4)(b)2., Florida Statutes, the dual convictions were impermissible.

Second District Court of Appeal

Carnes v. State, 2D20-201 (Apr. 30, 2021)

Carnes' convictions for providing false sex offender information and failing to register a change of address as a sex offender were affirmed, but the Second District, pursuant to the State's cross-appeal, reversed a downward departure sentence.

During the sentencing hearing, defense counsel argued a nonstatutory mitigator. Counsel asserted that the purpose of the registration requirements was to "keep track of offenders and 'to protect the kids and people from physical sexual assault," and to maintain federal funding; that the tracking measures were not "punitive." And, counsel argued that Carnes' actions "did not jeopardize the purpose the registration laws were intended to serve. For instance, nothing indicated that he went to any schools or tried to make any contact with children. [Counsel] further argued that [the defendant's'] girlfriend's residence was approved for sexual offenders, that Carnes accurately reported his place of employment, and that Carnes never stopped reporting to the sheriff's office." The lowest permissible sentence under the scoresheet was 6.65 years, and the judge could have imposed up to ten years for two third-degree felonies with consecutive sentences of up to five years for each.

The judge stated that the facts did not warrant more than the statutory maximum of five years each, and that defense counsel's factual recitation convicted the judge that the facts did not "warrant an excess of five years, so that will be a departure."

Under the Criminal Punishment Code, when the "lowest permissible sentence exceeds the statutory maximum for the offense, 'the sentence required by the [CPC] must be imposed.' . . . Therefore, the trial court's reliance on the facts of the current offenses is not consistent with the legislative sentencing policy that the severity of sentence increases for an offender with a long and serious prior record." On appeal, Carnes presented his argument from the trial court regarding the legislative purpose of the registration requirements – presenting an argument that the trial court was right for the wrong reason. The Second District rejected that argument because the trial court, after hearing that argument, "did not choose to state it as a ground for departure," either concluding that it was not a valid legal ground or it lacked factual support, or the court relied on its own discretion to reject that reason.

The Second District, further noting Carnes' argument based on legislative policy, found that "allowing the court to impose a downward departure when a sexual offender does not contact children and is easily located after failing to comply with the registration requirements would work to eviscerate the sentencing policy. The legislature has determined that Carnes' violations are third-degree felonies subject to a maximum of five years' imprisonment but that due to his significant criminal record, his sentence should exceed the statutory maximum."

Terrell v. State, 2D20-1407 (Apr. 30, 2021)

The Second District reversed the summary denial of a Rule 3.801 motion for jail credit and remanded for further proceedings. The motion referenced Rule 3.801, but the text appeared to seek relief under Rule 3.800(a). The judge treated the motion as one under Rule 3.801, and denied it, as the claim for out-of-state jail time was not cognizable under Rule 3.801; it must be raised in a Rule 3.850 motion. The trial court should have granted leave to amend the motion so that it could be asserted, if possible, as a facially sufficient Rule 3.850 motion.

The Second District reiterated the same points in its similar opinion in Hastings v. State, 2D20-2996 (Apr. 30, 2021)

Fountain v. State, 2D20-289 (Apr. 28, 2021)

In a direct appeal from multiple convictions for sexual activity with a minor by a person in familial or custodial authority, promoting a sexual performance by a child, and possession of child pornography, the Second District reversed the conviction for one of the charges of sexual activity with a minor.

The charge in question alleged that the defendant's penis "penetrate[d] or had union with [the victim]'s mouth." At trial, "the victim testified unequivocally that Mr. Fountain's penis never penetrated her mouth." When the State attempted to impeach the victim with her alleged prior inconsistent statement as to that assertion, she stated that she could not recall having told the detective that the defendant placed his penis in her mouth. Upon further questioning by the State, the victim, at one point, responded that the defendant "placed his penis in union with her mouth." When questioned as to what she meant by "union," she said, "around my face, like around my mouth, and stuff like that." When asked if the defendant "ever place[d] his penis upon your lips" or "ha[d] you kiss his penis," she responded, "No."

