Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Colston, 19-13518 (July 13, 2021)

The Eleventh Circuit affirmed convictions for two drug offenses: knowing possessing with intent to distribute two kilograms of cocaine, and conspiring to distribute cocaine.

Colston had been under surveillance, and was arrested when she left a post office, carrying a package that contained about $200,000 worth of cocaine. Colston challenged the sufficiency of the evidence to show that she knew that the package contained cocaine. Although the government conceded that it had to prove Colston knew she possessed cocaine, the Court rejected that concession and found that the government had to prove only that Colston knew that she possessed a controlled substance. The statutory offense did not "require knowledge of the specific substance she possessed." 18 U.S.C. s. 841(a)(1) prohibits, inter alia, possessing with intent to distribute "a controlled substance."

The evidence was sufficient to prove that Colston knew that the package she picked up at the post office contained a controlled substance. She was in frequent contact with Pancho, who did know what was in the package. The two engaged in 169 phone calls in the 30 days preceding the arrest, and three days prior, there were 67 different contacts about the package. There were substantial efforts by the two to track the package down. "All that interaction with Pancho means that Colston had ample opportunities to discover the details of the plan – including that it involved a controlled substance." Colston's partner in the crime, Reyes, admitted that "he and Colston were going to Mobile 'to pick up drugs.'" Colston was instrumental to the plan's success. She was the one who asked post office employees about the package's whereabouts. She was the one who spoke to a postal inspector by phone, and then agreed to take a trip to Mobile, Alabama to retrieve the package. She had a copy of the package's receipt and tracking number stored on her phone, "empowering her to take possession of a package containing roughly $200,000 of contraband. This all suggests that she had the autonomy to obtain the package herself. . . . So her crucial contributions to the scheme supported the inference that she knew the package contained a controlled substance."

Colston also engaged in "extreme behavior" when trying to locate the package. When it could not be found, she drove across state lines to pick it up. While searching, "she texted a customer that she was in the 'middle of something huge.' Helping a friend pick up a lost package is hardly 'huge' in the ordinary scale of life events, so Colston's communication allows for an inference of knowledge." Knowledge could also be inferred from text messages on Colston's phone "showing that she illegally sold prescription pills right before her arrest." These messages "rebutted the suggestion that Colston was not familiar with drug trafficking."

With respect to the argument that the district court should not have instructed on a theory of deliberate ignorance, the "court instructed the jury that it could convict if Colston either knew the package contained a controlled substance or kept herself deliberately ignorant of it. So if, as Colston contends, there was insufficient evidence that she was deliberately ignorant of the contents of the package, then our precedent makes clear that the jury must have convicted on the supported theory – actual knowledge. []. This means that any error in giving the deliberate ignorance instruction was undoubtedly harmless." If the evidence at trial was sufficient to support one theory but not the other, the court presumes "that the conviction rested on the supported theory."

The evidence of the prior illegal sales of prescription drugs was properly admitted and was not inadmissible evidence of bad character. The evidence was "'highly probative of intent to distribute a controlled substance.'" The "text messages rebutted the suggestion that she was not familiar with drug trafficking and allowed the jury to infer that her involvement int eh charged crimes was no mere accident or mistake. And Colston's opioid offenses were temporally proximate to the charged conduct; the government only admitted messages from the ten days before her arrest."

United States v. Stancil, 19-12001 (July 13, 2021)

The Eleventh Circuit affirmed Stancil's conviction and sentence for being a felon in possession of a firearm and ammunition.

Stancil's sentence was properly enhanced under the Armed Career Criminal Act, as his three prior Virginia convictions for drug offenses were qualifying predicates under the ACCA.

Qualifying predicates under the ACCA include "serious drug offenses." The relevant Virginia statute made it unlawful to "manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance." The Eleventh Circuit applied the categorical approach in assessing the elements of the state offense. Stancil argued that the lest culpable conduct under the statute – possession with intent to give a controlled substance should not qualify as a serious drug offense because "giving" did not involve manufacturing, distributing, or possessing with intent to manufacture or distribute; "giving" could be a mere "accommodation," without an intent to profit. The Eleventh Circuit disagreed.

United States v. Phillips, 18-11737 (July 13, 2021)

Phillips appealed three convictions and sentences for sending sexually explicit videos to a 14-year old boy. Phillips pretended to be a 17- or 18-yer old girl and transmitted sexually explicit videos of women. The Eleventh Circuit reversed one of three convictions.

