Case Law Update
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Supreme Court of the United States

Borden v. United States, 19-5410 (June 10, 2021)

Borden received an enhanced sentence under the Armed Career Criminal Act. One of his three predicate convictions was for the Tennessee offense of reckless aggravated assault. The Supreme Court of the United States held that this offense was not a qualifying predicate. A qualifying predicate under the elements clause of the ACCA requires "the use, attempted use, or threatened use of physical force against the person of another." The Supreme Court had previously held that an offense that required only a mens rea of negligence did not qualify. In this case, the Court held that the Tennessee offense did not qualify because it required only a mental state of recklessness. Crimes of violence "are best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state – a deliberate choice of wreaking harm on another, rather than mere indifference to risk." Offenses with a mens rea of recklessness "do not require, as ACCA does, the active employment of force against another person. And they are not the stuff of armed career criminals."

Supreme Court of Florida

In re: Amendments to the Florida Rules of Criminal Procedure, SC20-1564 (June 10, 2021)

The Supreme Court approved amendments to the Rules of Criminal Procedure, effective as of July 1, 2021.

Rule 3.131(b), which addresses conditions of pretrial release, enumerates multiple factors for the trial court to consider. The factor of "whether the defendant is already on release pending resolution of another criminal proceeding or is on probation, community control, parole, or other relevant release pending completion of sentence," added "community control," which had not previously been enumerated.

Rule 3.220 (discovery), was amended to add a subdivision regarding depositions to require the prosecutor, along with discovery, to provide "[a]ny physical address or e-mail address designated by a law enforcement agency or department for service of notice of deposition."

The jury questionnaire form in Rule 3.9855 added directions, providing that before filing a copy of the form, the month and date of birth of the prospective juror should be redacted, but the year of birth should be retained.

Rule 3.987, the form for a motion for postconviction relief, was amended to clarify the oath requirement.

Kartsonis v. State, SC20-1500 (June 10, 2021)

The Supreme Court wrote to explain why the Court lacked jurisdiction to review an alleged conflict between district courts of appeal.

The Court first noted the strict standard for "express and direct conflict." It "requires either the announcement of a conflicting rule of law or the application of a rule of law in a manner that results in a conflicting outcome despite 'substantially the same controlling facts.' . . . Because the facts in the second situation 'are of the upmost importance,' there can be no conflict on this basis when the cases are easily distinguishable."

In this case, the "First District held that it was not error for a successor judge to *deny* Petitioner's Florida Rule of Criminal Procedure 3.800(b) motion when the original sentencing judge is unavailable, rejecting the Petitioner's suggestion below that Florida Rule of Criminal Procedure 3.700(c)(1), which governs the pronouncement of a new sentence by a successor judge in noncapital cases, should apply to all sentencing matters." The First District distinguished the case upon which the Petitioner relied, Gay v. State, from the Second District, because that case involved a "resentencing" by a different judge, as opposed to a Rule 3.800(b) motion to correct a sentence pending a direct appeal. The two cases were therefore "materially distinguishable" and the Supreme Court lacked jurisdiction, where there was no express and direct conflict.

Eleventh Circuit Court of Appeals

United States v. Montenegro, 19-13542 (June 11, 2021)

Montenegro appealed a sentence in which the district court applied a firearms enhancement under U.S.S.G. s. 2D1.1(b)(1). Both parties objected to the application of the enhancement. The issue was whether the government proved that the "firearm was used in connection with [the] offenses." The Eleventh Circuit affirmed the sentence.

Montenegro pled guilty to conspiracy to distribute and possess with intent to distribute 500 grams or more of cocaine, and possession with intent to distribute 500 grams or more of cocaine. The district court found a sufficient nexus between the rifle at issue and the drug sales because "(1) the first sale to the undercover officer took place at Montenegro's 'very small trailer' where the rifle was located; (2) Montenegro was using the trailer as his 'stash house' where he kept cocaine and people knew he sold drugs out of his trailer; and (3) there was a drug sales ledger in 'very close proximity' to the gun." In finding a sufficient nexus, the Eleventh Circuit emphasized one additional fact – that after the first sale, when the trailer was searched, more cocaine was found.

Montenegro argued that there was no evidence that the rifle had been present in his trailer during the first sale, and, he claimed the rifle was present for hunting purposes only. The Eleventh Circuit disagreed. "First, presenting another reason for why the rifle may have been present in Montenegro's trailer home does not establish that it was clearly improbable that the rifle was also possessed in connection with his drug offenses." "Second, Montenegro's argument that there is no evidence that he had the gun with him during the drug transactions fails because it ignores a key fact: Montenegro was indicted for *possession* of cocaine with intent to distribute, not for distributing cocaine. The rifle was located in his trailer home along with cocaine and a drug sales ledger. Thus, the rifle was present at the site of the charged conduct, even if the rifle was not present at either drug sale."

In showing the nexus beyond mere possession, the government "is not required to prove that the firearm was used to facilitate the distribution of drugs for the firearms enhancement to apply; its mere presence during the drug offense is sufficient." And, after the government meets its burden, "the burden then shifts to the defendant to show 'that a connection between he weapon and the offense was clearly improbable.'" That was noted to be a "heavy burden of negation."

