Case Law Update
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Supreme Court of the United States

Lange v. California, 20-18 (June 23, 2021)

A highway patrol officer pursued Lange's vehicle while Lange was playing loud music and honking his horn. The officer tried to stop Lange, but Lange, rather than stop, drove into his driveway and attached garage. The officer pursued Lange into the garage, observed signs of intoxication, administered sobriety tests, and later had a blood test administered, which resulted in misdemeanor charges of driving under the influence and a noise infraction. In this case, the Supreme Court held that "the pursuit of a fleeing misdemeanor suspect" does not always, or categorically, qualify as an exigent circumstance permitting a warrantless entry. It turns on the "particular facts of the case."

Exigent circumstances arising from a misdemeanant's flight, such as to allow a warrantless home entry, will entail "imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home." Those circumstances include the flight itself. Absent an exigency, the officers must obtain a warrant prior to entry into the home.

The California state appellate court erroneously applied a categorical rule when it concluded that the flight necessarily qualified as an exigent circumstance based on the pursuit of the misdemeanant. The case was therefore remanded for further proceedings in accordance with this opinion.

Supreme Court of Florida

Bargo v. State, SC19-1744 (June 24, 2021)

The Supreme Court affirmed a death sentence that was imposed at a resentencing proceeding. The sentencing court found the existence of two statutory aggravators, HAC and CCP, which were given great weight, and which alone would justify the death sentence, and 21 mitigating circumstances, all but two of which were assigned little or slight weight, with two receiving moderate weight.

Bargo argued that amendments to section 782.04(1)(b), Florida Statutes, barred the State from seeking the death penalty at the resentencing hearing. The original notice of intent to seek the death penalty was filed in 2011. The resentencing hearing was held after the 2016 statutory amendments, which added "certain notice requirements the State must follow when seeking the death penalty." Under the amended statute, a defendant must be given notice of intent to seek the death penalty by filing a notice within 45 days after arraignment; and that notice must list aggravating factors the State intends to prove. The amendments went into effect on March 7, 2016.

The State was not precluded from seeking the death penalty at the resentencing which occurred after the statutory amendments. "[N]othing in the 2016 legislation evinces any intent to apply to cases in which the defendant was arraigned – or waived arraignment – years before the amendment took effect."

Bargo argued that the trial court erred in applying the HAC factor when it permitted the jury to hear evidence of matters occurring after the murder, regarding the disposal of the body. In a pretrial motion in limine, the defense sought to exclude this evidence, and the State asserted that it was relevant only to the CCP factor, "because the post-death acts were part of a prearranged plan." Defense counsel requested an instruction limiting consideration to CCP, but no proposed instruction was submitted, and when the HAC and CCP instructions were given, there was no objection. In closing argument, the prosecutor referred to the burning of the victim when discussing HAC, but there was no objection to that comment; post-death acts other than that were referenced solely with respect to CCP.

The argument on appeal asserts prejudice only as to the HAC factor. Viewing defense counsel's arguments in the trial court as a concession of relevancy as to CCP, the appellate argument as to HAC was found to be unpreserved, and Bargo did not present any argument that fundamental error existed.

Bargo argued that greater weight should have been assigned to the mental mitigation evidence. A "circuit court is not obligated to provide 'demonstrable reasons' for the weight assigned to a mitigating circumstance." The record supported the trial court's conclusion that the State's expert was more credible than the defense's expert. The defense expert testified that of Bargo's multiple diagnoses over the years – ADD/ADHD, oppositional defiant disorder (ODD), bipolar disorder, schizoaffective disorder, anxiety and depression – Bargo was currently suffering only from depression and anxiety. The expert opined that the murder "was complex but not well planned." Bargo's emotional quotient was between ages 14

and 15. The State's expert concluded that ODD was the most appropriate diagnosis, which was "a behavioral disorder rather than a neurochemical disorder." The expert disputed prior diagnoses. The sentencing judge expressly found the State's expert to be the more credible witness and emphasized the defense expert's several assertions of not being aware of the facts of the case. Another defense expert's opinion regarding an "abnormal" PET scan of Bargo's brain was contradicted by two experts for the State.

The lower court's rejection of the mitigator regarding Bargo's capacity to appreciate the criminality of his act or conform his conduct to the requirements of the law, was likewise upheld based on the lower court's credibility determinations regarding the parties' expert witnesses.

The lower court did not err in assigning the defendant's age little weight. This argument was based on the expert's opinion regarding the defendant's EQ of 14 or 15 years of age. The defense expert admitted that there was no test for measuring EQ. That expert was found by the trial court to have "failed to identify any aspect of [Bargo's] "thought processes" or "behavior" before, during or after the instant offense that suggested that [Bargo] was functioning with the maturity level of a 14 or 15-year old.'"

