Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Gonzalez, 19-14381 (Aug. 19, 2021)

The Eleventh Circuit affirmed the denial of a motion for sentence reduction under section 404(b) of the First Step Act.

The Court addressed a question of first impression: "whether a sentence imposed upon the revocation of supervised release qualifies for a reduction under s. 404(b) of the First Step Act when the underlying crime is a covered offense under the Act." The Court held that it does. The government originally contested eligibility, but changed its position and conceded eligibility.

Sentence reduction under the First Step Act requires that the sentence previously imposed be for "a covered offense." That is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010." Gonzalez's underlying narcotics crime, which involved possession of crack cocaine, was a covered offense. "The remaining question, then, is whether a sentence imposed upon the revocation of supervised release qualifies for a sentence reduction under s. 404(b) of the Act when the underlying crime is a covered offense." "Because a 'period of supervised release is simply a part of the sentence for the underlying conviction,' *id.,* we join the Fourth and Sixth Circuits in holding that a sentence imposed upon revocation of supervised release is eligible for a sentence reduction under s. 404(b) of the First Step Act when the underlying crime is a covered offense within the meaning of the Act."

Although Gonzalez was eligible for a sentence reduction, the district court did not abuse its discretion in denying the reduction. "Where, as here, a defendant has engaged in criminal conduct while on supervised release, recidivism and deterrence are appropriate considerations in deciding whether to reduce a sentence under the First Step Act." The Court also disagreed with a Seventh Circuit holding "that district courts must always calculate and consider a defendant's new range under the Sentencing Guidelines before exercising their discretion under s. 404(b) of the First Step Act."

One judge authored a concurring opinion, addressing the nature of the district court's discretion when ruling on the motion for sentence reduction. The concurring judge, if "writing on a blank slate," "would hold we lack jurisdiction to review a district court's exercise of discretion to reduce – or not reduce – a sentence under s. 404(b)."

United States v. Watkins, 18-14336 (Aug. 20, 2021)

The Eleventh Circuit granted en banc review, vacated the prior panel opinion, and remanded the case to the three-judge panel for further proceedings.

The case involved an issue of inevitable discovery, an exception to the exclusionary rule that applies "when the unconstitutionally obtained evidence would ultimately have been discovered through lawful means had there been no constitutional violation." The Court "granted rehearing en banc in this case to decide what standard of proof the government must satisfy to show that the evidence would ultimately have been discovered through lawful means without the constitutional violation." Prior to the Supreme Court's 1984 decision regarding inevitable discovery in Nix v. Williams, the Eleventh Circuit had held that the "proper standard of proof for determining if the evidence would ultimately have been discovered through lawful means is reasonable probability." The en banc Court chose to revisit that issue in light of Nix, and now held "that Supreme Court precedent requires the use of the preponderance [of evidence] standard" "of predictive proof in ultimate discovery exception cases."

First District Court of Appeal

Chirinos-Calix v. State, 1D20-0952 (Aug. 20, 2021)

"'[W]here the parties and the judge agree, the trial [c]ourt may decide the issue of competency on the basis of the written reports alone.'" The "failure to enter a written competency order is not fundamental error."

Dettle v. State, 1D20-2651 (Aug. 20, 2021)

The holding of Lee v. State, 258 So. 3d 1297 (Fla. 2018), regarding double jeopardy and convictions for traveling to meet a minor for the purpose of engaging in an illegal act and improper use of computer services, does not apply retroactively to convictions which were final when Lee was decided in 2018.

Williams v. State, 1D20-3112 (Aug. 20, 2021)

The First District affirmed an order revoking probation. The evidence was sufficient to prove that Williams willfully and substantially violated curfew.

Officers encountered Williams on a beach after his 10:00 p.m. curfew when they responded to a call about juveniles using marijuana. "Williams testified that after leaving a restaurant with two friends, the trio arrived at Madeira Beach around 9:30 PM. Williams did not drive himself, he did not know the distance between the beach and his home, he had never been to Madeira Beach before, and he inadvertently lost track of time after his phone's battery died." "Even accepting Williams' account that he arrived at the beach at 9:30PM, knowingly going to a location that he had never been before so close to curfew represents a substantial risk of non-compliance of which Williams could not have been unaware." Appellate court decisions that Williams relied on were distinguishable because they involved probationers who "encountered unexpected obstacles outside their control." Williams did not engage in an effort to discern the time, and that suggested "willful ignorance rather than negligent forgetfulness."

