Case Law Update
August 16, 2021
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Eleventh Circuit Court of Appeals

United States v. Harris, 19-13692 (Aug. 9, 2021)

Harris and codefendant Archibald appealed convictions for conspiracy to possess with intent to distribute cocaine, attempted possession with intent to distribute cocaine, and possession of a firearm in furtherance of a drug trafficking crime. The Eleventh Circuit affirmed all convictions. The case involves a reverse sting operation in which the defendants, police officers, "protected 'drug couriers' as they delivered containers purportedly filled with cocaine to hotels in Miami."

Unpreserved challenges to the sufficiency of the evidence were reviewed under the plain error standard. With respect to the conspiracy charge, the record was "replete with statements by the defendants to Moe and their fellow officers that they were 'in' or 'all in' for Moe's drug operations, and with ample evidence that they provided protection to Moe's drug couriers. Kelvin and Archibald also repeatedly discussed only involving people they could trust in the scheme and devised strategies for keeping their activities secret. Kelvin went so far as to caution the crew not to change their lifestyles to avoid detection, and even promised that the organizations activities would 'live and die with [him].'"

As to the attempt conviction, while deliveries were being made to the hotels, Kelvin helped others "unload the coolers from the car and sat in the car while [others] took the coolers to Jay and Jamaal." Archibald gave a post-arrest statement in which he "admitted that he knew he was involved in protecting the drugs when Moe told both him and Kelvin that the couriers had moved '40 birds' or 'chickens' that day, and paid each of them $2,500 in cash for their work." Even if the Court assumed that Archibald "did not have knowledge of the specific substance he was protecting on September 28 – despite having heard the term 'powder' discussed that very day – he surely knew what he was doing by the time of the second delivery on October 11, when he appeared relaxed, laughed in the hotel room, and showed no surprise as Jay counted fifteen bricks of false cocaine right in front of him." He admitted that there were 13-15 kilos of drugs in each cooler and, at trial, testified that "[a]fter I saw what was taken out of the cooler I knew exactly what I was doing."

As to Kelvin's firearm possession conviction, "Kelvin told Anderson that he had to carry 'a pistol' everywhere he went. He was paid $9,000 in all precisely in order to provide armed protection for the cocaine deliveries on September 13 and 28 and on October 11."

Archibald asserted the defense of entrapment and challenged the sufficiency of evidence as to predisposition. He relied on testimony at trial in which one participant, Moe, an undercover FBI agent, "testified that Archibald and Kelvin 'were uneasy and nervous,' although they began to relax after Moe paid each of them $2,500 Archibald testified that he was afraid because another man sat behind him in the car." Among the relevant factors emphasized by the Court were: "Archibald accepted the 'opportunity' Schonton offered. . . . [H]e admitted that Schonton and Kelvin did not force him to take part in the scheme." He took no steps to walk away. He "twice confirmed that he wanted to continue." He made sure at the conclusion of one meeting that Moe would "be in touch." Text messages between Archibald and his wife preceding the completed transaction referenced luxury items that Archibald planned on purchasing for his wife.

The district court did not err in failing to give a duress instruction. Such an instruction requires proof of three elements, including that the defendant "had no reasonable opportunity to escape or inform [the] police." Archibald had "may reasonable opportunities to inform authorities about his involvement in Moe's drug trafficking organization." Other testimony, including his own post-arrest interview, contradicted his claim that "he could not report any of this because of Schonton's threats."

Allegedly false testimony from one witness at the grand jury hearing did not provide a basis for dismissing the indictment. Any prosecutorial misconduct during the grand jury proceeding will result in dismissal "only when the misconduct substantially influenced the grand jury's decision to indict or when there is grave doubt that the decision to indict was free from the substantial influence of such violations." The Court looked at the questioning from the grand jury proceeding and concluded it involved the prosecutor's unclear questioning regarding the sequence of events, and did not come close to establishing perjury. Another instance involved the witness getting "one of the lines of questioning 'a little mixed up' because there were multiple operations, which made her 'a little confused.' None of this establishes prosecutorial misconduct."