Phillips argued that the jury instructions constructively amended the indictment. The indictment charged Phillips with "knowingly and intentionally" causing a minor to engage in sexually explicit conduct. The jury was instructed that the government need not prove Phillips knew the boy was a minor. The offense for which Phillips was charged, 18 U.S.C. s. 2251(a), "does not require knowledge of age." The use of the phrase "knowingly and intentionally" did not "mean that the government charged Phillips with knowing his victim's age." An "extra mens rea term in an indictment ordinarily does not become part of the charged crime, and can be ignored without error."

Phillips argued that dual convictions for possessing child pornography and receiving it constituted a double jeopardy violation because possessing was a lesser-included offense of receiving. As this claim was not raised in the district court, it was reviewed for plain error. The Eleventh Circuit agreed that the dual convictions violated double jeopardy principles and vacated the conviction for possession. "Both offenses involved the same conduct from the same day, so punishing Phillips for both violated the Double Jeopardy Clause." "When a defendant has been improperly convicted for the same offense under two different counts, 'the only remedy' available is for the court 'to exercise its discretion' and 'vacate one of the underlying convictions.'"

First District Court of Appeal

Burgess v. State, 1D20-170 (July 16, 2021)

The First District affirmed a conviction for sexual battery of a child under the age of 12.

There was no abuse of discretion in admitting child hearsay statements. The statements were made by an officer, to whom the victim related how the defendant "inappropriately touched her several times." Further details were provided by the child, who also stated that "she was afraid to go home because she did not want to be around Appellant." The victim stated that she "knew the difference between a truth and a lie." She was in the fourth grade. The trial court made the following findings: "(1) the statements were general in nature; (2) the victim's uncomfortable demeanor was logical given the nature of the disclosure and the surprise of the inquiry; (3) the disclosure occurred only hours after the incident; (4) this was the first information provided to someone who asked about the incident; (5) there was no indication that the victim had any ill will toward Appellant or a motive to fabricate the disclosure; (6) given the close proximity to the incident the victim was likely under the emotional effects of the incident; (7) the language used by the victim was appropriate for the circumstances she was describing and her age; and (8) no evidence suggested that the victim was improperly influenced to make the disclosure."

The trial court did not err in admitting collateral offense evidence. Such "evidence may be introduced to corroborate the victim's testimony by showing that the defendant has a propensity for committing 'sexual offenses' as defined in section 90.404(2)(c)2. . . . Propensity evidence is relevant as evidence of corroboration, especially in child sexual abuse cases where the child victim is typically the sole witness, corroborative evidence is scant, and identity is not at issue." In this case, the victim was 10 years old at the time of the incident and was the sole witness, the collateral-crime evidence was therefore relevant. In finding that the relevance of the testimony was not outweighed by its prejudice, the court emphasized the following similarities between the multiple sets of offenses: "(1) Appellant used both his hands, and his penis when he touched and penetrated both victims; (2) both victims told Appellant to stop; (3) Appellant did not wear a condom in either incident; (4) both incidents took place in a residence belonging to a woman with whom Appellant was in a relationship; (5) Appellant took advantage of the absence of other adults; and (6) Appellant exploited the immaturity of both victims."

D.B. v. State, 1D20-2757 (July 16, 2021)

A claim that the trial court failed to orally pronounce the duration of probation and that it was not stated in the written order, was properly preserved for appellate review through a motion under Fla.R.Juv.P. 8.135(b)(2), which was deemed denied when the trial court failed to rule on it within 30 days.

Taylor v. State, 1D19-3522 (July 15, 2021)

Convictions for multiple drug offenses were reversed because the trial court erred in denying a motion to suppress evidence. The permissible scope of a welfare check, during which the drugs and paraphernalia were seized exceeded the permissible scope of a welfare check.

A deputy sheriff responded to a call about a man sleeping in a vehicle, at 4:30 a.m., with a knife on his lap. The officer observed this upon arrival at the scene. "The vehicle was legally parked, its engine was off, and no one else was present in the vehicle." The officer did not smell alcohol and the area was not a high crime area. There was no reason to believe Taylor had committed an offense or was about to. The officer never suggested "he had a reason to be concerned for Taylor's health or safety." The officer called for backup, which arrived with a K9 deputy. One deputy opened the driver's door, pulled Taylor out, while he was still asleep and seized the knife. Upon inquiry, Taylor indicated that he did not need medical attention. At the same time, the dog alerted to the presence of narcotics, which were seized during the ensuing search of the vehicle.

