Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Dudley, 19-10267 (July 22, 2021)

In an appeal from a conviction to possession of a firearm as a convicted felon, Dudley challenged the sentencing enhancement under the Armed Career Criminal Act, and his guilty plea to being a felon in possession, based on the Supreme Court's decision in Rehaif v. United States. The Eleventh Circuit affirmed the conviction and sentence.

As to the three ACCA predicate offenses, the issue was whether those convictions "were committed on occasions different from one another." The "different-occasions inquiry requires a court to look at the facts underlying the prior conviction." However, consistent with the Supreme Court's decision in Shepard v. United States, 544 U.S. 13 (2005), the court, in making this inquiry, is limited to "information found in such conclusive judicial records [that have] gone through a validation process that comports with the Sixth Amendment." Dudley argued that some of the Alabama documents upon which the district court relied, did not comport with Shepard, especially the indictments, which "did not contain the dates or times of the offenses."

The prosecutor in state court, during a plea colloquy, had proffered the dates of the three offenses – three dates, several weeks apart from one another. Upon inquiry from the prosecutor, defense counsel responded, "[t]hat's it." Dudley then pled guilty to the state offenses, in open court, and indicated that he did not have anything further to say. The Eleventh Circuit concluded that, consistent with Shepard, "a federal sentencing court is permitted to rely on those facts to conduct the different-occasions inquiry. And in this case, under the totality of the circumstances, Dudley implicitly agreed with the factual proffer such that the district court could rely on the proffered dates of Dudley's prior Alabama assaults to confirm hat the predicate offenses were committed on different occasions from one another."

The claim under Rehaif was raised for the first time on appeal, and was reviewed for plain error. Although the indictment did not allege that Dudley knew, at the time that the possessed the firearm, of his prior conviction of a felony, Dudley

was not entitled to relief. He did not show "a reasonable probability that, but for the error, he would not have entered the plea." He "does not assert that he would have changed his decision to plead guilty had he known that the government had to prove his knowledge of his felon status." There was overwhelming evidence that the government could prove such knowledge.

One judge concurred in part and dissented in part. This judge concluded that the district court "erred in relying on unconfirmed statements in the plea-colloquy transcript."

United States v. Williams, 19-11972, 19-13019 (July 23, 2021)

The Eleventh Circuit affirmed convictions for sex trafficking of a minor, sex trafficking of adults, and obstructing a human trafficking investigation.

The district court did not abuse its discretion in admitting graphic photos and videos of the victims. "To prove charges under s. 1591(a), the government needed to show that Williams knew means of force, threats of force, fraud, or coercion would be used to cause his victims to engage in commercial sex. These images and videos helped to show how Williams exerted complete dominance over his victims. Several videos show Williams directing the girls to engage in sexual conduct while he watched and recorded – one even showed a weapon in view of the camera. And the images show how he took sexually explicit photos of the girls, having them pose in provocative positions so he could photograph their genitals and naked bodies."

Although graphic, the images and videos were not unduly prejudicial. The district court, during voir dire, cautioned the jurors that sexually explicit evidence would be presented, and the jurors indicated that this would not affect their ability to be fair and impartial.

The Eleventh Circuit found that challenged evidence was sufficient to one of the convictions. As to the age of that minor victim, another victim testified that she told Williams that the victim in question was 17 years old "when he put her to work as a prostitute." Other evidence included Williams having taken the victim's ID documents when she moved in with him, which documents were found , in a locked safe, when the defendant was arrested. The evidence also showed that the defendant used force towards the victim: he "'held her down and hit her in the face multiple times' with a pair of shoes." On another occasion, he tied her up and put her in a car trunk for an hour, while driving her around. And, when she was pregnant, he had someone else punch her in the stomach.

The district court did not abuse its discretion in denying a requested jury instruction that "consent or involuntary participation of an adult is a defense" to sex trafficking, " because an adult can legally consent to commercial sex." The Eleventh Circuit "has never recognized consent as a valid defense to sex trafficking," and Williams did not "cite any other circuit that has. But even if consent were a valid defense, the court's jury instructions 'substantially covered' this issue." "The instructions that the court gave explained that Williams was guilty only if he knew that 'means of force, threats of force, fraud, coercion, or any combination of such means would be used to cause the person to engage in a commercial sex act." "The jury did not need a separate instruction, then, to explain that if the victim willingly chose to engage in a commercial sex act, force or coercion did not *cause* her to do it."

The district court did not abuse its discretion in calculating the amount of restitution for three victims, ranging from $30,000 to $522,600, per victim. "Relying on trial testimony, [the court] multiplied each victim's estimated daily earnings by the number of days she prostituted. The court then reduced the calculation of [two victims'] awards . . . by a considerable percentage to ensure a conservative estimate." The "court was not required – or even permitted – to offset the restitution it ordered by the amount Williams expended on his victims' living expenses."