Based on the victim's "dispositive disclamation that there was no physical contact between the two body parts [her mouth and the defendant's penis]," the motion for judgment of acquittal should have been granted. Although the victim once used the term "union," her own explanation made it clear that the facts did not constitute a "union" as that term is used in the statute.

The Second District rejected the State's argument that the defendant, after the denial of the motion for judgment of acquittal as to this charge, was required to note its objection to the court's denial of the JOA motion. No such requirement exists.

Third District Court of Appeal

Rubio v. State, 3D20-534 (Apr. 28, 2021)

The Third District reiterated its own prior holding that the Court lacked authority to "consider the trial court's failure to downward depart." The Court further noted that a conflict among districts is pending review in the Florida Supreme Court in Wilson v. State, SC20-1870.

Fourth District Court of Appeal

Stewart v. State, 4D18-3526 (Apr. 28, 2021)

The trial court erred in denying a motion to withdraw plea. Counsel failed to advise the defendant "of the collateral consequences of his plea and what sexual offender probation entailed. He was specifically not advised that he would be designated a sexual predator, which was never mentioned until after he agreed to the lea. His attorney did not know the levels of registration, as is reflected by his various statements to the trial court. The plea agreement did not elucidate the sexual offender probation or even mention registration as a sexual predator. Therefore, there is nothing in the record to contradict appellant's claim of lack of knowledge of the collateral consequences."

Raja v. State, 4D19-1210 (Apr. 28, 2021)

The Fourth District affirmed convictions and sentences for manslaughter by culpable negligence and attempted first degree murder.

The defendant, a former police officer who was still an on-duty officer at the time of this offense, approached the victim, who, at 3:15 a.m., was waiting on an I-

95 off-ramp for roadside assistance. The defendant was checking to see if assistance was needed. He was dressed in plain clothes and was en route to another call at the time. The defendant asked if assistance was needed. The defendant claimed that the victim drew a gun and pointed it at the defendant. After the victim did not drop his gun upon command, the defendant fired two or three times and the victim started running. The defendant called 911 because he left his police radio in his van. During the 911 call, the defendant kept yelling commands to the victim, who was running. The defendant's commands to the victim, as well as the gunshots, were also heard in an AT&T Roadside Assistance call. The medical examiner testified that the victim had been shot in the chest, and also had wounds to his arms that "were inconsistent with a person holding or aiming a gun." The defendant fired a total of six shots, in rounds of three, within seconds of each other.

The convictions for culpable negligence manslaughter and attempted first-degree murder did not result in a double jeopardy violation. Each offense contained an element which was lacking in the other. Attempted first-degree murder required premeditation; manslaughter required the element of death. Additionally, the two offenses were not degrees of the same offense.

The "merger doctrine" was not implicated "because neither charge involves felony murder. The elements of each crime cannot merge with one another because one requires the intent to commit premediated murder without killing the victim and the other does not require intent but does require killing the victim." The "merger doctrine was designed to generally prevent the government from charging felony murder when the underlying felony was assault."

Lastly, the "single homicide rule" was not applicable because the Florida Supreme Court, in State v. Maisonet-Maldonado, 308 So. 3d 63 (Fla. 2020), concluded that a legislative amendment to section 775.021, Florida Statutes, dispensed with prior case law which provided "that although a defendant can be charged and convicted under multiple criminal statutes for conduct causing another's death during one criminal episode, that criminal defendant can only be punished once for that death."

Moncadagonzalez v. State, 4D19-2031 (Apr. 28, 2021)

On direct appeal, the Fourth District reversed and remanded for resentencing. At sentencing, the court imposed what it believed to be the minimum sentence permissible under the scoresheet. As a scoresheet error existed, reducing the

minimum sentence from 251 months to 217 months, resentencing was required as a result of the scoresheet error.

