Case Law Update
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Supreme Court of the United States

Dunn, Commissioner of Alabama, Department of Corrections v. Reeves, 20-1084 (July 2, 2021)

In a state court postconviction proceeding in a death penalty case, the defendant, years after the trial, argued that counsel was ineffective for not hiring a penalty-phase expert to address mitigation evidence of intellectual disability. After the state courts denied relief, as did the federal district court when a habeas corpus petition was filed, the Eleventh Circuit Court of Appeals concluded that counsel were ineffective for failing to develop this testimony.

The state courts emphasized the defendant's burden of rebutting "the strong presumption that [] attorneys made a legitimate strategic choice," and that Reeves did not call any of his penalty phase attorneys to testify at the postconviction hearing. The Eleventh Circuit Court of Appeals construed this as a "per se prohibition on relief in all cases where a prisoner fails to question his counsel." The Supreme Court rejected the Eleventh Circuit's analysis.

The Supreme Court noted that dual deference existed: 1) towards defense counsel's strategic decisions; and 2) that of a federal habeas court towards a state court that adjudicates the claim on the merits. Where the defendant, who had the burden of overcoming the presumption of a legitimate strategic decision, did not call the attorneys to testify, the Supreme Court did "not know what information and considerations emerged as counsel reviewed the case and refined their strategy." "Simply put, if the attorneys had been given the chance to testify, they might have pointed to information justifying the strategic decision to devote their time and efforts elsewhere." The federal district court was "surely not obliged to accept Reeves' blanket assertion on an incomplete evidentiary record that '[n]o reasonable strategy could support counsel's failure." And, the Alabama court "did not apply a blanket rule, but rather determined that the facts of this case did not merit relief."

Supreme Court of Florida

Cruz v. State, SC20-60 (July 1, 2021)

In a direct appeal from convictions for first-degree murder and other offenses and a sentence of death, the Supreme Court affirmed the convictions and reversed and remanded the sentence for resentencing.

The trial court did not err in denying a motion to suppress statements. Cruz had been lawfully stopped and arrested and then made spontaneous, unsolicited statements. Cruz had been observed "spying around the corner" of a building; he acted nervously when officers approached; he was in an area where "the odor of cannabis was prevalent"; he ran "after another person had been searched in his presence"; this occurred at night and in a high crime/high drug area. After the first individual was searched with consent, an officer asked Cruz if he had anything illegal on him. Cruz started running and ignored the command to stop. Once detained, he resisted handcuffs and kept "reaching towards his waist area." He was subdued with a taser and handcuffed, and a search incident to arrest revealed a handgun in his front pocket.

Cruz also argued that the same statements, "why don't you just kill me know" and "I'm as good as dead," were not relevant to the charged homicide. "Cruz's unsolicited statements indicate that he was aware of the criminality of his actions and knew the police had a reason to arrest him when he was stopped by the officers."

Under Fla.R.Crim.P. 3.371(a), the judge has discretion to permit jurors to submit questions of witnesses during the trial. When asked by a prospective juror if the jurors would be allowed to ask questions, the judge responded that "[g]enerally the answer is no." The judge noted the possibility that jurors' questions could elicit hearsay or other inadmissible testimony. There was no objection to the judge's response and the Supreme Court concluded that Cruz did not demonstrate the existence of fundamental error.

Comments made by the prosecutor during opening and closing arguments in the penalty phase did not constitute fundamental error. The prosecutor argued that the prosecution "is not something that we take lightly because, as we discussed, not every murder is one that would be considered for the death penalty. . . ." Comments during closing argument did not improperly denigrate mitigation; the "prosecutor merely downplayed the significance of the mitigation." One comment compared "Cruz's life outcomes to that of his sister," making the point that one turned out fine,

while living in the same circumstances. In another comment, the prosecutor stated that ADHD and bipolar disorder "are not conditions that blur the line between right and wrong." And, it was argued that an attempt to commit suicide was "not the kind of mitigation that should be important – more important or more significant than the torturous death of another human being." This did not ask the "jury to discard the mitigating evidence," it only downplayed its significance. The prosecutor also argued that an event in which Cruz was struck by a golf club while still a preteen had no bearing because it was not connected to traumatic brain injury by any doctor. This emphasized the time gap between that incident and the murder. In another comment, the prosecutor stated that the crime was brutal, "the kind of crime that frightens you to your core," "the reason that children fear the darkness," the reason "why people have locks on their doors and keep guns for protection." Cruz "failed to show how the prosecutor's comments improperly inflamed the passions of the jury and amount to fundamental error."