There was no Batson error in permitting the prosecutor to exercise a peremptory challenge on an African American juror. The defense, when objecting,

did not establish a prima facie case of discrimination. In response to the peremptory strike, defense counsel asserted that the juror was African-American and that counsel was "unaware of 'anything that disqualifie[d] him.'" The prosecutor then gave the race-neutral reason of a "gut feeling," adding that co-counsel "reminded" him that the juror had "avoided eye contact." The government had, as of that time, excluded only one African American juror out of the seven peremptory challenges it made, and did not seek to strike the other three African American jurors. Two of the final 12 jurors were African American.

United States v. Akwuba, 19-12230 (Aug. 11, 2021)

The Eleventh Circuit reversed one conviction for health care fraud and affirmed the remaining convictions. The prosecution resulted from an investigation into a pill mill. The defendant "was convicted of issuing and conspiring to issue prescriptions for controlled substances improperly, conspiring to commit health care fraud, and committing health care fraud through her practice as a nurse practitioner."

The defendant challenged the sufficiency of evidence for multiple drug distribution convictions "because the government failed to present any evidence that the patients to whom she prescribed the controlled substances did not actually need them." While the government did not offer such proof, it was not required to, as that was not an element of the offense. And, the doctor who operated the medical practice that was involved, testified that providers, including the defendant, "would prescribe controlled substances to patients who did not need them." In a prior decision, Ruan, the Eleventh Circuit had held that "even if [the patient] felt that she benefitted from the medications [the medical professional] prescribed, a reasonable jury could nonetheless conclude that the manner in which[the medical professional] prescribed them was outside the usual course of professional practice.'" The doctor in this case testified that he believed some of the prescriptions from the defendant involved excessive dosages, but approved them to avoid an argument. Another medical staff member testified that many of the patients receiving prescriptions from the defendant did not "really have anything wrong with them," and that there was not enough information to support the prescriptions.

As to the conspiracy charges, the defendant and the doctor "directed patients to return monthly to keep up billing." At times, the defendant issued prescriptions when she did not have the legal authority to do so. The defendant knew the medical office billed insurance companies for her work.

The evidence was insufficient as to one of the health care fraud charges because the insurance company that was billed for the prescriptions at issue in the count was an entity not named in the indictment. As to the other charges, which were upheld, "evidence showed that Ms. Akwuba knew claims were being submitted to those benefit programs for prescriptions that were not medically necessary." An expert witness reviewed files and concluded "that the prescriptions for controlled substances issued to those patients by Ms. Akwuba were not justified by the medical records and not medically legitimate."

After an investigator was questioned to clear up some prior confusion, the judge read a stipulated instruction to the jury, but added an additional sentence, stating that "all of each patient's records from Family Practice were, however, provided to defendant and her counsel prior to trial." The defendant challenged this additional portion of the instruction on appeal, asserting that it was a disputed fact for which the court partially granted a verdict. The Court disagreed. Viewing the statement in context, it pertained "to the government's exhibits and the Family Practice files it received from ABME (the Alabama Board of Medical Examiners)." The defendant was therefore able to put forth a defense based on "missing records," which would extend beyond those obtained by the government. The district court's instruction did not constitute a directed verdict because "it does not relate to an *element* of any offense Ms. Akwuba was charged with." The district court was wrong to instruct the jury regarding a stipulation for something that the parties did not stipulate to. However, that did not rise to the level of a constitutional violation because the defendant was still able to present the theory of the defense regarding missing records.

The defense, on direct examination of the defendant, sought to present testimony that a prescription pad from a collaborating doctor had been stolen and used for fraudulent prescriptions. The court excluded this testimony when the defense, after having been given an opportunity, could not show that any prescriptions issued from the stolen pad were attributed to the defendant. Absent such a link, the testimony was properly excluded as irrelevant.

