Case Law Update
June 21, 2021
Prepared by
Richard L. Polin

Supreme Court of the United States

Terry v. United States, 20-5904 (June 14, 2021)

The First Step Act of 2018 provided some crack offenders with the opportunity to obtain reduced sentences, and the changes of the Act apply retroactively. In this case, the Supreme Court conclude that "crack offenders who did *not* trigger a mandatory minimum" did not qualify for reduced sentences under the First Step Act.

21 U.S.C. s. 841 defined three categories of crack offenses. Those in ss. 841(a),(b)(1)(A)(iii) and 841(b)(1)B)(iii), both imposed mandatory minimum sentences. Those in s. 841(a),(b)(1)(C), did not. The Fair Sentencing Act "modified the statutory penalties only for subparagraph (A) and (B) crack offenses – that is, the offenses that triggered mandatory-minimum penalties."

Greer v. United States, 19-8709 (Jun 14, 2021)

Pursuant to Rehaif v. United States, 588 U.S. ___ (2019), for felon-in-possession cases, "[t]he Government must prove not only that the defendant knew he possessed a firearm, but also that *he knew he was a felon* when he possessed the firearm." In Greer and a companion case, the Court addressed the question of whether there was an entitlement "to plain-error relief for their unpreserved *Rehaif* claims. We conclude that they are not."

Although the first two elements of plain-error analysis existed – there was an error, and the error was plain, the third element, that the error affect "substantial rights" was not satisfied. For substantial rights to be affected, there must be "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." A defendant has the burden of establishing an entitlement to relief for plain error.

"If a person is a felon, he ordinarily knows he is a felon. . . . That simple truth is not lost upon juries. Thus, absent a reason to conclude otherwise, a jury will usually find that a defendant *knew* he was a felon based on the fact that he was a

felon. A defendant considering whether to plead guilty would recognize as much and would likely factor that reality into the decision to plead guilty. In short, if a defendant was in fact a felon, it will be difficult for him to carry the burden on plain-error review of showing a 'reasonable probability' that, but for the *Rehaif* error, the outcome of the district court proceedings would have been different."

Both Supreme Court petitioners had multiple felony convictions, which constituted substantial evidence that they knew they were felons. "Neither defendant has ever disputed the fact of their prior convictions." One stipulated to that fact; the other admitted it when he pled guilty. On appeal, neither asserted "that they would have presented evidence at trial that they did not in fact know they were felons when they possessed firearms."

The Court observed that plain-error relief could be available if "the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon. When a defendant advances such an argument or representation on appeal, the court must determine whether the defendant has carried the burden of showing a 'reasonable probability' that the outcome of the district court proceeding would have been different."

Eleventh Circuit Court of Appeals

United States v. Anderson, 18-13947 (June 15, 2021)

Anderson appealed multiple convictions for mail fraud, making false statements and money laundering. The offenses related to the mailing of U.S. Customs and Border Protection forms "which falsely claimed large business expenditures . . . as part of a scheme to acquire federal government subsidies under the Continued Dumping and Subsidy Act of 2000."

The defendant chose to testify at trial. He argued on appeal that the court's colloquy violation his constitutional rights; that "questions impermissibly interfered with the attorney-client relationship." The Eleventh Circuit found nothing improper in the colloquy between the judge and the defendant. When the judge queried whether Anderson was choosing to testify, the defendant asked to speak to counsel; and counsel asked to step outside with the defendant, which the court permitted. Upon their return, the defendant stated that he would testify and that it was his decision to do so.

The Eleventh Circuit noted that the better practice was to have the discussions on the record, but observed that a district court was "not required to engage in this type of colloquy." The Court also rejected the argument "that a court should be disallowed from asking a defendant whether he wants to testify. Specifically, a defendant has a constitutional right to testify. It is an odd constitutional right that cannot even be mentioned to a defendant. Disallowing a procedure that permits immediate vindication of a right in favor of a protocol that might someday, years down the road, ensure that the right was honored seems a peculiar way to go about securing the right. Making a record of a defendant's choice, by contrast, ensures, that the defendant's rights are protected."

The pattern instruction on mail fraud refers to the use of either the United States Postal Service or a private interstate carrier to meet the jurisdictional "mailing" requirement. In proposed instructions, the defendant deleted all references to a private interstate carrier; the government deleted one such reference, but retained others. Prior to closing arguments, the court adopted the defendant's version of the charge. During closing argument, defense counsel then stated that "the shipping labels for three of the claims showed the use of UPS, not the U.S. Postal Service," and "offered this fact as an additional basis for reasonable doubt." The judge noted this and then advised counsel that the instruction would be amended to "make clear that use of either the U.S. Postal Service or a private or commercial interstate carrier satisfied the mail-fraud statute's jurisdictional element."