The admission of a prior armed robbery conviction and facts regarding it in the penalty phase was neither error nor fundamental error. It "'is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction.' . . . '[T]estimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.'"

Testimony by the State's mental health expert as to Cruz's admission to having been involved in a prior robbery of a drug dealer was not fundamental error. It was relevant to the issue of motive in this case, and, even if erroneous, it did not go to the foundation of the case and was not a feature of the trial.

Although the trial court failed to instruct the jury to determine whether someone other than the defendant actually killed the victim, in a multi-participant case, that was not fundamental error. Even without possession of the gun, the jury found Cruz guilty of both premeditated and felony murder, and the record showed that he was a major participant.

The trial court's written sentencing order was insufficient because it improperly relied on facts not in evidence. The judge had also presided over the separate trial of codefendant Charles and the written order for Cruz noted that the judge had considered evidence from both trials. "It is improper for a trial court to consider 'evidence from a different trial that was not introduced in the guilt phase of

the present trial.'" The evidence in question related to a witness seeing Cruz with the firearm, and included a stipulation in Charles' trial that Cruz was the shooter.

The evidence supported the aggravator that the murder was committed during a felony – the burglary, robbery and kidnapping. "Cruz and Charles broke into Jemery's apartment, beat him, and robbed him. Cruz and Charles also stole a television and prescription bottle from the apartment, and Cruz was seen removing money from Jemery's account at an ATM. Further, blood found in the trunk of Jemery's car demonstrated that Jemery was placed in the trunk and driven to the field where he was shot and found miles from his home."

The financial gain aggravator was supported by the evidence regarding the theft of the television and bottle of pills, and Cruz's use of the victim's ATM card.

The HAC factor was supported by the evidence of the victim's blood throughout his apartment, reflecting a beating before being shot. There were numerous injuries to much of the victim's body, and the victim was found shot, and still alive, in the field, bound with wire and duct tape.

The "avoid arrest" aggravator was supported by the evidence. Although the victim did not know Cruz or Charles, they had common friends, and those friends would have been able to identify Cruz and Charles. This factor was supported by the evidence that the victim had defensive wounds and resisted the attack, as well as the leaving of the body, bound, in the remote location.

The CCP factor was supported by the evidence. The victim was bound, so he could no longer resist attacks. The multiple crimes were committed over a substantial period of time – the initial burglary, the beating, the binding and gagging, the ransacking of the apartment; the drive to the remote location.

First District Court of Appeal

Baker v. State, 1D19-947 (July 1, 2021)

The First District reversed one of two convictions for armed robbery. Although there were two victims, the incident involved "a single taking of $202 from a desk at a food-delivery-service office." Both of the victims were bound at gunpoint. "However, Baker's fellow offender swiped only a single wad of money from a desk in the back of the office. Neither robber took anything from the victims themselves, and neither took anything from elsewhere in the office." Under such

circumstances, convictions for two robberies constituted a double jeopardy violation.

Cato v. State, 1D19-3789 (June 29, 2021)

The First District affirmed the denial of a motion to withdraw plea. Cato pled guilty to the charge of burglary of an occupied dwelling. The post-sentencing motion to withdraw plea alleged that the victim had told the police "that he did not want to pursue charges against Cato," and that the victim, a friend of Cato's, would tell defense counsel the same upon inquiry, but defense counsel never contacted the victim.

There was no error in denying the motion without an evidentiary hearing. Cato was aware of this before the plea colloquy, but he testified at the colloquy, under oath, "that he had had time to speak with his attorney, that he was satisfied with his attorney's advice, and that he understood that he had the option to reject the plea, go to trial, and call witnesses."

Branch v. State, 1D21-706 (June 29, 2021)

The First District affirmed the denial of a Rule 3.800(a) motion to correct an illegal sentence. A claim that the trial court "failed to orally pronounce the statutory authority for the costs and fines it imposed, failed to explain what the assessments represented, and made no findings about his ability to pay," was not cognizable in a motion to correct illegal sentence. These assertions were "not challenges to an 'illegal sentence' correctable under rule 3.800(a). Rather, a defendant seeking to challenge an error in the procedure used by a trial court to impose costs or fines must do so by filing a motion under Rule 3.800(b)," which motion must be filed during the pendency of a direct appeal from the sentence.