The First District accepted that the initial welfare check was reasonable. However, "the Deputy did exceed that scope when he opened the vehicle door without warning and pulled Taylor out of the vehicle while still asleep." There was no sign of criminal activity; "[n]or was it apparent that Taylor was unresponsive, unconscious, or experiencing any sort of health emergency." And, the officer made no inquiry before pulling Taylor out of the vehicle. The mere presence of the knife was inadequate to justify the seizure.

Additionally, in an argument regarding standing that the State raised for the first time on appeal, the Court concluded that "[b]ecause Taylor disclaimed the illegal items as a result of the unconstitutional search and seizure, he retains standing to challenge the search and seizure." And, even if the alert by the dog provided probable cause for the search of the vehicle, the illegality of the detention preceded the alert by the dog.

Massey v. State, 1D20-950 (July 15, 2021)

The First District affirmed multiple convictions. The defendant ended up representing himself in a probation violation case while he was represented by an assistant public defender in the case involving new offenses. A claim that the trial court erred in denying a motion to continue was not expressly reserved for appeal in conjunction with the defendant's guilty plea. Alternatively, even if it had been reserved for appeal, there was no abuse of discretion.

The trial court renewed the offer of counsel numerous times prior to the trial and plea. Although the assistant public defender, in the capacity of standby counsel, expressed "concern Appellant was not prepared because he had not deposed several witnesses," "Appellant remained steadfast in his desire to proceed to trial *pro se*." After the jury was sworn, and prior to testimony, Appellant requested counsel. The public defender again moved for a continuance, and the trial court provided a recess to interview witnesses and review the evidence. Immediately after the recess, Appellant entered his guilty plea to the charges.

Duty v. State, 1D20-1353 (July 15, 2021)

Duty was convicted of armed robbery. The First District reversed the denial of a Rule 3.850 motion and ordered a new trial. Trial counsel was ineffective for "1) failure to investigate and present an alibi witness; 2) failure to impeach a witness; and 3) failure to move to suppress am impermissibly suggestive show-up identification."

The robbery occurred at about 3:30 p.m. Duty's employer, Mr. Davis, testified at the evidentiary hearing on the 3.850 motion, that he dropped Duty off around 4:00 p.m., after work, in the vicinity of the crime, providing an arguable alibi. The employer was called by the police at about 4:30 p.m., inquiring abut the defendant. Defense counsel testified that he was unaware of the call from the police prior to trial, but it was noted on an investigator's report and was part of trial counsel's file. Mr. Davis's testimony would have added other favorable information, including testimony about what the defendant was wearing and the amount of cash he had when he got out of Davis's car. These points would have undermined testimony presented by witnesses for the State.

At trial, Detective Nieto testified that he was never given Mr. Davis's name as an alibi witness. That would have been refuted by the videotaped interrogation

of the defendant, in which the defendant repeatedly inquired about Mr. Davis, and Nieto was seen holding Davis's business card. At the evidentiary hearing, defense counsel testified that he did not want to use the video because of the defendant's use of profanity, including a reference to the victim. The First District concluded that this strategic decision was "not reasonable under the norms of professional conduct." The video clearly impeached Nieto, and the "use of profanity by Appellant does not reasonably raise such a concern that the interrogation tape should not have been used, especially considering the limited amount of evidence available to convict Appellant of the crime charged."

Trial counsel should have moved to suppress the identification. The victim called 911, a few minutes after being robbed at knifepoint. She "described the perpetrator as a male wearing a grayish, light green sweatshirt; a red ball cap; and cargo shorts. He did not have a backpack." She was then told by law enforcement that a "suspect, who fit the description, had been detained." She was driven to the location of the detention. The defendant was shirtless, wearing a backpack and a construction tool belt. "Rather than having Appellant appear as he was when detained, the police had Appellant remove his backpack and tool belt and had him put on a white t-shirt. Appellant was surrounded by several officers at the time of identification." The victim said the defendant "looked 'pretty close' to the person who robbed her." An officer told he she needed to be sure and she responded that she "can't be sure, but, yes, it looks like the guy."