First District Court of Appeal

Lucas v. State, 1D19-3882 (June 10, 2021)

The Court issued a one-paragraph opinion affirming the denial of a motion to suppress which challenged a traffic stop. The Court previously issued an opinion affirming the denial of a suppression motion in an appeal from a passenger in the same vehicle who raised the same legal issues: Thomas v. State, 1D19-3881 (Jan. 20, 2021).

One judge issued a separate opinion, "concurring dubitante," abiding by the prior opinion but believing it to have been erroneously decided. This opinion concluded that "the investigatory stop in this case was based on the faulty legal premise that an 'unassigned' dealer tag is inherently criminal in nature and that stopping a vehicle with such a tag is a permissible basis to deviate from the Fourth Amendment."

Another separate concurring opinion expresses alternative rationales for affirmance, including reasonable suspicion based on the totality of the circumstances: "the officer confronted a car whose occupants could have been driving innocently on dealer-connected business, but where the circumstances – after midnight, on a weekend, at a convenience store, with multiple people in the car, some distance from its registered address – indicated to him that the car wasn't being used for dealer-business activity."

Cowan v. State, 1D20-1764 (June 10, 2021)

The First District reversed the denial of a Rule 3.850 motion as to one of its claims. Cowan alleged "that his trial counsel was ineffective in failing to preserve for appeal the trial court's ruling on the admissibility of child hearsay statements." In the motion, Cowan failed to allege prejudice during trial. Cowan should have been provided an opportunity to amend the claim.

Washington v. State, 1D19-4487 (June 8, 2021)

Washington, a juvenile at the time of the first-degree felony murder for which he was convicted, received a resentencing after Miller v. Alabama, and received a life sentence under the 2014 juvenile sentencing statutes. That sentence was affirmed on appeal, with the Court noting that its scope of review "'is limited to a determination of whether the trial court abused its discretion.'" No such abuse of

discretion was found; the facts regarding the trial court's weighing of the relevant sentencing factors are not set forth in the opinion.

One judge, in a concurring opinion, noted that the "abuse of discretion" standard created the potential for "sentencing disparities between similarly situated criminal defendants," based on the different weight that different judges apply to the same factors.

Shaw v. State, 1D20-0443 (June 8, 2021)

The First District affirmed an order finding Shaw to be a sexually violent predator and civilly committing him.

At the trial, the State introduced evidence of one sex offense committed by Shaw, as well as other prior convictions for non-sexual offenses, including a burglary and a false imprisonment. He also had a prior conviction for one sexually violent offense – indecent liberties with a child, a North Carolina conviction. Shaw "requested that the jury be instructed that it had to find that the non-sexual prior convictions relied on by the State were sexually motivated beyond a reasonable doubt."

Under the SVP act, a single conviction for a sexually violent offenses is sufficient to qualify the respondent for civil commitment if there is proof of the requisite mental abnormality or personality disorder and risk of sexually violent recidivism. "Other prior convictions and allegations are then relevant, even where they are not proven beyond a reasonable doubt, when they support the existence of the current mental abnormality or personality disorder that creates a high risk of reoffending in a sexually violent manner." The jury was instructed that the indecent liberties with a child conviction was the only one that would qualify as a sexually violent offense, and the State proved the conviction for that offense. "For that reason, the trial court properly instructed the jury to apply the clear and convincing evidence standard to all elements of the sexually violent predator determination and rejected Shaw's request for an instruction on the reasonable doubt standard."

Second District Court of Appeal

Cabrera-Toledo v. State, 2D19-881 (June 11, 2021)

A "'written sentence must conform to its oral pronouncement; when the two differ, that constitutes reversible error.'" The failure of the written sentence to

specify that the sentences for two offenses were concurrent, as had been orally pronounced, required correction.

Gilbert v. State, 2D19-1622 (June 11, 2021)

The Second District affirmed a conviction for sexual activity with a child, while noting that "this case is a close call on evidentiary issues."

The victim, a relative of the defendant, had moved between residences of multiple family members before moving in with the defendant. After telling her boyfriend that the defendant was sexually abusing her, the abuse was reported to the police, and the victim confronted the defendant "about the abuse over Facebook Messenger and took screenshots of their conversation." She also wrote down what happened in a journal and referred to that journal during a later interview with the Child Protection Team. At trial, the State introduced the screenshots, a video of the interview with the CPT, and the journal. The defense was that the victim fabricated the abuse in order to return to her prior residence.

Gilbert challenged the Facebook message screenshots as unauthenticated hearsay. Sufficient authentication was found on the basis of several facts: "The victim and her relative testified to Mr. Gilbert and the victim's 'extensive history' of communicating over Facebook Messenger. Mr. Gilbert's real name (as opposed to a nickname) and his profile picture were included in the screenshots. . . . Even more, the victim and Mr. Gilbert referenced 'facts only known by' them in the messages – the car that Mr. Gilbert was fixing up for the victim and Mr. Gilbert's frustration with transporting the victim's boyfriend back and forth for weekend visits." An argument by the defense that the messages could have been altered "since they were not retrieved by a cell phone extraction or a subpoena to Facebook" was rejected, as that went to the weight of the evidence, not its admissibility. The related hearsay challenge was not preserved for review because the trial court never ruled on the hearsay objection and Gilbert did not argue that it constituted fundamental error.