Shepard v. State, 1D20-3384 (June 28, 2021)

In an appeal from the summary denial of a motion for postconviction relief, the First District denied the State's motion to take judicial notice of records from the defendant's direct appeal. One judge wrote a concurring opinion, explaining that Rule 9.141(b)(2)A), Fla.R.App.P., limits the appellate record to certain enumerated items, and that the record may not be supplemented by either part to include non-enumerated records. The concurring opinion notes earlier appellate court opinions questioning the wisdom of the strict application of this rule and suggests that the appellate rules committee consider amending the rule.

Second District Court of Appeal

Ward v. State, 2D20-2127 (July 2, 2021)

The Second District reversed an order of the trial court prohibiting Ward from filing further pro se postconviction motions. The trial court did not attach sufficient prior records to show that Ward had been abusive in his prior filings in the trial court. Although Ward apparently had filed several prior postconviction motions, the trial court's order attached only one, and it did not show that the same or any related issue to the current one had previously been raised.

Robinson v. State, 2D20-3239 (July 2, 2021)

The Second District reversed the summary denial of one claim of a Rule 3.850 motion for further proceedings. The claim as alleged was facially sufficient, and on remand the trial court must attach records that conclusively refute the claim or grant an evidentiary hearing. In the claim at issue, Robinson "contended that his defense counsel was ineffective for failing to object to the use of Florida Standard Jury Instruction (Criminal) 3.6(f) at his trial inasmuch as the use of that instruction effectively deprived him of his only defense (which, at trial, was premised upon the Stand Your Ground Statute, section 776.012, Florida Statutes (2013)). Although the failure to object to the use of a standard jury instruction, standing alone, may not constitute deficient performance, on the record it does not conclusively appear that counsel's agreement to the instruction's use, when coupled with a statement counsel made that suggests counsel misunderstood the state of the law concerning the interaction between a Stand Your ground defense and the justifiable use of force defense set forth in 3.6(f), leads us to conclude that Mr. Robinson has raised a facially sufficient claim." The instruction in question pertained to the duty to retreat.

L.E.S. v. State, 2D19-4363 (June 30, 2021)

A Rule 8.135(b)(1)(B) motion was correctly denied. When the trial court imposes the statutorily required minimum fee of $100, the public defender's fee, the court is not required "'to announce the imposition of the fee at sentencing or notify [the respondent] of the right to a hearing to contest the fee.'" The Second District applied the Supreme Court's recent holding in State v. J.A.R., 46 Fla. L. Weekly S157a (Fla. June 3, 2021).

Myers v. State, 2D20-3075 (June 30, 2021)

A Rule 3.850 motion alleging ineffective assistance of counsel was summarily denied because it failed to include sufficient allegations of prejudice. The trial court failed to provide the defendant leave to amend within 60 days, and the order of the trial court was therefore reversed in part, for further proceedings as to this claim.

Third District Court of Appeal

Tomlinson v. State, 3D18-1982 (June 30, 2021)

The Third District affirmed the defendant's conviction and sentence for extortion.

The fraud statute, section 836.05, Florida Statutes, includes an element that the communication "maliciously threaten[] an injury . . . or maliciously threaten[] to expose another to disgrace. . . ." "Malice" is not defined in the statute. Florida appellate courts have used the definition of "legal malice," rejecting a definition of "actual malice." Florida appellate courts are in conflict as to whether "'[i]t is fundamental error to use the definition of legal malice when that of actual malice is appropriate because it reduces the State's burden on an essential element of the offense charged.'" The standard instruction, based on this unresolved conflict, has since been amended, to include alternative definitions of malice for extortion.

The Third District, in this case, concluded that the trial court did not commit fundamental error by instructing on legal malice, finding "that legal malice is the more appropriate standard to be applied in extortion cases." "Legal malice" is defined as "intentionally and without any lawful justification." "Actual malice" "means with ill will, hatred, spite, or an evil intent."

Fourth District Court of Appeal

Petit v. State, 4D19-3875 (June 30, 2021)

The Fourth District affirmed a conviction and life sentence for first-degree murder.

The trial court did not err in denying a motion to suppress the defendant's statements. "Appellant gave a non-verbal response when asked if he wanted to speak to the detective about why he was there, and then unequivocally stated 'Yes' when

the detective followed up on his question.' The "detective in the instant case testified at the suppression hearing that he interpreted Appellant's response as an affirmation that Appellant wanted to talk to him without his lawyer present." "To the extent Appellant's initial hesitation prior to answering 'Yes' can be interpreted as equivocal, based upon the totality of the circumstances, it was clear that the detective's statement was not a directive or a coercive statement but was instead a reminder to Appellant that he needed to answer questions with either a 'Yes' or 'No' response." The relevant portion of the questioning is quoted in the opinion:

> Q. And then this other thing is not really a right. It's just knowing [and] understanding your rights, do you want to speak to me and have a conversation about why you're here?
>
> A. You said what?
>
> Q. Knowing and undertand[ing] your rights, do you want to talk to me and have a conversation about why you're here, why I got an arrest warrant for you? Yes? You gotta say it.
>
> A. Yes.

