Case Law Update
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Supreme Court of Florida

Alcegaire v. State, SC19-428 (Sept. 9, 2021)

The Florida Supreme Court affirmed convictions for three first-degree murders and other offenses, as well as the sentences, which included death sentences for each of the murders.

A motion for new trial was correctly denied because the trial court did not have jurisdiction to entertain it. The trial court had been divested of jurisdiction where the defense filed its notice of appeal three days earlier.

Multiple comments by the prosecutor during closing argument, only one of which was the subject of an objection, were addressed by the Court. Arguments based on "facts not in evidence" were rejected based on a review of the evidence. In one, the prosecutor referred to victim Branch as the love of victim Washington's life. This was supported by evidence that the two were dating and lived together and that Washington referred to Branch as his wife.

Four claims of impermissible bolstering were found to be without merit. The prosecutor argued that it was anticipated that the defense would challenge the credibility of the State's witness, Campos, based on his demeanor on the witness stand – i.e., looking sideways, not looking at anyone, staring down, not making eye contact. The prosecutor explained that a doctor had testified about side effects that someone would suffer from an injury, including the things that Campos himself had gone through when he witnessed much of the incident while hiding in his residence and when he himself got shot during the incident. The doctor's testimony is quoted in the opinion and the Court found the prosecutor's argument to be consistent with that testimony. This included references to some nerve injury in the jaw, affecting the ability to "smile correctly or appropriately."

Campos also testified that he did not want to testify in court because he was afraid. A comment in closing that Campos feared for his life was supported by the testimony. Comments that Campos "worked hard not to pick the wrong people" and that he "does not want the wrong people convicted" were supported by law

enforcement testimony regarding their multiple visits with Campos and his failure to immediately identify the suspects.

A comment about Campos being in shock after having been shot was a permissible inference from the evidence, even absent medical testimony regarding such shock.

A comment about the defendant high-fiving his coperpetrator while in an elevator, showing that they were "excited to come to Lakeland to kill these people," and that they were "happy and ready to go," was found to be supported by a video of their behavior in the elevator.

The prosecutor's frequent use of the words "I think" during closing argument was challenged as impermissible statements of person belief or personal opinions. The Court disagreed, concluding that they were fair comments on the evidence.

In three quoted paragraphs, the prosecutor referenced the theme of "justice for the victims." There were no objections. Reviewing the comments in their entirety, the Court concluded that they "did not become the theme of, nor pervade the closing argument," and the defendant was therefore not entitled to relief.

The Court also addressed a related claim of cumulative error, examining "'the entire closing argument with specific attention to the objected-to . . . and the unobjected-to arguments' in order to determine 'whether the cumulative effect' of those arguments deprived Alcegaire of a fair trial." The Court, with no further elaboration, concluded that the claim was without merit.

The prosecutor used a map during closing argument to depict locations where the offenses occurred and where the defendant was picked up afterwards. The defense objected that this was impermissible new evidence that was not presented during the trial. The jury heard testimony as to those locations during the trial and the map was therefore a visual demonstration of that which was already in evidence.

Several witnesses presented victim impact evidence during the penalty phase. Defense counsel affirmatively "stated that there was no objection." The challenge on appeal was therefore without merit. Additionally, the trial court instructed the jury that the testimony "was not to be used for finding aggravation and was not to be considered as an aggravating factor." The victim impact statements were also "relatively short."

The Court also found that the evidence of guilt was sufficient. The defendant rented a van for the round trip to the scene of the murders and back. He was seen on surveillance driving the van and was also seen with coperpetrator Smith on video at the apartment complex where the murders occurred. Smith was identified by Campos as a perpetrator and shooter; the defendant was seen in the residence with Smith. After the murders, the defendant used his cell phone for internet searches related to the murders. He also deleted text messages, including one which was from one of the victims and which contained that victim's address. At the time of arrest, the defendant was changing his appearance, by removing distinctive dreadlocks.

First District Court of Appeal

Hall v. State, 1D19-1920 (Sept. 9, 2021)

The First District affirmed a conviction and sentence for trafficking in heroin and found that the evidence was sufficient, notwithstanding the asserted defense of entrapment.