Although the Supreme Court concluded in Lawrence v. State, 308 So. 3d 544 (Fla. 2020), that comparative proportionality review no longer existed in appellate review, Bargo argued that "relative culpability review" survived, based on other sentences given to codefendants. The Court did not decide whether such "relative culpability review" survived Lawrence, as pre-Lawrence case law had generally rejected such claims raised by "triggerman" defendants. In this case, "the sentencing order makes clear that the evidence established that Bargo not only fired the gun but planned all aspects of the murder."

Puzio v. State, SC19-1511 (June 24, 2021)

The Supreme Court held that the Fourth District's decision in this case was contrary to the Supreme Court's decision in Williams v. State, 242 So. 3d 280 (Fla. 2018), regarding "the proper remedy for a harmful *Alleyne* error that occurs where, in sentencing a juvenile offender under section 775.082(1)(b), Florida Statutes (2020), the trial court enhances the sentence under section 775.082(1)(b)1. Without a jury finding of the fact that authorizes the enhancement, namely whether the juvenile offender 'actually killed, intended to kill, or attempted to kill the victim.'"

Where such an error existed, the Supreme Court's Williams decision held that the proper remedy was "to resentence the juvenile offender pursuant to section 775.082(1)(b)2.," the statutory sentencing provision that applies to a juvenile offender "who did not actually kill, intend to kill, or attempt to kill." The Fourth District had remanded for a "'ministerial correction' of sentence for which '[t]he defendant need not be present.'"

The Fourth District had treated the resentencing on remand as ministerial because the sentencing judge, in a proceeding during which the Fourth District had relinquished jurisdiction to the trial court, had stated that the court "would have imposed the same sentences for the homicide offenses had it resentenced Puzio in the first instance under section 775.082(1)(b)2." Puzio was entitled to a de novo resentencing.

The State asked the Court to expand Williams and hold that a jury could be empaneled on remand to make the finding regarding an intent to kill, etc. The Court declined to decide that issue in this case. The facts of this case were deemed unique and made it "a less-than-ideal vehicle for revisiting the double-jeopardy concerns that caused the *Williams* court to forego the possibility of empaneling a jury and hold instead that the remedy of 'resentencing pursuant to section 775.082(1)(b)2. is the more prudent course.'" And, the State did not ask for such a remedy in the district court of appeal. The double jeopardy issues of empaneling a new jury had not been fully briefed.

Eleventh Circuit Court of Appeals

United States v. Henry, 18-15251 (June 21, 2021)

The Eleventh Circuit affirmed a sentence of 108 months after a guilty plea to the charge of being a felon in possession of a firearm. Henry argued that the sentence was unreasonable and that the district court failed to adjust the sentence under Sentencing Guideline s. 5G1.3(b)(1), "for time served on an undischarged term of state imprisonment."

Henry had served 24 months of a state prison sentence of 20 years for burglary. He argued that although the Supreme Court held that the Sentencing Guidelines were advisory, s. 5G1.3(b)(1) was binding on sentencing courts. The Eleventh Circuit disagreed. The Supreme Court's Booker decision held that "all guidelines are advisory." One Eleventh Circuit judge dissented as to this issue, concluding that there was a distinction between "the sentencing *range* produced by

the Guidelines," which, per Booker, was advisory, and "kind-of-sentence" guidelines, which remain untouched by Booker.

The Court further held that even if there was an error in "failing to properly consider the Guidelines' advisory recommendation" of s. 5G1.3(b)(1), any such error was harmless in this case. The sentencing judge stated on the record that the same sentence would be imposed by the court either way.

The sentence was also found to be substantively reasonable. The district court considered all relevant factors. It considered the Guidelines, the PSI report, and arguments of counsel. The advisory range exceeded the statutory maximum. The court considered "the fact that Henry had been convicted of ten burglaries over the 23 years prior to the offense he was being sentenced for." In at least three of those, Henry was armed and he had a prior conviction for an assault.

In addition to distinguishing between two classes of guidelines, the dissent believed that the Eleventh Circuit itself had previously held that s. 5G1.3(b) is mandatory in its own decision of United States v. Knight, 562 F. 3d 1314, 1329 (11th Cir. 2009). The majority disagreed with the dissent's interpretation of Knight. The dissent construed Booker as making the Guideline "range" advisory, but concluded that "provisions in the Guidelines that neither enhance a defendant's sentence based on judicial factfinding nor mandate the imposition of a sentence within the guideline range are biding on sentencing courts, so long as they do not conflict with a federal statute or the Constitution." The dissent then proceeded to conclude that the adjustment under section 5G1.3(b)(1) was "one such requirement."