Amison v. State, 1D18-1312, 1D18-1313 (Aug. 18, 2021)

In an appeal from convictions for multiple financial crimes, the First District reversed several convictions and affirmed others. The two defendants, a husband and wife, hosted a fundraiser to benefit families of firefighters who had died. Of the $28,000 believed to have been raised, about $12,000 was distributed to the families of the firefighters, about $9,000 was attributed to expenses incurred, and the remaining $6,700 was not accounted for. Two months after the fundraiser, the Amsions deposited over $10,000 in their personal bank account, at a time when they were experiencing financial difficulties, including trouble paying their household rent.

Dual convictions for "grand theft and organized scheme to defraud violate[d] double jeopardy because thy were based on the same conduct." "[D]ouble jeopardy analysis looks solely to the charging document, and cannot be based on evidence adduced at trial." The dates and victims alleged in the information for the two charges were identical, except for the addition of one victim. And, "[t]heft is necessarily included in organized scheme to defraud."

As a result of the vacating of this conviction, Mrs. Amison argued that it would lessen the total points on her sentencing scoresheet, and that she should be resentenced, where her husband received a shorter sentence when he was convicted of fewer offenses. The Court disagreed. The trial court imposed sentences of one year for each of the victims, and emphasized Mrs. Amison's "lying and deceit 'like I've never seen before' and [her] abuse of her position of trust as a charity organizer." This sentence "resulted from the number of victims plus Jennie's greater culpability, her deceit, and her abuse of trust. Vacating a single theft count does not change any of the court's sentencing considerations."

The order of restitution for over $11,900, erroneously included $5,195. This sum had eventually, if belatedly, been put into an account that resulted in distribution to the families of the firefighters. "Giving back money previously stolen or withheld unlawfully is still giving back."

A challenge to a conviction for grand theft as to the Amison's landlord could not be challenged on appeal by Mrs. Amison "because she intentionally and expressly admitted guilt of this charge as trial strategy. She cannot claim error in something she agreed to and told the jury to do."

Several of Mr. Amison's convictions were reversed as double jeopardy violations. This included several grand theft convictions, which were lesser-included offenses of organized scheme to defraud.

The Court found the evidence insufficient as to RICO, which requires convictions for at least two predicate "incidents." One of the alleged predicates charged in the information, for failure to apply charitable contributions under section 496.415(16), Florida Statutes, did not qualify as a predicate incident because it was not included in the statutory definition of racketeering activity. Without that predicate incident, there remained only one qualifying predicate and the RICO conviction was therefore reversed.

Reed v. State, 1D21-335 (Aug. 18, 2021)

The First District affirmed the denial of a Rule 3.850 motion which raised 14 claims. The Court's opinion addressed each of the claims.

A claim of ineffective assistance of counsel "based upon counsel's failure to object to the State's use of peremptory challenges is not cognizable in a

postconviction motion" because "it could not be shown that the jury that served was biased or that the strikes had any effect on the fairness of the trial."

Counsel was not ineffective "for opening the door to the admission of prior based acts during direct examination by asking Appellant about six prior felonies." Evidence as to those felonies was previously determined to have been admissible, and Reed had previously stipulated to the admissibility of the evidence regarding the prior offenses.

A claim that counsel failed to seek the disqualification of the entire State Attorney's Office was deemed "speculative."

A claim that counsel was ineffective for failing to secure an expert witness regarding side effects of one of the victim's medications failed because the trial court had previously granted the State's motion to exclude such evidence as irrelevant.

Counsel was not ineffective for failing to seek judgments of acquittal as to charges of sexual battery with a deadly weapon. Evidence of nonconsensual sexual activity was presented. One victim was attacked with a knife; the second was attacked at gunpoint. The defendant admitted to having intercourse with the victims. DNA was "collected from in and on the victims' bodies within a short time following the incidents."

A claim that counsel failed to depose and present the victims of the collateral crimes failed because it was speculative, as the defendant did not allege any specifics to which those victims would testify in a manner favorable to the defendant. "[M]erely asserting that a deposition would have revealed reliability and impeachment issues is not sufficient to warrant postconviction relief."

A claim that the prosecutor "probed into his prior convictions when the trial court had forbidden it" was not cognizable in a Rule 3.850 motion. "Issues of prosecutorial misconduct, insufficiency of the evidence, and trial court error are not cognizable in a collateral postconviction motion."