A claim based on objective entrapment was not preserved for appellate review. With respect to subjective entrapment, Hall argued that there was no evidence of predisposition to traffic; he testified that he was a user and addict, not a dealer. He was unemployed and looking to make some money and was thus responding solely to the financial inducements of the government's confidential informant.

However, there was evidence that would enable the jury to find to the contrary:

> Although Hall declined the confidential informant's initial request to sell an ounce of heroin, upon being contacted a second time, Hall said he would try to get the requested amount. By the third contact, Hall and the informant discussed arranging a meeting place, and Hall worked with his regular heroin supplier to obtain the requested amount. The State also showed a videorecording of the arranged buy. In it, Hall sits in a car with the confidential informant and an undercover investigator as they wait for the supplier to arrive with the heroin. After mentioning he has a friend in Alabama who is selling heroin for $0 a "point"

> – one-tenth of a gram – Hall complains that "I can't even do $30, $35 around here." This comment, along with others, conveyed an understanding of the terminology and other basics of the heroin trade. At minimum, this evidence conflicted with Hall's assertion that he had never sold heroin and could lead a reasonable person to infer that Hall did have a predisposition to commit trafficking.

State v. King, 1D19-4166 (Sept. 9, 2021)

The First District reversed an order which granted a Rule 3.850 motion based on ineffective assistance of counsel.

King was convicted of first-degree murder of an adult woman and her "full-term, unborn quick child, and armed burglary." The convictions at issue were from the third trial in this case, and trial counsel had appeared in all three of the trials; the first two resulted in hung juries. The trial court granted relief based on the claim that counsel failed "to introduce evidence of a 'temperature discrepancy' between the inside and outside of the house where the murder occurred."

The defense was that the defendant's girlfriend "committed the murder and then staged the murder scene to frame him Counsel argued that if, as the girlfriend maintained, the back of the house had been open for at least several hours before she woke up at 10:00, it would have been warmer inside than the 70 degrees reflected in the lead detective's report." At one of the prior trials, the defense did introduce evidence regarding the temperature, including that the outside temperature had been 90 degrees, and that the thermostat had been at 79 degrees. A detective stated in her written report that it had been 70 degrees inside the house, but there was no testimony to that effect during the trial.

During the first trial, defense counsel did not present any argument about the thermostat or the temperature discrepancy. In the second trial, counsel presented argument based on the detective's written report, but did not reference the thermostat. As a result of this evidence, the First District rejected the trial court's comparison of the third trial to the prior trials. The postconviction court, when granting relief, "stacked the conclusion that the thermostat evidence is what *caused* the first two juries to hand, resulting in mistrials. This is conjecture and not supported by the evidence. It is impossible to conclude to the requisite level of evidentiary certainty that any one issue made the difference between the earlier

mistrials and the verdict in this case. It could just as easily, or more likely have been the difference between a capital and a six-person jury, among other factors."

Additionally, the evidence of the 70-degree indoor temperature lacked factual foundation. It was referenced in the detective's report, but the detective testified that she, herself, did not enter the residence until the next day; she was not indoors on the only relevant day.

The arguments regarding temperature were thus found to lack sufficient evidentiary basis, and the trial court therefore erred in finding that defense counsel were deficient. With respect to the prejudice prong for ineffective assistance of counsel, the appellate court detailed the evidence from the trial and concluded that there was substantial evidence to support the defense presented regarding the girlfriend being the murderer and staging the scene to incriminate the defendant. Even without evidence regarding the temperature discrepancy theory, there was substantial evidence supporting the defense theory. As the jury already had been presented "a fair jury question, and the jury convicted Appellee after deliberating less than two hours," the court could not "conclude that there is a 'reasonable probability,' as required by *Strickland*, that the result of the trial would have been different if defense counsel had presented argument that there was a temperature discrepancy."

The opinion of the Court is based on a highly-detailed factual presentation regarding the evidence adduced at the final trial, as well as the preceding trials.

Fourth District Court of Appeal

Parrish v. State, 4D19-1991 (Sept. 8, 2021)

The Fourth District granted Parrish's motion for rehearing en banc and withdrew its previous opinion.

Parrish challenged the sufficiency of the evidence as to four felony-facilitation kidnapping convictions. A majority of the Court found the evidence sufficient as to three, but insufficient as to the fourth, applying the three-part Faison test. One judge dissented and would have found the evidence insufficient as to all four kidnappings. The Court also certified to the Florida Supreme Court a question of great public importance: whether the Faison test has been superseded by section 775.021(4), Florida Statutes.