Rule 30(b) requires "that the district court inform counsel whether it will give a requested instruction prior to counsel's closing argument." Having done that, the court created a problem by subsequently amending the instruction after closing argument. The problem was created by the court giving an erroneous instruction in the first place. Defense counsel's misstatement of the law in closing argument then created a further problem. Ultimately, the Eleventh Circuit concluded that the revision of the instruction after defense counsel's closing argument resulted in "little prejudice at all, and certainly no unfair prejudice." The instruction on the means used to send the subsidy claims "had nothing to do with the theory of defense, which was that Defendant had acted in good faith in making his claims." "Defense counsel, a very able and experienced attorney, had to foresee the possibility that the court would take corrective action once it realized that the instruction it had agreed to give was not just legally incomplete, but flat out wrong under the circumstances. Accordingly, defense counsel must have anticipated any prejudice that Defendant experienced - which was quite slight – when she received agreement to an instruction that did not conform to the evidence."

In rebuttal argument, the prosecutor commented on defense counsel's statement regarding UPS, urging the jury not to let defense counsel's "definition of mail fraud confuse you. The judge will instruct you that UPS counts." While the prosecutor could have handled the situation better, such as by acknowledging that the parties made a mistake which would be corrected, there was no abuse of discretion in the judge not giving a curative instruction when requested by defense counsel.

A modified Allen charge did not constitute plain error. The Court's opinion sets out the pattern instruction alongside the district court's instruction and highlights the differences, which the Eleventh Circuit characterized as "minor wording changes." For example, the district court instructed that upon failure to agree on a verdict, the case "must" be tried again; the pattern instruction uses "may" instead of "must." The pattern instruction references "those of you who disagree." The given instruction stated "each dissenting juror." Four other linguistic distinctions are noted in the Court's opinion.

United States v. Nunez, 19-14181 (June 17, 2021)

Four codefendants appealed convictions for drug smuggling under the Maritime Drug Law Enforcement Act and the Eleventh Circuit affirmed the convictions, addressing several jurisdictional issues under the MDLEA.

The vessel qualified as a "covered vessel" under the MDLEA. "It carried no documents, it flew no flag, and it had no name or identifying numbers that would permit entry into a national registry. No one on the vessel verbally claimed that it had any nationality, nor was the vessel 'in a position to provide evidence' of any nationality, so it falls within the meaning of 'vessel without nationality' in international law." The MDLEA's jurisdiction extends to "a vessel without nationality." "In the absence of any claim of registry, the vessel lacked nationality." A "claim of registry" is defined in the Act as possessing on board the vessel and producing specified documentation; flying the vessel's nation's ensign or flag; or verbally claiming nationality or registry by the master or individual in charge.

The district court denied the defendants' request for an evidentiary hearing on the jurisdictional issue, asserting a right under the Confrontation Clause to cross-examine witnesses and call their own. The Eleventh Circuit upheld the district court's denial of an evidentiary hearing. Jurisdiction is a "'preliminary question[] of law to be determined solely by the trial judge'; it is not an element of the crime." Jurisdiction can be established by documentary evidence, without an evidentiary

hearing. Furthermore, there was no proffer of evidence as to any factual dispute, and the defendants "have never identified any facts provided by the government that they contest. Nor have they identified additional evidence they wanted to introduce at an evidentiary hearing."

Addressing the sufficiency of evidence as to three of the defendants, as to whether they knew they were transporting drugs, the Court observed that two "admitted during their interrogations in Mobile that they knew they were agreeing to transport drugs before they left the Dominican Republic," and the third "made incriminating statements that stopped just short of admitting to knowledge." Additionally, "the men were in a small boat that contained nothing but fuel, 400 pounds of cocaine, and a few personal items. There was little room for anything else. And they were promised a lot of money for the trip."

Three of the defendants were not deprived of their right to present a complete defense when they were prohibited from "cross-examining the government's witnesses about more than the basic details of their 10-daqy outdoor confinement on the [vessel]." They were prevented "only from introducing cumulative evidence, so it did not infringe their weighty interests." Alternatively, any error was harmless. "The government presented a video recording from the patrol plane, credible testimony that the smugglers attempted to throw the cocaine overboard when the Coast Guard approached, the confiscated cocaine, photos of the boat showing that the smugglers sat just inches away from the cocaine, and expert testimony that the smugglers' behavior was typical of cocaine importation from Colombia through the Dominican Republic into Puerto Rico. And the smugglers were able to introduce 'the essence of' the desired testimony."