Four nurses testified for the government about "nurses' professional obligations when prescribing controlled substances." The defendant argued that the legitimacy of a medical purpose is a subjective inquiry and that the general testimony from the experts constituted direct commentary on the defendant's intent and that that was not admissible. The Court disagreed. Rule 704(b) "does not preclude even expert testimony that supports an obvious inference with respect to the defendant's state of mind if that testimony does not actually state an opinion on this ultimate

issue, and instead leaves this inference for the jury to draw." Testimony from the same experts about their own personal practices, viewed under the plain error standard, presented a "closer question." Plain error did not exist where the remarks "were not the main, or even a substantial, focus of their testimony," and the court instructed the jury as to what the issues of the case were.

United States v. Coats, 18-13113 (Aug. 12, 2021)

The Eleventh Circuit affirmed the defendant's conviction and sentence for being a felon in possession of a firearm. Coats pled guilty to that offense.

Coats argued for the first time, on appeal, that his conviction was invalid based on Rehaif v. United States, 139 S.Ct. 2191 (2019). When "a defendant is charged with being a felon in possession of a firearm under s. 922(g)(1), the knowledge-of-status element requires proof that at the time he possessed the firearm he was aware he had a prior conviction for 'a crime punishable by imprisonment for a term exceeding one year.'" Coats argued "that his guilty plea was constitutionally invalid because no one informed him of s. 922(g)(1)'s knowledge-of-status element," and that the guilty plea was therefore neither knowing nor voluntary. Because Coats was not informed of that mens rea requirement, "the district court erred in accepting Defendant's guilty plea." However, under the plain error standard of review, Coats failed to demonstrate the requisite prejudice. He argued that an error under Rehaif should be treated as structural. The Court rejected that argument.

Rehaif "made no attempt to show that he would not have pled guilty but for the *Rehaif* error." He "has not asserted that he would have gone to trial had he understood the knowledge-of-status element." And, the record clearly demonstrated that the government could have proved beyond a reasonable doubt that Coats had the relevant knowledge, based on his substantial criminal history, which included 12 criminal convictions, four of which were for felonies.

The Court also found that Coats' prior Georgia state-court conviction for burglary qualified as a predicate crime for ACCA sentencing purposes. The Court first concluded that Coats would have to be treated as an aider-and-abettor based on the nature of his conviction, and that as an aider-and-abettor, a predicate conviction could still qualify under ACCA. Coats' argument was based, in part, on his contention that aiding and abetting under Georgia law did not require "an affirmative act or intent to facilitate the crime." If that were so, the Georgia statute might be overly broad for purposes of ACCA predicate offenses. The Eleventh Circuit, however, concluded that Coats "failed to show from Georgia caselaw's treatment of

the affirmative act prong of the aiding-and-abetting doctrine a 'realistic probability' that Georgia's party-to-a-crime statute extends liability 'significantly beyond' generic accomplice law."

Coats sought a sentencing reduction for his conviction for obstruction of justice based on "acceptance of responsibility." The mere fact of a guilty plea, however, could not suffice as the basis for such a reduction; the reduction would require the existence of extraordinary circumstances. Such circumstances did not exist. "Here, Defendant assaulted the CI four months after the former's arrest. The essence of Defendant's argument is that his case would have been less extraordinary had federal authorities moved more quickly and gotten him indicted during that four-month period of time. But the speed by which the federal authorities moved seems to be an arbitrary and inapt factor in determining whether Defendant's case was extraordinary. Defendant's argument also does not account for the violent nature of his obstructive conduct. While a one-time occurrence, this was not a minor incident."

First District Court of Appeal

Walker v. State, 1D20-0608 (Aug. 12, 2021)

The First District affirmed convictions for attempted first-degree murder and solicitation to commit first-degree murder, and clarified the law of principals as it applied to this case.

