Case Law Update
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Eleventh Circuit Court of Appeals

In re: Sealed Search Warrant, 20-14223 (Aug. 30, 2021)

"This case requires us to consider whether the use of a government filter team to review seized materials that are claimed to be privileged necessarily violates the privilege holder's rights. Here, the government obtained and executed a search warrant at a suite of offices where the Optima Family Businesses were located. Among the materials seized were items from the office of an in-house attorney. The Optima Family Businesses and their owners, managers and controllers [the Intervenors] assert attorney-client and work product privilege over at least some of these documents." The Intervenors sought an injunction to prohibit the government's filter team from reviewing any "potentially privileged documents unless either the Intervenors agree or the court, after conducting its own privilege review, orders disclosure."

"The district court held a hearing on the Intervenors' motion and imposed a modified filter protocol but denied the Intervenors' request to prohibit anyone from the government from reviewing potentially privileged documents unless the Intervenors agree or the court orders disclosure." That order was appealed and the Eleventh Circuit affirmed the district court's order on the motion to enjoin the use of a filter team. The Intervenors "have not showed a substantial likelihood of success on their argument that government filter teams *per se* violate privilege holders' rights."

The district court found that "improper disclosure of privileged documents to the prosecution team was not a concern since '[n]ot only do [the Intervenors] have the opportunity to review the documents *before* the filer team, but any documents identified by the [Intervenors] in their privilege log may not be released to the prosecution team until the parties agree to do so, or the Court or special master has ruled on the privilege objections."

The Eleventh Circuit first concluded that it had jurisdiction for the appeal. The appeal originated from an order seeking injunctive relief "in a civil case to prohibit the government from reviewing seized materials . . . ."

On the merits, the denial of a preliminary injunction was reviewed for an abuse of discretion. The safeguards that were included in the protocol meant "that the filter team cannot inadvertently provide the investigation with any privileged materials." Other federal appellate courts had "approved of the use of a walled-off government filter team to review documents for privilege." The Intervenors did not cite any case law to support the broad remedy they sought of a "holding that government agents 'should never . . . review documents that are designated by their possessors as attorney-client or work product privileged' until after a court has ruled on the privilege assertion.'" And, while some courts "disapproved of particular filter-team protocols," the protocol at issue in this case suffered "from none of the defects those courts found disqualifying." In one of those cases, the government's filter team, not the party asserting the privilege, "determined which documents were privileged." In another of those cases, while disapproving of the protocol in question, the Court had acknowledged that a government filter team, once in possession of seized after a search, could sift through the documents, and such an action was "respectful of, rather than injurious to, the protection of privilege." The problem was the absence of a check on the filter team's initial determination. That problem did not exist in this case.

United States v. Braddy, 19-12823 (Aug. 31, 2021)

The Eleventh Circuit affirmed convictions for possession with intent to distribute more than five kilograms of cocaine and conspiracy to possess with intent to distribute. The Court addressed Braddy's challenge to the denial of a motion to suppress evidence and found that the initial traffic stop was supported by reasonable suspicion, that the traffic stop was not unlawfully prolonged, and that the search of the vehicle was supported by probable cause.

Bicycles on the back of Braddy's vehicle "at least partially obstructed the vehicle's license plate," which was a Florida tag; the stop occurred in Alabama. An officer relied on an Alabama statute which required that vehicle operators have a "plainly visible" license tag or plate attached on the rear end of the vehicle. Braddy disputed the application of this Alabama statute to nonresidents, based on another statute that applied to nonresidents operating vehicles in Alabama. The Eleventh Circuit did not determine which statute applied because even if the officer's conclusion was erroneous, his contrary interpretation would still be "objectively reasonable." This assessment was based upon a combination of the language in the two Alabama statutes, as well as Alabama case law regarding statutory construction, as well as the scope of applicability of the two statutes.