In finding the identification procedures unduly and unnecessarily suggestive, the First District emphasized, from the 3.850 evidentiary hearing, that the victim went to the police station after the identification and "was told by officers that the cash stolen from her was not located, but drugs were found on Appellant and that he had probably used her cash to purchase the drugs before being detained. However, there is no evidence in the record that drugs were ever found on Appellant, and he was never charged with a drug related offense. The victim testified that being told this false information about the drugs gave her confidence in her identification. The victim also stated that if she had known before trial about the information regarding Appellant's attire when he was detained and his possible alibi, then she likely would not have confidently identified Appellant as the perpetrator at trial." While trial counsel testified he did not know that the victim was told about drugs, "had trial counsel questioned the victim appropriately, it is highly likely that this information would have been acquired prior to trial."

Ultimately, the First District agreed with Duty's argument that counsel was ineffective based on "the cumulative effect of errors discussed above."

State v. Dutton, 1D20-2912 (July 15, 2021)

The First District reversed an order dismissing the case based on a speedy trial violation, citing its recent decision in Davis v. State, 2021 WL 2493118 (Fla. 1st DCA June 18, 2021), for the point that the "Florida Supreme Court's administrative order, AOSC20-13, suspended '[a]ll time periods involving the speedy trial procedure,' including those related to the filing of informations))."

Lycans v. State, 1D20-1715 (July 13, 2021)

The First District affirmed the denial of a Rule 3.850 motion as untimely, successive, and lacking in merit.

The motion alleged that counsel was ineffective for failing to present an expert witness regarding the defendant's state of mind and mental capabilities. He further argued that serious health issues and medications caused him to reject a 15-yeaer plea deal offered by the State. "Lycans should have raised any such claim on direct appeal." And, the ineffective assistance of counsel claim was untimely, as the motion was filed more than two years after the issuance of the mandate in the direct appeal. Finally, the medical records regarding hospitalization and medications were known well before the filing of the motion. Lycans was aware of his own records, medications and hospitalizations. The State listed the medical records in its discovery response. Defense counsel referred to them in closing argument at trial. And Lycans referred to them in a prior postconviction motion. These records therefore did not qualify as newly discovered evidence.

Mitchell v. State, 1D21-181 (July 13, 2021)

The First District affirmed the summary denial of a Rule 3.850 motion.

A claim of newly discovered evidence satisfied the requirement that it could not have been uncovered by due diligence at the time of trial, but it was not such "that it would probably produce an acquittal on retrial." An informant "told Mitchell that Champion stated that he intended to testify falsely that Mitchell confessed his guilt. Champion hoped that his testimony would result in a more lenient sentence. Champion admitted that Mitchell never confessed to the crime nor did he share anything about his case with Champion." Champion testified at trial that Mitchell confessed. However, at trial, "[m]ultiple witnesses testified that they saw Mitchell selling black tar heroin to the victim on the night the victim died. Moreover, defense

counsel thoroughly impeached Champion's credibility. Counsel brought out that Champion had a motive to lie in exchange for leniency. And even if the jury had found Champion's testimony credible, the alleged statement by Champion to the informant that Mitchell never confessed to him does not negate or refute the other evidence of Mitchell's guilt."

A Giglio claim based on the presentation of the same trial testimony from Champion failed because Mitchell's motion "did not offer any evidence or make any argument that the prosecutor knew or reasonably should have known that Champion's testimony was false."

And, in a related claim, Mitchell argued that counsel was ineffective for failing to address Champion's perjured testimony, and that Mitchell had advised counsel about this, but counsel; did not act on it. Mitchell did not allege what else counsel should have done, however.

Mitchell's request for counsel for the Rule 3.850 proceedings was denied by the trial court and that denial rested within the court's discretion. The motion was not deemed complex and did not require "substantial legal research."

Second District Court of Appeal

Rodriguez v. State, 2D19-1106 (July 16, 2021)

Rodriguez appealed convictions and sentences for second-degree murder with a firearm and third-degree murder of the same person. The Second District reversed the conviction for third-degree murder as a double jeopardy violation, and affirmed the conviction for second-degree murder.