Supreme Court of Florida

Haliburton v. State, SC19-1858 (June 17, 2021)

The Supreme Court affirmed the denial of a Rule 3.203 motion for a determination of intellectual disability as a bar to execution," and a successive Rule 3.851 motion.

Several witnesses testified at an evidentiary hearing. IQ scores ranged from 74 to 80, and under one test, there was a confidence interval of 70-79, "'meaning there's a 95 percent chance that his IQ score is between 70 and 79.'" The true IQ score would have been as high as 85. One expert placed the IQ in the 79-80 range. The trial court did not apply the "Flynn effect" to subtract that number from the IQ

scores of 80; rather, the court viewed them as scores of 76, a decision which was upheld by the Supreme Court. An expert testified as to reasons why the Flynn effect number should not be applied in this case.

The Court also addressed deficits in adaptive behavior. One expert noted a deficit in math functioning, but did not disclose any other significant impairment. Another expert, rejecting the existence of deficits, emphasized that Haliburton's last three years of formal education ranged from above average to failing, and he did not complete his education due to behavioral problems. While incarcerated, he was a full-time student in an academic program and demonstrated "average ability." The defendant had the burden of demonstrating by clear and convincing evidence that he satisfied this element of intellectual disability analysis.

While the trial court used somewhat ambiguous language when addressing the element of the age of onset prior to age 18, the Supreme Court construed the judge as "simply saying that Haliburton's deficiencies – which it had already determined were insufficient to establish intellectual disability – were not present when he was a minor." "Substantial evidence support[ed] the trial court's findings that Haliburton failed to establish that he ha[d] significantly subaverage intellectual functioning or concurrent deficits in adaptive behavior sufficient to meet the second prong of the intellectual disability standard." Thus, "Haliburton necessarily cannot meet the third prong."

Finally, the trial court conducted a "holistic review," as it did not rely solely on the failure to meet the first prong of the intellectual disability standard, but conducted "a detailed analysis of the testimony concerning the adaptive deficits prong and the 'conjunctive and interrelated assessment' of all three prongs of the standard as completed by *Hall [v. Florida*], 572 U.S. at 723, and *Oats[v. State*.]."

Haliburton also argued that section 921.137(4), Florida Statutes, which imposed a burden of proof of clear and convincing evidence on the defendant was unconstitutional, and that a preponderance of the evidence standard should have been applied. The Court did not reach this issue because it found that the claim would have failed even under such a lesser standard.

First District Court of Appeal

Grace v. State, 1D19-133 (June 18, 2021)

A juvenile's sentence totaling 50 years form multiple offenses was not unconstitutional as it was neither a life sentence nor the functional equivalent of a life sentence.

Copeland v. State, 1D20-1482 (June 18, 2021)

The trial court denied a Rule 3.801 motion for additional jail credit as a successive motion. On appeal, the State relied on attachments of prior motions to demonstrate this. Those pleadings, however, were not included in the record prepared by the Clerk of the Circuit Court and therefore could not be considered. Furthermore, the State's attempt to rely on those documents on appeal "would not relieve the trial court of its duty to attach these same records to its order to support a finding that a motion is successive." The case was reversed and remanded "for the trial court to attach the necessary documents proving Appellant's claims are successive."

Second District Court of Appeal

Ross v. State, 2D19-2061 (June 18, 2021)

In an appeal after a guilty plea, Ross challenged the trial court's denial of his prior motion to suppress. The Second District reversed the suppression order because "there was no record evidence of a standard or directive governing the impoundment of Mr. Ross's vehicle."

An officer stopped Ross's vehicle while randomly "running tags" on vehicles. The officer then learned that the tag was invalid and a traffic stop was conducted in a nearby public park. Ross, when pulled over, admitted that his license was not valid, but said he had been trying to get it fixed. He was arrested for driving with a suspended license. Ross then denied consent to search the vehicle. There was no evidence that the public park was a high-crime area or that it was known for vehicle theft or vandalism; nor were its hours of operation established. The officer acknowledged that many people left cars there overnight. The officer decided to have the car towed for impoundment, and later justified that based on "his generalized concern that he or the sheriff's department might be held liable if 'something' were to happen to the car." In a prior deposition, the officer stated that

he had decided to impound the car "no matter what happened." Ross asked to call someone to call him home. Although the officer agreed, when Ross did not get someone to come in about 20 minutes, the officer went ahead with the impoundment.

To support the impoundment, the State relied on a General Order of the Sheriff's Office, which states that vehicles may be impounded after an arrest if it is "determined that the vehicle is to be impounded for safekeeping."