In Re: Grand Jury Subpoena, 21-11596 (June 25, 2021)

In grand jury proceedings, an attorney working for the corporate entity that ran a candidate's campaign, was subpoenaed to testify and invoked the attorney-client privilege "over his communications with the candidate and the Campaign regarding the subject of the subpoena – certain financial disclosure forms filled out by the Campaign and a number of purchases paid for by the Campaign's bank accounts." The district court partially granted the government's motion to compel on the basis of the crime-fraud exception to the attorney-client privilege; the Eleventh Circuit affirmed that ruling.

The government satisfied its burden of having "some foundation in fact" that would establish "the elements of some violation that was ongoing or about to be committed." The government proffered evidence related to wire fraud, that "a

campaign donor . . . said that he donated money to the Campaign with the intention that the candidate 'would use the money for purposes related to his official position' as an elected official. . . ."

The government also made the required showing that "the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it." The evidence "relates to statements the attorney made to the government during an interview" in which he stated that "he provided legal advice to the Campaign related to completing and filing the financial disclosure forms now at issue." During his review of relevant bank statements, "he repeatedly saw expenditures from the bank accounts that appeared personal in nature."

First District Court of Appeal

C.H. v. State, 1D20-2686 (June 24, 2021)

The First District remanded the case to the trial court because it was unclear whether the trial court deviated from the recommendation of the Department of Juvenile Justice as to the restrictiveness level for the juvenile's disposition. DJJ recommended a nonsecure placement. The trial court first ordered nonsecure residential placement in a standard commitment order. A week later, a "departure" order was entered, mandating commitment to a "medium" security level placement. Florida law, however, does not recognize "medium" as a restrictiveness level. The trial court defined its criteria, which were more restrictive than the statutory definition of a nonsecure facility. The First District sought clarity from the trial court as to what it was doing with respect to the restrictiveness level.

Giddens v. State, 1D18-4591 (June 22, 2021)

The First District affirmed convictions for first-degree murder and attempted robbery. Although the trial court erred in permitting "the prosecutor to ask Giddens whether the State's witnesses . . . were being untruthful, and whether they all had lied to the jury," that error was harmless beyond a reasonable doubt.

Giddens never disputed "that he was the person that shot I.P. That was not his defense." He testified "that he did not commit a robbery, that he brandished the gun in self-defense or in defense of others, and that the gun accidentally discharged when I.P. aggressively charged him" Defense counsel engaged in extensive cross-examination of state witnesses, highlighting inconsistencies in their testimonies. Defense counsel asked one of those witnesses whether he had lied. Defense counsel,

in closing, argued that the State's witnesses were untruthful. "There was, in other words, plenty of impeachment questioning on be3half of Giddens to telegraph to the jury that he believed the State's witnesses were not telling the truth and that the jury should believe his version of events instead. We see no reasonable possibility that this would have been any less the case even without the prosecutor's inappropriate questions; there was, quite frankly, no other way to reconcile Giddens's defense with the testimony of the State's witnesses."

Second District Court of Appeal

Petterson v. State, 2D19-769 (June 25, 2021)

The Second District remanded a sentence for correction of scrivener's errors. The defense sought correction of these through a Rule 3.800(b)(2) motion pending the direct appeal. Although the trial court granted that motion and entered an order correcting the errors, it did so more than 60 days after the filing of the motion. The court's order was therefore a nullity and the trial court was directed to again correct the errors on remand from this appeal.

K.W. v. State, 2D19-3927 (June 23, 2021)

The trial court erred in denying a motion to suppress evidence because there was no reasonable suspicion to detail K.W., nor probable cause to arrest him.

Police responded to a call from a homeowner whose alarm went off at 1:00 a.m. The homeowner viewed video surveillance and saw three juveniles on bicycles, but did not recognize anyone and did not observe anything more than the juveniles sitting on their bicycles. Her alarm, attached to a front window, could "only go off on the inside if the screen was opened." The homeowner provided police with the address of a juvenile she suspected; she did not provide any name; nor did she state that the one whose address she provided resembled those in the video.

The deputy arrived and observed three juveniles on bicycles at the end of the owner's driveway. That officer had observed a bicycle on the road, later learning that it was in front of the house whose address the homeowner had provided. A second deputy went to the address provided and spoke to K.W., who initially provided a false name and date of birth; he later gave his correct name. The officer took him into custody for the false name. She searched him and found marijuana.

While it was not clear to the Second District when the initial contact transformed from a consensual encounter into an investigatory stop, "at no time during the encounter did the deputy have the required suspicion to detain" K.W. Nor was there probable cause for an arrest for providing a false name. That is "not a crime unless the individual providing the false name has already been lawfully detained by law enforcement."

Third District Court of Appeal

Ward v. Junior, 3D21-1355 (June 25, 2021)

The Third District granted a habeas corpus petition after the trial court denied pretrial bail. Ward had been released on house arrest and violated conditions of release and was taken back into custody. Ward did not commit a new law violation and there was no motion from the State for pretrial detention based on statutory provisions permitting such pretrial detention. On remand, the State was granted leave to file a motion for pretrial detention, and, failing that, the trial court had to determine appropriate conditions of release.