A challenge to the information based on the alleged lack of support by probable cause or sworn testimony did not raise a fundamental defect, and had to be raised on a timely manner, prior to the conclusion of the State's case.

A claim that the State's notice of intent to rely on collateral offense evidence was defective could not be raised in a postconviction motion.

A Brady claim failed where the defendant admitted that the evidence at issue was disclosed prior to trial. To the extent that the claim suggested that the defendant lacked sufficient time to prepare as a result of this disclosure, the Court noted that it was disclosed more than a month prior to trial. And, as all of this was known prior to trial, any alleged error regarding this had to be raised on direct appeal.

Malone v. State, 1D20-2482 (Aug. 17, 2021)

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

Malone was sentenced to consecutive terms of life in prison, with parole eligibility, for two first-degree murders, in 1974. He was a juvenile at the time of the offenses. In 2017, he sought resentencing pursuant to Miller v. Alabama and Atwell v. State. The trial court appointed counsel. Prior to any resentencing hearing, the Florida Supreme Court receded from its decision in Atwell, and, when the State argued that Malone was no longer entitled to resentencing, the trial court denied Malone's motion based on the change in the case law.

When the State fails to appeal or seek rehearing of an order on a Rule 3.850 motion granting a resentencing, the trial court must proceed with the resentencing, notwithstanding the Supreme Court's receding from Atwell. In this case, the trial court never granted the Rule 3.850 motion and the order appointing counsel would not be treated as the functional equivalent of the granting of the rule 3.850 motion.

The Court rejected an argument that the denial of resentencing "would result in a manifest injustice because other similarly situated *Atwell* defendants were resentenced before the Florida Supreme Court decided *Michel* and *Franklin* [which receded from *Atwell*]." Based on current case law, the sentences imposed are legal and afford the possibility of parole, and there is no resulting manifest injustice.

Second District Court of Appeal

D.L.J. v. State, 2D19-4526 (Aug. 18, 2021)

The imposition of some costs and fees was reversed. The imposition of $100 for the cost of prosecution was reversed because the State did not specifically request it at resentencing. The Court rejected the State's argument that based on the language used in section 938.27(1), Florida Statutes, other, specifically enumerated agencies (The Department of Financial Services and the Office of Financial

Regulation of the Financial Services Commission), must request such costs, but the State Attorney's Office need not, because it is not specifically referenced. The SAO is similarly required to make an express request.

Barco v. State, 2D20-2289 (Aug. 18, 2021)

The trial court dismissed a Rule 3.850 motion as untimely. The Second District reversed and remanded for further proceedings based on a lack of clarity regarding the relevant dates triggering the two-year limitations period.

Although it was clear that a judgment and sentence were filed on May 31, 2017, for which the time to appeal would expire on July 1, 2017, resulting in a time deadline of July 1, 2019, the record before the appellate court noted the existence of an amended judgment on August 14, 2017, reducing one of the charges listed in the judgment. "We can locate no document attached to the order that explains how this amendment came about. Therefore, we cannot determine whether the judgment was amended pursuant to a motion that tolled rendition, which would start the two-year filing deadline on September 13, 2017." Additionally, on remand, the trial court must apply the prisoner mailbox rule when determining the relevant filing date for the postconviction motion.

Third District Court of Appeal

Wimes v. State, 3D21-738 (Aug. 18, 2021)

In addition to being untimely, a Rule 3.850 motion was without merit. Counsel was not ineffective for failing to seek dismissal based upon pre-arrest delay. "Wimes was arrested shortly after a witness, who had previously refused to give a statement to the police, came forward and provided a statement implicating Wimes in the charged offense, and after a shirt found at the scene was retested and Wimes' DNA was found on the retested shirt." And, the claim that counsel was ineffective for failing to raise a Brady claim was "entirely speculative."

Fourth District Court of Appeal

Cabriano v. State, 4D19-3608 (Aug. 18, 2021)

An order denying a Rule 3.850 motion was reversed for an evidentiary hearing as to one of its multiple grounds – that counsel was "ineffective for failing to move to disqualify the trial judge."