The statutory language regarding principals, s. 777.011, includes one who "counsels" or "procures." Walker's conduct fell within both of those terms, even though she was not present at the time of the incident "and did not actively support the crime's commission as it occurred." Walker persuaded her daughter, Fine, to kill J.C., "because J.C. was dating Walker's ex-husband." "Walker gave Fine a disguise to wear during the attack on J.C. Fine then obtained a machete to use as the murder weapon." After the murder was committed by fine, Fine "told the police that Walker threatened to ground her if she did not kill J.C."

Hightower v. State, 1D20-1569 (Aug. 12, 2021)

The First District reversed an order denying a Rule 3.850 motion as untimely and ordered that an evidentiary hearing be conducted on remand.

Hightower had been incarcerated in New Jersey, and, upon return to Florida to commence his Florida sentence, he moved to toll the running of his two-year time limit for his 3.850 motion for the time while he was incarcerated out of state because he did not have access to Florida legal materials. On remand, the trial court, which had treated the Hightower's motion as one for an extension of time, was directed to permit the defendant, at the evidentiary hearing, to develop the facts regarding the limit on his access-to-courts argument, and to also determine if Hightower filed his motion within two years of his actual return to custody within the State of Florida. Even if he was entitled to a tolling of the limitations period, his Rule 3.850 motion would have to have been filed within two years from the date he was returned to Florida.

Richardson v. State, 1D19-4526 (Aug. 9, 2021)

The First District affirmed convictions for three sex offenses and kidnapping. The defendant waived counsel and represented himself after a Faretta hearing. "The trial court did not commit fundamental error when it failed to renew the offer of assistance of counsel during the *Williams*-rule hearing, because the hearing did not constitute a 'subsequent stage' that required renewal." After the initial Faretta hearing, "the trial court renewed the offer of assistance of counsel at a pretrial hearing on October 9, 2019, and Appellant again stated he wished to represent himself. The *Williams*-rule hearing was conducted the next day, and the trial court did not renew the offer of assistance of counsel. Appellant's waiver from the day before applied to the *Williams*-rule hearing, and the trial court was not required to renew the offer of assistance of counsel because the two pretrial hearings were not separate and distinct and constituted the same 'stage' of the proceedings."

The evidence was sufficient as to kidnapping with the intent to commit other felonies. "The confinement was not merely incidental to the underlying crimes because it continued even after the underlying felonies had ceased. . . . Appellant confined the victim to his van, committed the underlying felonies, and continued the confinement when he drove the victim to the second location, where he committed further felonies." "Second, the confinement was not inherent in the nature of the other crimes, because it was not necessary to confine the victim to commit the underlying acts, and was inherent to Appellant's intent to forcibly move the victim to facilitate the underlying crimes." "Third, the confinement of the victim in the van made the commission of the underlying crimes substantially easier to commit and lessened the risk of detection, as Appellant secluded the victim from public view and moved the victim to darker areas."

Upton v. State, 1D20-1092 (Aug. 9, 2021)

Although the trial court believed it was sentencing the defendant as an habitual felony offender, the court imposed a more lenient sentence than that required for habitual offender sentencing. Thus, the trial court was required to follow the sentencing guidelines requirements. "Here, we find the trial court would have imposed the same sentence if a correct scoresheet had been used. The trial court was clearly operating under the belief that it was imposing an HFO sentence without regard for guideline requirements and that the ten-year term chosen was the term necessary to serve all criminological considerations. Further, the ten-year sentence imposed was consistent with the request of the State and consistent with similarly situated co-defendants in the case. These factors confirm that the sentence was not based in any substantial part on the minimum required sentence under the guidelines, regardless of whether that minimum was seven and one-half years or something slightly less."

Dukes v. State, 1D20-2707 (Aug. 9, 2021)

In an appeal from the summary denial of a Rule 3.850 motion, the First District reversed for further proceedings on two of the claims. The trial court found that "the motion attempted to couch claims that should have been raised or had been raised on direct appeal as claims for ineffective assistance of counsel."