Fourth District Court of Appeal

Teets v. State, 4D19-2253 (June 23, 2021)

The Fourth District affirmed a conviction for second-degree murder.

The trial court did not fail to conduct a Richardson hearing because no discovery violation occurred. The Sate presented testimony from an expert regarding "trigger pull test results." The defense objected at trial that the defense did not have a report of the trigger pull on the weapon in question. "Before trial, the State disclosed the 'Crime Laboratory Analysis Report' in discovery. The defendant was therefore on notice the State tested and examined the weapon. He should have reasonably expected the State to test the gun's operability and examine its features, including the trigger pull weight. But the defendant chose not to depose the expert. His claim is therefore barred because reasonable diligence would have led to the discovery of the evidence." Additionally, an expert's notes are not subject to disclosure.

Jenkins v. State, 4D20-1171 (June 23, 2021)

The Fourth District affirmed a conviction for indirect criminal contempt without a written opinion. One judge wrote a dissent, concluding that the county court judge who tried the contempt case lacked subject matter jurisdiction. The contempt case originated with an order to show case by a circuit court judge who received a letter, but disqualified himself. The chief judge ultimately transferred the case to the county court criminal division, which opened a misdemeanor file. The dissenting judge asserted that under section 83.22, Florida Statutes, a court may punish contempts "against it." The dissent also addressed what it believed to be a conflict between a local administrative order and the rules of procedure regarding service of a county court judge as an acting circuit court judge. Under the rules of criminal procedure, only the supreme court chief justice may appoint a different judge to try a contempt; not a chief judge of the circuit court.

Almarales v. State, 4D20-1611 (June 23, 2021)

The Fourth District reversed convictions for two counts of lewd or lascivious molestation of a child. The trial court "erred in allowing thee state to make a bolstering argument regarding the victim."

In closing argument, the prosecutor stated:

> In opening statement, defense counsel told you that she imagined these allegations, that kids at school are talking about sex, that she's learning about sex at school. Ladies and gentlemen, an eight-year-old is not going to imagine allegations like this in the detail and in the manner that she explained it, an eight-year-old as smart as this child is.

"While the prosecutor in this case did not expressly argue that an eight-year-old does not have the capacity or mental ability to fabricate sexual abuse allegations, the prosecutor essentially said as much. The prosecutor suggested that any eight-year-old could not come up with the detail supplied by the victim in this case. There was no evidence at trial to support such an assertion, and it was not a reasonable inference from the evidence. The prosecutor went beyond the evidence and asserted that children of the victim's age do not have the knowledge necessary to fabricate the sort of allegations involved in this case."

As to the State's argument that the comment was fair reply to defense argument that "the victim's testimony was fabricated because the words she used 'were not the words of an eight-year-old," that was "a matter that is arguably within the realm of common experience," and, "if the state believed that defense counsel's arguments were improper, the state should have objected."

Walton v. State, 4D21-139 (June 23, 2021)

Although a Rule 3.850 motion was correctly denied as being legally insufficient, the trial court erred in determining that the motion was untimely. A motion may be filed within two years of the date of issuance of an appellate court's mandate in a direct appeal.

State v. Stephenson, 4D21-332 (June 23, 2021)

The Fourth District reversed an order granting a motion to vacate a plea.

At a misdemeanor arraignment, the defendant accepted the State's offer of a withheld adjudication. The defendant was also offered the option of attending a misdemeanor diversion program. There was no plea colloquy. Four years later, the defendant filed a Rule 3.850 motion, alleging that he was being deported back to Jamaica as a result of the plea and would not have erred it, and would have accepted to diversion program if he had been advised of the immigration consequences.

The motion was untimely, as it was filed more than two years after the judgment and sentence became final. The record also reflected that the defendant had been detained by immigration authorities at the airport in 2015, but then waited three years to file the motion to vacate. It was therefore clear that the defendant could have learned of the immigration consequences within two years of the finality of the conviction.

State v. Emmanuel, 4D21-348 (June 23, 2021)

The trial court discharged the defendant based on a speedy trial violation. The Fourth District reversed. The case revolved around the suspension of speedy trial periods under the Florida Supreme Court's Administrative Order, 20-13.

The State filed an information 103 days after the arrest for robbery. The administrative order in question suspended all time periods involving the speedy trial rule. The trial court erred in concluding that the administrative order, related to

COVID-19, did not apply to the time for filing charges. The administrative order was not limited to time periods for court proceedings.

Fifth District Court of Appeal

Similien v. State, 5D19-3476 (June 25, 2021)

A trial court's oral pronouncement of credit for time served prevails over the written sentence. The case was remanded for the trial court to correct the entry on the written order to conform to the oral pronouncement.