The motion alleged that the judge "departed from his role as a neutral arbiter and became an advocate for the State by suggesting that Cabriano's testimony had opened the door to cross-examination about the incident involving his step-daughter." The Rule 3.850 motion presented sufficient allegations to support a motion for disqualification of the judge, as the motion alleged that "the judge took it upon himself to raise the issue and then made the argument on the prosecutor's behalf." The record before the appellate court did not refute the claim "that the judge's actions created a sufficient concern about his impartiality that counsel should have moved to disqualify him." The motion also presented sufficient allegations as to prejudice resulting from counsel's failure to move to disqualify the judge: "Cabriano sufficiently alleged that the trial was rendered fundamentally unfair, and its outcome unreliable, by the judge's apparent lack of impartiality and counsel's failure to move to disqualify him. Cabriano did not need to show that the prosecutor would not have pursued the same line of cross-examination, or that the outcome of the trial would have been different, if counsel had moved to disqualify the judge."

E.A.C. v. State, 4D20-2079 (Aug. 18, 2021)

The Fourth District granted a motion to certify the following question as one of great public importance:

> Do witnesses appearing in a juvenile adjudicatory hearing by Zoom during a global pandemic constitute a per se violation of the defendant's due process rights?

Marks v. State, 4D21-1063 (Aug. 18, 2021)

The Fourth District granted a petition for writ of certiorari. Marks' petition challenged an order denying a motion to remove the condition of probation that required him to wear an ankle monitor. The requirement for electronic monitoring was based on the court's assertion that the victims of the sex offenses were 15 years old or younger. Marks alleged that the victims were not 15 or under and that the information did not allege that they were 15 or under. On remand, the trial court must "determine whether the state presented evidence about the age of the victims. If the state did not do so prior to the imposition of the sentence, the state cannot do so now."

Fifth District Court of Appeal

State v. Sullivan, 5D20-1482 (Aug. 20, 2021)

The Court granted the State's petition for writ of certiorari, which challenged an order of the trial court "compelling it to disclose the name and address of the confidential informant ("CI") used in this case, together with producing copies of the CI's substantial assistance agreement with the State" and other documents pertaining to the CI.

Sullivan was charged with trafficking and conspiracy to traffic. The trial court held an evidentiary hearing on the motion to compel. Sullivan argued that the disclosure was relevant and essential to her defense of entrapment by the CI. At the evidentiary hearing, an undercover officer, the handler of the CI, testified that he introduced the CI to Sullivan "for purposes of arranging the drug transaction with Velez. Hobbs also confirmed that the CI was not present when he purchased the cocaine from Velez." The State did not intend to call the CI as a witness at trial.

"Here, because the State has represented that it will not be calling the CI as a witness at trial, the CI's disclosure is required only if the failure to do so infringes on Sullivan's constitutional rights." Disclosure of the identity under such circumstances "is required when the identity is relevant and helpful to the specific defense raised or is otherwise essential to a fair determination of the cause at issue."

In this case, the identity of the CI "is actually well-known to Sullivan." "Nevertheless, a defendant's knowledge of an informant's name does not necessarily extinguish the need for maintaining an informant's confidentiality." The trial court erred by requiring disclosure of the CI's information "without conducting an in camera proceeding" first. After conducting the in-camera hearing, the lower court must "weigh the interests of the State in protecting against the disclosure of the CI's information and Sullivan's need for the requested information as being relevant and helpful to her defense of entrapment. This in-camera hearing should include taking the testimony of the CI."

State v. Wright, 5D20-1807 (Aug. 20, 2021)

The trial court erred in granting a motion to suppress evidence obtained through an authorized wiretap.

The wiretaps, which were approved by the trial court, were previously authorized by an acting state attorney, who was serving in that capacity while the elected state attorney took a leave of absence. The defense argued that the acting state attorney was not authorized to apply for a wiretap. The Fifth District disagreed, as the acting state attorney "had all the powers appurtenant to that position and, thus, had authority to authorize the wiretap applications."

Section 934.07(1), Florida Statutes, authorizes "any state attorney" to apply for a wiretap. The plain language of the statute did not refer to "an elected state attorney." The Fifth District distinguished an earlier case in which an assistant state attorney, in his capacity as an assistant state attorney, was found to have been unauthorized. Here, the acting state attorney was acting in the capacity of an acting state attorney, not an assistant state attorney.

Webb v. State, 5D21-686 (Aug. 20, 2021)

A Rule 3.800(a) motion may not be used to compel DOC to calculate gain time. Such a calculation is "solely within the province of DOC," and any relief must be through administrative remedies. After exhausting administrative remedies, the prisoner may then seek appropriate judicial relief.