Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Watkins, 18-14336 (Sept. 16, 2021)

In an opinion on rehearing, the Court reversed a pretrial suppression order.

Watkins, a post office supervisor, was charged with the importation of cocaine with the intent to distribute. Se was caught-red handed and voluntarily confessed, but the district court suppressed the confession and the government appealed. The Eleventh Circuit reversed on the basis of the inevitable discovery or ultimate discovery doctrine.

Two packages containing cocaine were received at a postal facility, the original abroad. Each was addressed to a different individual, one to a post office, one to a UPS facility. Neither had a post office box number. The cocaine was discovered in the packages by law enforcement agents, who removed the cocaine and replaced it with fake cocaine, before tracking the packages, through GPS, and letting them proceed to their original destinations. With respect to the individuals to whom the packages had been addressed, neither of the recipient facilities leased a box to either of those named individuals. Law enforcement agents came to the conclusion that the transactions involved a supervisor who would be aware of the incoming packages. Suspicions existed as to Watkins.

While the police were searching one of the postal facilities at the end of a workday, the tracking device on one package, which had not always been operable, started signaling from Watkins' residence. Three agents approached the front door of the residence and smelled marijuana. When they knocked and Watkins opened the door, the odor became more pervasive. When the agents asked if Watkins knew why they were there, she put her head down, and responded, "the boxes" or "the packages."

One agent asked to see the packages, and Watkins began walking back into the house. She did not say anything, but the agent construed the act of reentering the house to constitute consent for the agent to follow her in. Two other agents first conducted a security sweep inside the house. The agents had planned to apply for a

search warrant based on the smell, and one did so after the sweep. All of the evidence, however, was seized prior to a warrant being obtained, as the packages were observed in plain view during the security sweep. After the security sweep, Watkins was handcuffed, signed a waiver of Miranda rights, and made several incriminating statements.

The district court suppressed the evidence on the basis of the warrantless use of the tracking device, the absence of a warrant for the search of the residence, and the tainting of consent to search the residence due to the prior illegality of using the warrantless tracking device.

In discussing the inevitable discovery doctrine, the Eleventh Circuit noted the requirement that "'the lawful means which made discovery inevitable were being actively pursued prior to the occurrence of the illegal conduct.'" But " active pursuit' in this sense does not 'require that police have already planned the particular search that would obtain the evidence' but only 'that the police would have discovered the evidence by virtue of ordinary investigations of evidence or leads already in their possession.'"

Although a Magistrate Judge had concluded that the evidence would have been inevitably discovered absent a Fourth Amendment violation, the District Judge rejected that on the basis of prior decisions of the Eleventh Circuit that dealt with whether consent to search was sufficiently attenuated from a constitutional violation to be voluntary. In a subsequent order, the District Court rejected the government's assertion that absent the tracking of the package to the defendant's residence, the knock and announce and sub sequent events would have unfolded in the same way.

The current Eleventh Circuit criticized the lower court's rationale, as it misstated "the predictive standard. The standard is not whether the evidence in fact 'would have' been discovered, but whether the preponderance of the evidence indicates it would have been – whether it more likely than not would have been." And, the District Court relied on its own fact-findings as opposed to those of the magistrate judge, who was in a better position to make credibility determinations.

The Court further addressed the "active pursuit" requirement, finding that it is not always necessary for the government to prove that a search warrant had already been sought. Rather, "the government must show only 'that the police would have discovered the evidence by virtue of ordinary investigation of evidence or leads already in their possession.'"

"The evidence incriminating Watkins would have been discovered through ongoing investigation and the pursuit of leads that were already in the possession of the agents at the time the device started functioning and they monitored it. She was their lead suspect and for good reason. . . . They had already looked up information about her and obtained her address. They were discussing doing a knock and talk at her house, which would not have required a search warrant. Not only was it their probable next step, but at the moment the tracking device reactivated, they were actively discussing doing it. And it is not as if the knock and talk is a novel or unfamiliar investigative technique: collectively the agents had done hundreds of them."

On remand, the district court was given options. If it does not hold an evidentiary hearing itself, it is bound by the magistrate judge's findings, and that would compel the finding that the search was valid under the inevitable discovery doctrine. If the court conducts a further evidentiary hearing, it would then have to evaluate that evidence under the standards enunciated in this opinion.

First District Court of Appeal

Ellis v. State, 1D17-961 (Sept. 15, 2021)

The trial court failed to make an independent competency determination prior to sentencing. The case was reversed and remanded for a retroactive determination, if possible. Otherwise, a new sentencing hearing would have to be held after competency is restored. One judge dissented, concluding that the trial court had made an adequate oral finding and that the failure to reduce that to writing did not constitute fundamental error.