To support an impoundment, "a law enforcement agency must show that it is operating under a standard of some sort – that is, a directive, a guidepost, a benchmark, a criteria – that informs and potentially curtails the exercise of an officer's discretion before a law enforcement officer can impound a vehicle and conduct an inventory search." It "is the State's burden to put evidence of that standard before the court." That was not done in this case. "At most, we can glean broadly stated criteria from General Order 10.08 regarding what items maybe searched in the course of an inventory search; but there is nothing in this record that tells us what criteria guided the deputy's initial decision to impound this vehicle." "We think the Supreme Court had something more in mind when it tethered the State's discretion to impound vehicles incident to an arrest 'to standardized criteria.'"

One judge dissented, finding General Order Number 10.08 to have been sufficient.

Burney v. State, 2D19-646 (June 16, 2021) (on motion for written opinion and rehearing)

Burney filed a petition alleging ineffective assistance of appellate counsel, claiming a manifest injustice as a result of counsel's failure to argue that the jury instruction on voluntary manslaughter as a lesser-included offense of second-degree murder constituted fundamental error. Although the petition was untimely, he claimed that counsel's failure resulted in a manifest injustice. The Second District disagreed.

The Florida Supreme Court has since receded from the decision in State v. Montgomery which had found the existence of fundamental error. Under Montgomery, Burney would have been entitled to a retrial. However, as a result of the recent decision receding from Montgomery, Knight v. State, Burney received what he was entitled to – a trial with correct instructions on the greater offenses for

which he was convicted, second-degree murder and attempted second-degree murder.

Third District Court of Appeal

R.L.G. v. State, 3D21-675 (June 16, 2021)

R.L.G. was held in indirect criminal contempt for leaving home in violation of a supervised release order. The Third District reversed the contempt as to two of the three incidents at issue and affirmed as to one.

"The evidence against the juvenile consisted of his probation officer testifying to location information provided by BI Incorporated, the third-party monitoring company that supplied and monitored an ankle bracelet worn by the juvenile'' On "the limited record before us and the precedent of this Court and the other district courts, we agree with the juvenile."

The Court addressed the State's argument on appeal that hearsay "encompasses only the out-of-court 'statements of persons,'" and does not extend to a "'statement by a machine' because it was automatically generated without manual input from any person.'" The opinion sets forth the testimony of the juvenile probation officer regarding how he learned of ankle bracelet alerts. The Court found the officer's testimony to be "inconclusive and indeterminate in several ways." It was unclear if the officer's reference to an alert from "the system" was a reference to BI's system of the State's system. It was also found to be unclear whether the system used GPS or WiFi. It was also "unclear if the officer meant BI sent its location information by only email alerts or by both emails and separate electronic alerts in some manner not further identified." The officer "was never asked and never said that BI's location information or messages were 'automatically generated without manual input from any person.'"

The Court noted that the State's argument was based on the "growing trend in the law to recognize that evidence of information from new technologies, DNA matches, facial recognition, and chromatography (used to detect chemicals in samples) is often generated without human input." "These circumstances have given rise to a movement to remove such out-of-court 'statements by machines' from the ambit of the hearsay rule, so long as the statements were automatically generated without manual input from any person." Because this argument had not been advanced by the State in the trial court, the evidence was not adduced to show that the information was automatically generated without human input, and the State, as

the proponent of the evidence, did not meet its burden of showing that the evidence was admissible.

One judge dissented, concluding that the evidence was sufficient to show that the alerts from the system were not hearsay.

One of the three incidents giving rise to contempt was also based on the officer's personal knowledge, and was therefore not subject to the same reversal.

Fifth District Court of Appeal

State v. Koontz, 5D20-2203 (June 18, 2021)

The Fifth District reversed an order suppressing evidence obtained from a warrantless search of a motor vehicle.

Koontz and a companion were fishing along a riverbank. Florida Fish and Wildlife Commission officers observed " a truck lodged in the mud along the edge of the riverbed." Koontz sought assistance to free the truck. The officers ran the identity of Koontz through a law enforcement database and learned that he did not have a valid driver's license and that the had an outstanding warrant for his arrest. Koontz attempted to flee but was apprehended and arrested. Because he was being arrested, and his companion did not have a valid license, the truck was going to be towed. A search revealed contraband in the center console.

The search was found to be a valid inventory search, "in compliance with FWC's general orders. Testimony from one of the officers detailed the polices and procedures related to inventory searches and indicated that those procedures were followed during the course of impounding the truck." There was nothing in the record to show that the inventory search was a subterfuge. "The truck was mired in the bank of a navigable waterway, and the decision to tow the truck from that location was not only reasonable but in line with FWC's operating procedures." Once the "determination to tow was made, the officers were not required to provide an alternative."