Second-degree murder and third-degree murder have different elements and are separate offenses. Second-degree murder "requires proof of an 'act imminently dangerous to another and evincing a depraved mind regardless of human life.'" Third-degree murder "requires that the person be 'engaged in the perpetration of, or in the attempt to perpetrate, any felony other than [those enumerated in s. 782.04(4).]" However, the two offenses were degree-variants of the same offense. They are both in the same murder statute, s. 782.04. The dual convictions were therefore barred. The Court rejected a portion of the Appellant's argument, stating that "double jeopardy protections do not extend to the information or jury selection phase" of the case, and the State therefore "permissibly charged and tried Mr. Rodriguez on the dual homicide offenses without violation double jeopardy." The

double jeopardy concerns arose only after the "jury returned guilty verdicts on the dual murder offenses."

The trial court had attempted to cure the problem. After adjudicating the defendant guilty of both offenses, at the subsequent sentencing hearing, the judge announced its decision to rescind the adjudication for third-degree murder. The court then filed a new written judgment and sentence, solely for the one murder conviction. The trial court failed, however, to file a written order rescinding the prior adjudication for the second murder conviction. The trial court, on remand, was thus ordered to enter a dismissal as to the conviction for third-degree murder. The Second District rejected the Appellant's argument that the remedy was to enter an adjudication of not guilty.

Third District Court of Appeal

Haro v. State, 3D21-1197 (July 14, 2021)

The trial court erred in denying a motion under Rule 3.850, which alleged that counsel was ineffective for failing to obtain jail credit for 113 days for time spent in Colorado, while fighting extradition to Florida. The trial court relied on Rule 3.801, which requires motions for jail credit to be filed within one year of the finality of the judgment and sentence. That rule did not apply because a) Rule 3.801 does not apply to credit for time served out-of-state; and b) the motion was filed under Rule 3.850, as a claim of ineffective assistance of counsel.

Garcia v. Junior, 3D21-1265 (July 14, 2021)

The trial court, after an evidentiary hearing, granted the State's motion for pretrial detention. The Third District denied Garcia's subsequent habeas corpus petition challenging the pretrial detention. Garcia was charged with four counts of driving under the influence manslaughter and other charges.

Pretrial detention is permitted, by statute, upon a finding of a "substantial probability" that an accused committed DUI manslaughter and that the accused "poses a threat of harm to the community." The trial court's finding of the substantial probability was supported by the evidence adduced. Evidence included Garcia's slurred speech, video footage of him stumbling as he attempted to sit. A blood alcohol level of .062, testimony regarding the operation of a vehicle at "almost three times the posted speed limit on a surface road, testimony of "limited or nonexistent braking before impact," and "impaired situational awareness." Garcia

argued in the appellate court that there was testimony about the lack of bloodshot eyes; his alertness at the scene; and the lack of odor or presence of alcohol or marijuana in his vehicle, among other facts. The appellate court, however, would not "reweigh or otherwise disturb the trial court's determinations absent an abuse of discretion."

The trial court's finding of a threat of harm to the community was supported by evidence. As a preliminary matter, the Third District rejected Garcia's construction of the relevant statute. Garcia argued that the trial court had to make findings as to all of the factors in section 907.041(4)(c)4.a.-c, before making a determination of harm to the community. The use of the word "and" in the referenced statute, meant only that "the trial court must decide if substantial probability exists after considering all the specifically enumerated factors as well as the catch-all, any other relevant facts. The trial court would not be free to ignore facts supporting (or refuting) one element simply because it found another element existed. The 'and' in this context following 'based on' means the trial court must conduct a thorough analysis and consider and weigh all relevant factors listed in (4)(c) in determining if a substantial probability of danger to the community exists." The trial court, in making its findings, emphasized Garcia's "'disregard for safety' as well as 'serious concerns about supervision.'" As was the case in the first part of the appellate court's analysis, the Court would not reweigh or second-guess the findings of the trial court.

Fourth District Court of Appeal

Thomas v. State, 4D19-2547 (July 14, 2021)

A sentence including enhanced penalties was reversed for further proceedings because the State did not file its notice of intent to seek enhanced penalties "within a sufficient time before sentencing." Om remand, the State was permitted to seek a habitual felony offender sentence again.

Rodriguez v. State, 4D21-113 (July 14, 2021)

A claim that a driver's license revocation was erroneously imposed was not a "sentence" subject to correction in a Rule 3.800 motion.