The sentence of life in prison, with a 15-year mandatory minimum, was substantively reasonable. The offenses included "years of brutally torturing, beating, and threatening [the victims] into submission."

Tarleton v. Secretary, Florida Department of Corrections, 18-10621 (July 23, 2021)

The Eleventh Circuit affirmed the denial of a petition for writ of habeas corpus, which challenged a state court conviction for unarmed robbery.

Trial counsel was not ineffective for failing to object to hearsay statements of three declarants. The Eleventh Circuit applied the highly deferential standards of review applicable when a federal court reviews a state court's adjudication of a claim on the merits. Under this standard, with respect to the prejudice prong of the claim of ineffective assistance, the state court did not make an unreasonable determination of the facts. This included the state court's finding that a bank teller identified Tarleton as the perpetrator. The teller described the perpetrator as "5'8", clean-shaven," and wearing glasses. She got a good look at his eyes. She picked his photo out of a photo array two weeks after the robbery. Additionally, based on the totality

of the evidence at trial, there "was not a reasonable probability hat the result would have been different if the hearsay had been challenged and excluded." One other testifying witness, a relative of the defendant, "was 'pretty sure' that Tarleton was the man in the surveillance video and stills." Another witness recognized him as the perpetrator, having looked at the surveillance video. And, his ex-wife testified that the "person in the surveillance video looked like Tarleton, and told the defective that 'it absolutely was him.'" Additionally, the hearsay statements that were admitted were equivocal. One was that it looked like Tarleton, but the witness was not sure. Another had been reluctant to get involved and "provided no details or reasons that might make her testimony influential with the jury." And a third would likely have been "surmised" by the jury to have come "from one of the trial witnesses, and it would not have had much impact on the jury."

A Confrontation Clause challenge to one of the out-of-court statements was raised, for the first time, in the state court direct appeal. The state appellate court affirmed without written opinion. There had been no contemporaneous objection in the state trial court. Due to the affirmance without opinion, the state appellate court was presumed to have ruled on the merits of the Confrontation Clause claim. Under such circumstances, absent any written explanation from the state appellate court, in federal habeas proceedings, it was Tarleton's burden "to demonstrate that there was no reasonable basis for the decision" of the state appellate court. The Eleventh Circuit concluded that such a reasonable basis existed – i.e., that the erroneous admission of the hearsay/Confrontation Clause statement constituted harmless error. In making that harmless error determination, the Eleventh Circuit applied the standard applicable in section 2254 cases, as set forth in Brecht v. Abrahamson, 507 U.S. 619 (1993), which held that error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict."

One judge dissented in part, concluding that the evidence at trial was "underwhelming" and that the state court's conclusion regarding prejudice represented an "unreasonable determination of facts."

First District Court of Appeal

Harley v. State, 1D20-1082 (July 21, 2021)

The trial court erred in denying a motion for jail credit under Rule 3.801 as a successive motion without attaching the earlier order on such a motion to the current order. Furthermore, when the State tried to supplement the record on appeal to include the prior order, it was denied by the First District because it was beyond the

scope of the proper appellate record under Rule 9.141(b)(2)(!). The First District did not disagree with the State's assertion that it would a "waste of judicial resources" to reverse and remand for further proceedings, as opposed to permitting the record to be supplemented. However, the limitations on a proper record in an appeal from the summary denial of a Rule 3.801 motion necessitated the reversal. The burden is on the trial court to attach to the order of denial all relevant records from the trial court file.

Butler v. State, 1D20-1803 (July 21, 2021)

"The trial court erred by resentencing Appellant without conducting a sentencing hearing." At such a hearing, the defendant must be present and have the opportunity to present evidence.

Pierce v. State, 1D19-2829 (July 20, 2021)

In a direct appeal from a sentence after an open plea to the court, the First District reversed and remanded for resentencing because "the trial court erred in imposing consecutive sentences of ten and eleven years in prison [for two counts of vehicular homicide] where the Criminal Punishment Code scoresheet provided for a lowest permissible sentence of 19.8 years."

The defendant argued that the trial court "was required to impose sentences of 19.706 years on each count because this was the lowest permissible sentence under the Criminal Punishment Code scoresheet and exceeded the fifteen-year statutory maximum for a second-degree felony." The issue before the court was "whether the lowest permissible sentence applies under section 921.0024(2) when the lowest permissible sentence exceeds the statutory maximum for each individual count or when it exceeds the collective statutory maximum for all counts." The Florida Supreme Court recently addressed the issue in State v. Gabriel, 46 Fla. L. Weekly S62 (Fla. Apr. 8, 2021), and the First District applied that ruling in this case.

Hicks v. State, 1D18-5325 (July 19, 2021)

The First District affirmed a conviction for capital sexual battery but reversed the imposition of a fine. "[N]o fine may be imposed for a conviction of a capital felony. See s. 775.083, Fla. Stat. (2016) ('A person who has been convicted of an offense other than a capital felony may be sentenced to pay a fine. . . .')."