In addition to the kidnappings, the defendant was charged with, and convicted of burglary and six robberies. The offenses occurred in an auto parts store. Shortly before closing time, three masked gunmen entered the store. There were three employees, including a manager, and three customers in the store at the time.

The Faison test for the sufficiency of evidence of confinement for burglary when the burglary is committed in conjunction with another felony, requires that the confinement "(a) [m]ust not be slight, inconsequential and merely incidental to the other crime [prong 1]; (b) [m]ust not be of the kind inherent in the nature of the other crime [prong 2]; and (c) [m]ust have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection [prong 3]." The Fourth District rejected the defense argument that the Florida Supreme Court subsequently created a fourth prong – i.e., that kidnapping can not exist "if the captivity of the victim ceases naturally at the conclusion of the accompanying crime."

As to the three victims for whom the evidence of confinement was deemed sufficient, the Court emphasized the following: One employee "had been dragged on the floor by his belt before he was made to crawl to the room in the back of the store, and [] two customers [] were forced to crawl to the room in the back of the store or face the prospect of either being shot or violently dragged like the employee." This was not slight, inconsequential or merely incidental to the burglary and robberies as it was accomplished with "substantial force and violence." The movement was not merely incidental as the gunmen could have ordered the victims to the ground where they were found and taken their property at that point without engaging in the forceful conduct described above. These victims were also forced into a back room where they remained out of public sight until after each was individually robbed and until the entire burglary/robbery incident was completed.

With respect to the manger, he was not subjected to the same forceful crawling into the back room. H "was moved to the back of the store to facilitate the robbery of the money in the safe and black box in the back room." He was also "moved from the back of the store to the front of the store after the completion of the robberies of the individual victims to facilitate the robbery of the cash registers.". . . Here, the manager's movement and confinement were limited to facilitating the robbery from the safe, black box and cash registers he controlled as the store's custodian." The conviction for this offense was reduced to that of the lesser included offense of false imprisonment while armed and masked as false imprisonment is not subject to the Faison test regarding confinement.

Based on recent decisions of the Florida Supreme Court regarding dual convictions from a single transaction, the Fourth District observed that "our supreme court has determined that the now-abrogated common law single transaction rule – upon which *Faison* rests – cannot be reconciled with the post-*Faison* amendment to section 775.021, Florida Statutes, which clarified that '[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity . . . to determine legislative intent.'" As a result, the Court certified the question of great public importance noted above.

Fifth District Court of Appeal

Simpson v. State, 5D20-119 (Sept. 10, 2021)

The Fifth District affirmed a judgment and sentence, including investigative costs of over $20,000. The opinion was written to explain that an "objection to the sufficiency of the evidence, at least in the context of the imposition oof investigative costs, is not a 'sentencing error' as contemplated by Florida Rules of Criminal Procedure 3.800(b)." The Court further held that the Florida Supreme Court, in Mapp v. State, 71 So. 3d 776 (Fla. 2011), implicitly overruled the Fifth District's prior decision to the contrary in Munoz v. State, 884 So. 2d 1070 (Fla. 5th DCA 2004).

This means that a claim that the evidence is insufficient to support the investigative costs can not be preserved for appeal through the use of a Rule 3.800(b) motion during the pendency of the direct appeal and prior to appellate court briefing.

At the sentencing hearing, when the State sought the investigative costs, the judge inquired as to the amount and the prosecutor responded that "the last printout we have is $20,141.38." There was no stipulation to this; there was no objection. Although there was no evidence to support this, due to the absence of the objection, the issue was not preserved and the amount was affirmed. The Rule 3.800(b) motion was not a valid method for raising the claim.

Penaloza v. State, 5D21-1434 (Sept. 8, 2021)

The Fifth District cited a prior holding for the point that the "January 1, 2015 amendment to Florida Rule of Appellate Procedure 9.020(i)(3) does not have retroactive effect so as to undo the abandonment of a motion for new trial which resulted under the prior version of the rule when the notice of appeal was filed before

the filing of a signed, written order disposing of the motion for new trial filed by the appealing party."