In the video recording of the questioning, just prior to the detective inquiring, "Yes," the defendant could "be seen placing his hands together and making a shrug-lie gesture with no verbal response."

The Fourth District also found that the evidence was sufficient, and briefly summarized the pieces of evidence which placed the defendant at the scene of the murder. This included a security officer who recalled the defendant being present because of his distinctive footwear, Gucci slides; a positive identification of the defendant by the security officer from surveillance footage from inside a club prior to the incident; similar testimony from the defendant's cousin; additional testimony from the cousin identifying the perpetrator's white vehicle as the same one she observed the defendant driving the next day; and cell phone records.

E.A.C. v. State, 4D20-2079 (June 30, 2021)

The Fourth District affirmed a finding of guilt and addressed arguments related to the conduct of a non-jury trial with witnesses testifying remotely via Zoom.

With respect to the "due process right to counsel, to confront and cross-examine witnesses, and to be physically present at" the trial, the Court concluded: "E.A.C. was physically present at his trial alongside his counsel, the prosecutor, and the trial judge. His attorney had the opportunity to cross-examine witnesses, although due to the pandemic, those witnesses appeared by Zoom."

The Supreme Court's decision in Maryland v. Craig, regarding the right of face-to-face confrontation, did not address "how the standard should be applied when not only the jurisdiction, but the world, is in the middle of a pandemic." The Fourth District applied analysis from the Third District's prior decision in Clarington v. State, 314 So. 3d 495 (Fla. 3d DCA 2020). Clarington involved a probation revocation proceeding, and the Fourth District noted that there are distinctions between such a hearing and a juvenile's non-jury trial.

Defense counsel's main concern, when the nature of the remote hearing was being addressed, "was that the minor witnesses would not treat remote proceedings as seriously and it was harder to control what went on with them." Counsel was further "concerned about parental interference with testimony and the court's ability to see a witness's demeanor." The court responded that it knew "techniques" to address these concerns and stated that the court would "address every concern you've raised at the time it becomes an issue." On appeal, E.A.C. did not assert "any issue related to the witness' testimony and the remote proceedings during the non-jury trial." The appellate argument raised only "potential problems in a remote proceeding, not [] any problems that occurred here."

One judge wrote a specially concurring opinion; another judge wrote a written dissent. The dissent contended that the right to confront witnesses "was violated when the trial court permitted witnesses to testify remotely without first making the individualized findings required by *Maryland v. Craig*." The dissent asserted that "the use of Zoom for witness testimony at E.A.C.'s trial should be reviewed for (1)(a) *a case-specific determination of necessity* (b) that furthers an important policy, and (2) assurance of the reliability of the testimony."

Fifth District Court of Appeal

Vaughan v. State, 5D21-543 (July 2, 2021)

Upon sentencing for a probation violation, after the defendant had originally been designated an habitual felony offender, the judge did not redesignate the defendant as an HFO, stating that it would carry over from the original designation. There was no error in this as "redesignation of HFO status only requires a 'clear intent' of reimposing the status on the violation of a defendant's probation." There was no need for de novo HFO analysis upon probation revocation, "only that the court clearly communicate an intent to reimpose that HFO status." An order denying a Rule 3.800(a) motion was therefore affirmed.

Miller v. State, 5D21-676 (July 2, 202)

An order summarily denying a Rule 3.850 motion was reversed for further proceedings.

Miller claimed that counsel was ineffective with respect to his sentence as a prison releasee reoffender, "because the State used, and the trial court relied upon, an out-of-state, no-qualifying predicate offense to designate him as such." This was a Kansas conviction for attempted tampering with an electronic monitoring device.

Qualifying predicate offenses for PRR sentencing include, inter alia, out-of-state offenses "for which the sentence is punishable by more than 1 year in this state." Under Florida law, tampering with an electronic monitoring device is a third-degree felony, but the attempt is a first-degree misdemeanor, with a maximum punishment of one year in prison. The records attached to the trial court's order did not indicate whether the Kansas conviction was for the completed offense or for an attempt.