Third District Court of Appeal

Johnson v. State, 3D20-0257 (July 21, 2021)

In a one-paragraph opinion, with minimal facts, the Court affirmed a conviction for first-degree murder and other offenses and held that the trial court did not abuse its discretion in overruling an objection to testimony from a witness on cross-examination "regarding Defendant bringing an AK-47 assault rifle to the witness's house sometime prior to the shooting incident that precipitated the indictment in this case. Our decision is informed by the abuse of discretion standard of review applicable hereto."

Delhall v. State, 3D21-335 (July 21, 2021)

The denial of a Rule 3.850 motion after an evidentiary hearing on a claim of newly discovered evidence was affirmed by the Third District. "At the evidentiary hearing, the burden was on Delhall to establish that the newly discovered evidence was of such a nature that 'it would probably produce an acquittal on retrial.'" Factual details of the evidence adduced at the hearing, or the evidence from the prior trial, are not set forth. The Third District emphasized the thorough analysis of the lower court in a 16-page order, and applied the appellate standard of review which holds that an appellate court will not substitute its judgment for that of the trial court "on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court, "so long as its decisions are supported by competent, substantial evidence."

Fourth District Court of Appeal

Simmons v. State, 4D18-2101 (July 21, 2021)

The Fourth District applied and reiterated the Florida Supreme Court's recent holding from State v. Dortch, 46 Fla. L. Weekly S129 (Fla. May 20, 2021), that "there is no fundamental error exception to the preservation requirement of" Fla.R.App.P. 9.140(b)(2)A)(ii)(c)."

State v. Foster, 4D21-135 (July 21, 2021)

The State appealed a county court order which "excluded the State's use of a recorded exit interview on the basis that Defendant had a reasonable expectation of privacy." The Fourth District reversed.

Foster worked as a correctional officer and conducted the exit interview of another officer who submitted a resignation. One other officer was present. The interview dealt with a claim of excessive use of force. A sign prohibited cell phones at the interview. Grinstead, who was confronted with allegations of mistreatment of inmates and staff by others, secretly recorded the interview. Grinstead, himself, reported incidents of excessive use of force to the Inspector General, and the IG interviewed Foster. Foster signed a form that stated that "any false statements would constitute the crime of perjury." Foster gave a statement and was subsequently arrested for perjury. She sought the suppression of the recorded exit interview under sections 934.02 and 934.03, Florida Statutes. The trial court excluded the use of the recording, finding that there was a "reasonable, subjective expectation of privacy that conversations made in a closed room outside of the hearing of anyone but the persons involved in the conversation, with rules established and enforced that prohibit a cell phone being brought into the building, and thereby recording, a chance meeting between a resigned officer and his superiors."

The Fourth District disagreed. FDOC's "policy mandated that both the exit interview and its subject matter be documented; the subject matter involved matters of great public importance; the interview was witnessed by another FDOC employee; and the interview took place on government property." Oral conversations are protected under section 934.03 if the speaker has "an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable." The parties to the recorded exit interview did not demonstrate "any sort of expectation that the meeting was private or confidential. Although Defendant argues on appeal that the reason for Grinstead's resignation was unlawfully recorded without knowledge or consent, the record reflects that after the exit interview, Defendant herself documented Grinstead's reason for resignation by preparing an incident report that was sub mitted to MINS for review by the IG's office for a possible investigation. Also, all attendees at the exit interview were MCI employees, on MCI property, acting in furtherance of their public duties. Finally, the allegations of inmate abuse were a matter of public interest which Defendant documented and shared for the purpose of a possible investigation."

Nerette v. State, 4D21-630 (July 21, 2021)

Nerette was charged with the misdemeanor of exposure of sexual organs. He filed a motion to dismiss under Rule 3.213, arguing that he was presumed incompetent for more than one year prior to the filing of the motion. Review of an order denying that motion was sought by a mandamus petition, which the Fourth

District treated as a certiorari petition and denied. The defendant "failed to submit to a court-ordered competency evaluation before rule 3.213's one-year time limit ran."

"Petitioner may not take advantage of his failure to abide by the court's order [to submit to a competency examination]. Had he submitted to the reevaluation by July 23, 2020 as ordered, Dr. Day could have opined Petitioner was competent to proceed, as Dr. Day's February 2020 report stated Petitioner had a fair possibility of being restored to competency with medication." The rule mandating dismissal after one year was therefore inapplicable.

Fifth District Court of Appeal

Turner v. State, 5D21-758 (July 23, 2021)

The Fifth District affirmed, without written opinion, the denial of a Rule 3.850 motion which alleged, inter alia, that trial counsel was ineffective for failing to impeach the victim with alleged inconsistent pretrial statements. Although the Court affirmed without written opinion, one judge, in a specially concurring opinion, addresses the issue and includes substantial case law regarding impeachment with prior inconsistent statements.