The journal constituted inadmissible hearsay. The only exception relied upon by the State – a prior consistent statement – applies to rebut a claim of recent fabrication. Gilbert's defense was that the fabrication was not recent. The error in admitting the journal was found to be harmless error, however. "Mr. Gilbert's defense theory was that the victim fabricated the abuse – all along – so she could move back to her prior residence. Because defense counsel thoroughly questioned the victim on the abuse, the events surrounding the abuse, and then some, it certainly

follows that 'the jury was either going to believe that both [the victim's] [journal] and [her] testimony were true or that they were not.' . . . Moreover, the trial court had already admitted the video interview with a Child Protection Team officer – which tracked the victim's statements in the journal almost exactly. . . . And while Mr. Gilbert now complains that the journal was improperly admitted, defense counsel used the journal during closing argument to attack the victim's credibility by highlighting how unreliable her memory was."

Two comments by the prosecutor in closing argument were addressed. The first comment referenced the vulnerability of the victim in her relationship with the defendant. While a prosecutor may not appeal to the jury's sympathy for the victim, looking at the trial record and closing argument as a whole, "the State's commentary on the victim's vulnerability appears to be the State's spin on Mr. Gilbert's theory of defense." The defense emphasized the victim's history of breaking rules, lying and acting out; deceptive maneuvers to move to her prior residence. The State "took the same facts . . . and put them in a different light, turning an allegedly vindictive past into a vulnerable childhood."

The second comment, that "[t]he reality is, because she's telling you what happened to her. She's credible," was erroneous, but did not rise to the level of fundamental error, where trial counsel did not object to the comment. The prosecutor was vouching for the witness's credibility or providing an opinion as to the witness's truthfulness. It was, however, a single comment and was distinguishable from prior cases, because the prosecutor "neither lied to the jury to bolster the victim's credibility nor tarnished defense counsel's reputation." The comment was "relatively brief," the trial was "otherwise capably run," and there was "other corroborating evidence."

S.S. v. State, 2D19-2464 (June 2021)

An adjudication of delinquency for trespass was reversed because the State "did not present sufficient evidence of the notice element of the offense."

S.S. was found on the victim's property without permission. The property was entirely enclosed by a fence. At an officer's request, S.S. jumped over the offense, but there was no testimony about the height of the offense. The notice element of trespass may be established by actual communication, posting, fencing or cultivation. The only evidence in this case was that of the fencing of the property. Notice by fencing, as set forth in the trespass statute, requires that the fence be at

least three feet in height. The fact S.S. had jumped over the fence, without more, did not suffice to satisfy the requirements for notice by fencing.

Nasrallah v. State, 2D19-2941 (June 11, 2021)

The defendant's convictions and sentences were remanded with directions to enter a written order nunc pro tunc as to the defendant's competency. The trial court made an oral finding that competency had been restored prior to the trial, but had not reduced that oral pronouncement to a written order.

Gomez v. State, 2D19-4239 (June 11, 2021)

The Second District reversed an order revoking community control for failing to attend a Narcotics Anonymous meeting. The terms of the order of community control did not require attendance at the meeting.

The condition of community control stated: "You will remain confined to your approved residence except for one half hour before and after your approved employment, public service work, or any other special activities approved by your officer." "Remaining confined in an approved residence," subject to the noted exceptions, was not broad enough language such as to require attendance at an NA meeting. Although there was no objection to this in the trial court, the error was fundamental.

Blattner v. State, 2D20-1846 (June 11, 2021)

The summary denial of a Rule 3.801 was reversed and remanded for further proceedings. When the motion was denied, Blattner was given 60 days in which it file an amended motion. He failed to do so, but later claimed in a motion for rehearing, that he had not received the order directing him to file the amended motion within 60 days. After he appealed to the Second District, that Court relinquished jurisdiction to consider the claim that he had not received the order. The trial court, on remand, denied the motion, but did not address the claim that Blattner never received the 60-day order.

Fourth District Court of Appeal

Icon v. State, 4D20-246 (June 9, 2021)

A public defender's fee of $1,500, in excess of $100, was reversed because Icon did not affirmatively agree to pay the amount and there was no proof to support the amount in excess of $100. A transcript fee of $185 was reversed for the same reason, as was a $50 investigative fee. On remand, upon sufficient proof, the fees could be reimposed.

Fifth District Court of Appeal

Woods v. State, 5D20-2034 (June 11, 2021)

The denial of a motion to withdraw plea was reversed because the record did not conclusively refute it, and the hearing on the motion was conducted without Woods' presence. He was entitled to be present, because "a hearing on a motion to withdraw plea . . . is a critical stage in the proceedings."