Whitfield v. State, 1D20-3736 (Sept. 15, 2021)

The Court denied a prohibition petition based on the stand your ground law, citing prior case law for the point that the existence of standard-of-proof defects in the pretrial immunity hearing is "cured after the defendant went to trial, raised a self-defense claim, and was convicted by a jury under the heavier trial burden of proof beyond a reasonable doubt." The Court's opinion does not set forth any of the facts of the case.

Foster v. State, 1D21-664 (Sept. 15, 2021)

The trial court partially granted the State's motion to compel disclosure of a passcode. "A search warrant was issued for Petitioner's cell phone. The State sought to compel disclosure of Petitioner's passcode to execute the warrant. Petitioner argued in the trial court that he could not be compelled to provide his passcode because that would violate the Fifth Amendment. . . ." Foster sought review by certiorari, and the First District dismissed the petition because Foster had an adequate remedy on plenary appeal. Assuming that evidence from any ensuing search was admitted at trial over objection, and that Foster was convicted at trial, the suppression issue could then be raised on direct appeal.

Jones v. State, 1D21-802 (Sept. 15, 2021)

A claim that the defendant was convicted by a six-person jury rather than a 12-person jury, after the State waived the death penalty, was not cognizable in a Rule 3.800(a) motion, as the claim attacked the conviction, not the legality of the sentence. The claim could not be treated, in the alternative, as a Rule 3.850 motion, as such a motion would have been untimely.

Second District Court of Appeal

Chery v. State, 2D19-2444 (Sept. 17, 2021)

The Second District reversed convictions for multiple drug offenses. The affidavit in support of the search warrant for a search of Chery's residence lacked probable cause.

The affidavit included information a detective received from both Casie Aguilera and Henry Aguilera, Jr. Casie stated that she had received drugs from Chery, when two duffle bags containing contraband were placed by Chery in her car. Hector stated that he was subsequently in Chery's residence and observed about five to seven ounces of cocaine and methamphetamine in Chery's bedroom, in plastic bags. He stated that he was "aware of how much an ounce of methamphetamine and cocaine looks like." He also stated that "Chery stated that Hector Aguilera Sr [sic] delivered him nine ounces of methamphetamine and cocaine at the beginning of the month of August."

Casie provided no information regarding Chery's residence and did not corroborate Aguilera Jr.'s claims. There "was no independent investigation on the

part of police to corroborate that claim." The affidavit set forth no information regarding any criminal history of Chery's., "let alone one involving narcotic sales."

The Second District further rejected the State's argument that the good-faith exception of United States v. Leon should apply. That was because "the affidavit in support of the warrant lacked any indicia of reliability and corroboration. As such, reliance on it as proper support for a search warrant was not objectively reasonable, and the good faith exception is inapplicable."

Nelson v. State, 2D19-3593 (Sept. 17, 2021)

In a direct appeal of convictions and sentences, based on the trial court's failure to conduct a necessary competency hearing and to enter an order regarding competency, the Second District, during the pendency of the direct appeal, relinquished jurisdiction to the trial court for 60 days, to enable the trial court to make a nunc pro tunc determination of competency, if possible.

Bickel v. State, 2D20-1394 (Sept. 17, 2021)

The Second District reversed the summary denial of one claim in a Rule 3.850 motion for further proceedings, because the trial court failed to attach court records conclusively refuting the claim.

The claim in question alleged that "counsel was ineffective for advising [Bickel] not to accept an early plea offer of five years' prison followed by ten years' sex offender probation that covered all three cases pending against him."

In a case involving charges of sex offenses and the use of a computer for child exploitation, the Rule 3.850 motion set forth allegations that a laptop computer seized from Bickel, which allegedly contained more than 100 photos involving minors had been lost, and that defense counsel was aware of this and advised the defendant that counsel told him that the absence of a chain of custody would mean that the State had no case. Counsel allegedly told Bickel that five years in prison was too high an offer "and that the 'magic number' was three years." Bickel subsequently learned that the laptop had never been lost. The information about a lost laptop allegedly originated from a detective's deposition testimony.

In the trial court, the State responded, and the court accepted, that there had been no plea offer of five years plus probation. This response included an email exchange between counsel. The emails related to negotiations in 2017, three years

after the time that the defendant's motion was referring to, and the emails did not reference any prior plea offers that may or may not have been made. Additionally, the State's reliance on such emails, even if proper, could only be done through an evidentiary hearing, as they were not part of the previously existing trial court record.

Third District Court of Appeal

Hernandez v. State, 3D21-1738 (Sept. 15, 2021)

The Third District granted a habeas corpus petition based on the trial court's failure to set reasonable bond for a human trafficking charge.