Martinez v. State, 4D19-2538 (Apr. 28, 2021)

The Fourth District affirmed a conviction for third-degree grand theft, for property with a value of $10,000 or more, but less than $20,000. The trial court awarded restitution in excess of $50,000. The theft arose out of a real estate transaction. The defendant, the victims' real estate agent, obtained more than $30,000 from the victims, to invest in the defendant's own company, falsely promising 8% returns and falsely promising that the investment was safe.. Periodic payments totaling $15,000 were obtained, purportedly towards a loan; and $5,000 was obtained, purportedly for closing costs on the home that was being purchased.

The Fourth District held that restitution "may be ordered above the maximum dollar value defining a defendant's offense." The only test was whether "the amount of restitution bore a significant relationship to the victims' damages and losses caused by Appellant's course of conduct. . . . Because the amount of restitution awarded constituted the total amount of money which the State proved the couple lost in the three thefts, the significant relationship test is met, and the award of restitution was proper."

Coffield v. State, 4D20-2250 (Apr. 28, 2021) (on motion for rehearing)

The Fourth District granted a habeas corpus petition and held that Coffield was entitled to an adversary preliminary hearing.

Petitioner was arrested for "interference with custody," a third-degree felony. More than 21 days after the arrest, an information was filed, charging the same offense. Bond was posted, but Coffield remained in custody on other offenses. About 10 months later, an amended information added the charge of lewd and lascivious battery. Two weeks later, Coffield was served with a capias on the new offense, while still in custody. An Arthur hearing was held on the new offense and bond was denied. Coffield then moved for an adversary preliminary hearing on both charges. The court denied the motion as to the lewd and lascivious batter because the information was filed before service of the capias.

Construing Rule 3.133(b)(1), Fla.R.Crim.P., the Fourth District held that "where the state has not filed charges within twenty-one days of arrest, the defendant is entitled to an adversary preliminary hearing on all charges pending as a result of

the criminal episode *at the time of the adversary preliminary hearing*." The two charges in this case arose out of the same episode and Coffield was therefore entitled to the adversary preliminary hearing on both.

One judge dissented, based on the defendant's delay in requesting the adversary preliminary hearing – more than four years after the initial arrest and 3 ½ years after the capias on the new charge. The dissent also concluded that the lewd and lascivious battery was a distinct offense, not a part of the same criminal episode, because the victim did not disclose that she had sex with the defendant until months after the initial arrest. Facts relied on by the dissent were that the defendant allegedly interfered with custody by "detaining/concealing the victim, who was a runaway," and the defendant had sex with the victim.

Jing v. State, 4D21-147 (Apr. 28, 2021)

The Fourth District reversed a conviction for resisting an officer without violence. "[A] Florida statute precluded law enforcement from arresting Appellant for a misdemeanor that did not occur in the presence of a law enforcement officer. During an investigative stop, law enforcement officers effected an arrest by handcuffing Appellant for transport to the station house for further questioning. This conduct exceeded the lawful bounds of the investigative stop, so the State failed to establish a necessary element of resisting an officer without violence."

Officers responded to a call about trespassing at Mar-a-Lago. They learned about what happened from a security officer and through surveillance videos and photos they were shown. Later that day, an officer observed the defendant elsewhere, and when another officer arrived, the officers decided to arrest the defendant; one officer testified that it was an investigation of the trespassing incident and that they wanted to talk with the defendant. There were problems communicating with the defendant due to a language barrier. One officer approached the defendant with handcuffs; the defendant backed up and put her hands across her chest, yelling "no, no, no." The defendant resisted the officer's attempts to get her hands behind her back.

The acts of handcuffing the defendant to transport her to the station for further questioning "elevated an investigatory stop into an arrest." The offense of loitering and prowling is a misdemeanor. An arrest for a misdemeanor must be predicated on the officer's personal observation of the commission of the offense. The arrest was therefore precluded, and the officer was not acting in the lawful execution of a legal duty.

One judge dissented, concluding that the officer had reasonable suspicion for an investigatory stop.