The First District summarized the law regarding when claims of ineffective assistance of counsel may not be raised in a 3.850 motion, even though that is the normal vehicle for such claims. "First, an ineffective-assistance claim relying on a legal point already considered and rejected on the merits by an appellate court is procedurally barred [when asserted in a 3.850 motion]. . . . Second, an attempt to establish a point of law or interpret – not apply – a constitutional right couched in a postconviction motion is not truly an ineffective-assistance claim and is unauthorized under Florida Rule of Criminal Procedure 3.850." "Neither of the summarily-denied claims here involved an issue that had been considered and rejected on the merits in [the] direct appeal. Nor did Dukes attempt to establish a point of law in his claims; he merely argued that counsel should have made various evidentiary objections."

Second District Court of Appeal

Gilbert v. State, 2D19-1622 (on rehearing)

The Second District affirmed a conviction for sexual activity with a child by a person in familial or custodial authority.

Gilbert challenged the admissibility of Facebook message screenshots as unauthorized hearsay, because they could have been altered where they were admitted through the victim's personal screenshot of the messages. Finding the evidence admissible, the Court emphasized the following: "The victim and her relative testified to Mr. Gilbert and the victim's 'extensive history' of communicating over Facebook Messenger. Mr. Gilbert's real name (as opposed to a nickname) and his profile picture were included in the screenshots. . . . Even more, the victim and Mr. Gilbert referenced 'facts only known by' them in the messages. . . ." The trial court therefore did not err in finding sufficient authentication.

The victim's journal was admitted into evidence over the defendant's hearsay objection on redirect examination. The journal was erroneously admitted as it did not satisfy any hearsay objection, including that for a prior inconsistent statement. "Because the victim's alleged 'motive to fabricate' - her desire to move back to her prior residence – 'predated' the journal, it couldn't be used to rebut Mr. Gilbert's defense theory." Nevertheless, based on the facts of the case, the error was harmless.

The prosecutor's reference in closing argument to the vulnerability of the victim did not constitute fundamental error, as it "was not an impermissible plea for sympathy. . . . Looking at the trial record and the closing argument as a whole, the State's commentary on the victim's vulnerability appears to be the State's spin on Mr. Gilbert's theory of defense." The defense had been emphasizing the victim's breaking of rules, lying and acting out. The prosecutor took the same facts "and put them in a different light, turning an allegedly vindictive past into a vulnerable childhood."

A second comment was improper, but did not rise to the level of fundamental error. The prosecutor stated: "The reality is, because she's telling you what happened to her. She's credible." This constituted vouching for the credibility of the victim. However, the comment was "relatively brief"; the trial was "otherwise capably run"; and "there was other corroborating evidence.

Marcario v. State, 2D19-4743 (Aug. 13, 2021)

A conviction for attempted robbery with a firearm was reversed because there was a meritorious statute-of-limitations defense and counsel was ineffective by failing to assert it.

The charge was a second-degree felony, subject to a three-year statute of limitations. The information originally alleged attempted robbery with a weapon. Marcario then left the country and was not located until 16 years later, in 2019, when he was returned to Florida, and the information was amended to charge attempted robbery with a firearm. The substantive amendment of the charge outside the limitations period was untimely. Amendments beyond the limitations period are limited to those which correct clerical errors. Counsel was ineffective for failing to seek dismissal based on the untimely amendment of the information. The amended information superseded and vitiated the earlier information, and the case would therefore not have simply reverted back to the originally filed information which charged attempted robbery with a weapon.

Watrous v. State, 2D21-1065 (Aug. 11, 2021)

The Second District found the defendant's conviction for violating Fort Myers's panhandling statute unconstitutional. An officer observed the defendant "'actively begging' for money at" a bus station. The Court, addressing First Amendment claims, reviewed the ordinance under a strict scrutiny standard. This required the State to prove "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."

The State "posited promoting the 'economy' and 'the flow of travel,' 'preventing nuisance,' and 'public safety' as government interests justifying the panhandling ordinance and the charge against Mr. Watrous." None of those interests were compelling in the context of this case. There was no evidence that the defendant was either impeding traffic or endangering the public.