The trial court conducted an Arthur hearing and then concluded "that there were no conditions that would assuage the court's concerns regarding protecting the community, and particularly the victim, from possible communication or contact from Hernandez. The case involved allegations that the defendant and the 17-year-old victim "'were seen dancing erotically' in a video available for sale and viewing, which video 'was filmed at the direction of [Hernandez] and with the intention to profit from the sales.'"

The problem with the trial court's stated concern about contact through telephonic or other electronic means was that "without more, it could apply to prevent bail in any case." There was no evidence that "Hernandez poses a special, heightened, or in any way particularized risk of offending by trying to reach the victim" "The State did not meet its burden in showing that there are no conditions that could reasonably protect the community." The prior friendship between the two, which allegedly created the risk of contact, was deemed "conclusory and not supported by the record." A lead detective had testified at the hearing that the defendant ended the prior relationship with the victim and the victim was "essentially, on her own after that."

Fourth District Court of Appeal

Judon v. State, 4D20-2469 (Sept. 15, 2021)

Sentencing scoresheet errors resulted in a reversal of the sentence on direct appeal. The court imposed an overall sentence of six years in prison. A corrected scoresheet reflected a minimum sentence of 14.85 months. It was not clear from the record that the same "sentences would have been imposed by the trial court using a correctly computed scoresheet."

State v. Lebrun, 4D21-330 (Sept. 15, 2021)

Lebrun was convicted for a third offense of driving with a suspended license. The trial court, over the State's objection, offered the defendant the choice, at arraignment, of an open plea with a withheld adjudication plus court costs. The defendant accepted the offer. The appellate court reversed because section 322.34(2)(b)2., Florida Statutes, requires a minimum of ten days in jail on a third DWLS conviction. Because Lebrun's "plea was based upon the trial court's promised sentence which the trial court cannot now honor, appellee must be given the opportunity to withdraw his plea."

State v. Moss, 4D21-347 (Sept. 15, 2021)

As in the preceding case, the trial court failed to impose the mandatory ten-day sentence for a third DWLS. In this case, the trial court had concluded that the application of the mandatory minimum as applied to this defendant was an ex post facto violation.

The Fourth District, relying on prior case law involving PRR and habitual offender sentencing statutes, concluded that there was no ex post facto violation. The current offense was committed after the effective date of the statute with the 10-day mandatory minimum. In Grant v. State, the Florida Supreme Court rejected a similar ex post facto argument, finding that a "habitual offender sentence is not an additional penalty for an earlier crime; rather, it is an increased penalty for the latest crime, which is an aggravated offense because of the repetition."

Moss also argued that there was a due process violation for convicting him of an uncharged crime, "because the information contained only one prior conviction," and he was therefore charged under section 322.34(2)(b)1., and not (b)(2). The Fourth District disagreed. "Here, the information charged appellee with a violation of section 322.34(2)(b), which is a first degree misdemeanor. Section 322.34(2)(b)2. simply increases the crime's penalty but not its degree." Thus, "the number of DWLS convictions did not change the degree or level of the crime charged, it only increased the penalty. Appellant was convicted of a first degree misdemeanor, the crime set forth in the information."

Fifth District Court of Appeal

Hyacinthe v. State, 5D21-312 (Sept. 17, 2021)

Hyacnithe's conviction, resulting from a plea agreement, were reversed because the trial court "erred in failing to conduct a Nelson hearing despite Hyacinthe's repeated requests to do so."

> Hyacinthe sent three letters to the trial court expressing dissatisfaction with his appointed counsel and requesting a Nelson hearing to address counsel's purported ineffectiveness. The crux of his letters claimed that counsel had not been providing him with evidence relating to his case, including a report containing the grounds for the search warrant that led to the discovery of incriminating evidence. Further, Hyacinthe expressed concern that counsel had failed to retain a forensic expert to conduct a review of his computer and had failed to inform him of details regarding discussions with the State.

The trial court should have conducted an inquiry because the defendant clearly and unequivocally stated that he wished to discharge counsel, based on a claim of incompetence, and the allegations were more than expressions of general dissatisfaction.

Claridy v. State, 5D21-1091 (Sept. 17, 2021)

The Fifth District dismissed a petition alleging ineffective assistance of appellate counsel as untimely. The mandate from the direct appeal was issued on September 16, 2016, and the conviction and sentence became final at that time. The petition was filed almost five years after that time. Under Rule 9.141(d)(5), Fla.R.App.P., a petition alleging ineffective assistance of appellate counsel may not be filed "more than 4 years after the judgment and sentence became final on direct review."