Third District Court of Appeal

Couch v. State, 3D20-732 (Aug. 11, 2021)

The Third District found that the evidence was insufficient to sustain a conviction for trespass on legally posted horticultural property under s. 810.09(2)(e), Florida Statutes. The evidence was insufficient regarding the requirement that the

property be 'legally posted." There was no testimony regarding the distance between signs or their location vis-à-vis the boundaries and corners of the property of the height of the lettering. There was no testimony that the signs included the "name of the owner, lessee, or occupant of the land."

Although the offense under s. 810.09(2)(e), did not include a statutory definition of legal posting, the court looked to the definition in s. 810.011(5)(a) for "posted land."

Fourth District Court of Appeal

Brevil v. State, 4D19-3010, 4D19-3011 (Aug. 11, 2021)

Brevil appealed convictions in two cases for sale of cocaine and sale of heroin, both of which were enhanced as the sales occurred within 1,000 feet of a licensed child care facility. One of the convictions was reversed and reduced to a lesser offense; the other was reversed for resentencing.

In the case which proceeded to trial, the child care facility "dd not have a statutorily-required sign identifying it as a 'licensed' child care facility, or words to that effect." One sign stated "PRESCHOOL." Another sign "contained the name of the preschool and what appears to be a cartoon-type drawing." The bottom of the sign was obscured by bushes. A third sign had the name of the school, the word "Preschool," a telephone number, and the words "Resister Now." None of the signs included the phrase "licensed child care facility" or any comparable language.

The relevant statutory provision for the offense states that "this paragraph does not apply to a child care facility unless the owner or operator of the facility posts a sign that is not less than 2 square feet in size with a word legend identifying the facility as a licensed child care facility and that is posetd on the property of the child care facility in a conspicuous place where the sign is reasonably visible to the public."

The second of the two cases resulted in a guilty plea. Brevil challenged that conviction based on the evidence from the case that proceeded to trial, but the trial court was not required to consider evidence in a different case "in determining whether the state could establish a prima facie case in the plea case." Second, the existence of the sign was not an element of the offense; it is an affirmative defense.

Kaiser v. State, 4D20-2265 (Aug. 11, 2021)

The Fourth District affirmed an order revoking probation and imposing a term of imprisonment. Kaiser argued that the court had to modify or continue probation under s. 948.06(2)(f)1., Florida Statutes, because his probation was revoked for a low-risk violation, i.e., a "positive drug or alcohol test result." That argument failed because his probation was not revoked for a positive test result; it was reversed because of his guilty plea to charges of possessing and smoking methamphetamine. One judge dissented.

Cabrera v. State, 4D21-81 (Aug. 11, 2021)

The summary denial of a Rule 3.850 motion was reversed for an evidentiary hearing. The trial court denied the claims of ineffective assistance of counsel based on the state's argument that the record refuted the claims. One of the claims was denied on the basis of a report the State furnished to the trial court with a DNA report. That report was not a part of the trial court record at the time of the defendant's plea and could not be considered as the basis for a denial of a claim without an evidentiary hearing. Summary denials based on a records conclusively refuting the claim must rely on trial court documents that were a part of the record at the time of the plea, trial or sentence, not documents obtained and filed subsequently. Reliance on those more recent documents necessitates an evidentiary hearing.

Fifth District Court of Appeal

Knight v. State, 5D20-2435 (Aug. 13, 2021)

Knight appealed convictions for two sex offenses. Although Knight was evaluated by an expert for competency, there was nothing in the record showing that a competency hearing had been held. The case was remanded for a nunc pro tunc determination of competency, if possible.

Knight also challenged child hearsay evidence as cumulative. While this issue was unpreserved and any error was harmless, the Fifth District admonished trial courts to "diligently exercise their role as gatekeepers [to] ensure that needlessly cumulative evidence is excluded." "That gatekeeping function is especially important when addressing the admissibility of child hearsay, as such evidence is often highly prejudicial."