Braddy contended that the traffic stop was unlawfully prolonged by virtue of the officer "engaging in nontraffic stop activities, including conducting probative questioning about his travel plans and itinerary, his residence, and the ownership of his vehicle as well as the dog sniffs." The Court disagreed, finding that the "questions were related to the purpose of the traffic stop and did not unlawfully prolong the traffic stop. " Generally, questions related to an individual's traffic plans or itinerary are ordinary inquires [sic] related to a traffic stop." This was especially true "given the fact that Braddy was driving a vehicle on Alabama roads with an obstructed Florida license plate that was not registered to him. Similarly, questions about the address on Braddy's driver's license, which Officer Sullivan determined was incorrect, and questions about the ownership of the vehicle Braddy was driving were also well within the scope of the traffic stop."

Nor did the dog sniff unlawfully prolong the initial traffic stop. "The uncontroverted testimony from the suppression hearing established that the canine unit arrived, and the initial dog sniff occurred when Officer Sullivan was engaged in conducting a routine records check during the stop. Specifically, while Officer Sullivan was in is patrol car waiting for a warrant check return on Braddy before finalizing the issuance of a warning citation for the obstructed license plate, Lieutenant Cully arrived at the scene with his dog and ran the dog around Braddy's vehicle." Once the dog alerted to the odor of narcotics, "the officers had reasonable suspicion of other criminal activity at that point to prolong the traffic stop."

Finally, Braddy challenged the reliability of the drug detection dog's alert as the basis for probable cause for the ensuing search. The evidence of reliability was found to be sufficient. Two officers "testified in detail about the training and certifications that they and their drug detection dogs obtained. And, "Officer Sullivan also explained that he was familiar with the alert of Lieutenant Cully's drug detection dog, as he had previously trained with Lieutenant Cully." Braddy's argument was based on his own expert witness, "who testified that the dogs did not perform a trained alert indicating the presence of drug odors and that the officers 'overhandled' their dogs." This argument involved a credibility determination, and that was a mater for the district court, not the appellate court. Furthermore, the testimony of the officers was consistent with video evidence.

The two officers provided detailed testimony regarding the dogs' responses to the vehicle. One judge dissented, based on the dog-sniff testimony. The dissent concluded that the officer's "descriptions of his observations did not include the kind of objective and articulable facts that are necessary to support a finding of probable

cause." The dissent concluded that those observation were "closer to the kind of 'inarticulate hunches' that the Fourth Amendment forbids. . . . The behavior he describes – a slight change in posture or breathing, particularly one that is said to happen within a fraction of a second – is described at such a high-level of generality, it could easily refer to normal dog behavior." As detailed in the Court's majority opinion, one officer "explained that when he ran his dog by the vehicle, the dog 'blade his body towards the car, closed his mouth tail went erect, and [he] saw a change in breathing and change in body posture, showing the presence of narcotics in the vehicle.' He described the dog's behavior as 'very quick' and explained that he had seen this behavior on 'many' occasions, which was consistent with the dog's behavior during training." The "dog could not go into 'final response' because it could not pinpoint the odor's source due to the wind conditions at the scene, but . . . the dog's changes in behavior were responses indicating the presence of drugs."

Pye v. Warden, Georgia Diagnostic Prison, 18-12147 (Sept. 1, 2021)

The Curt, on rehearing, vacated its prior opinion and decided to hear the case en banc.

The Court's prior opinion of April 27, 2021, reversed the denial of a habeas corpus petition, granted a new sentencing hearing, and addressed the claim of whether counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of the capital trial.

First District Court of Appeal

Wallace v. State, 1D19-4655 (Sept. 2, 2021)

Wallace appealed convictions for vehicular homicide, leaving the scene of the accident, two counts of leaving the scene of the crash involving death, and one count of tampering with electronic monitoring. The First District reversed the two convictions for leaving the scene of a crash involving death as double jeopardy violations and affirmed the remaining convictions. As to the double jeopardy violations, it did not matter that Wallace was not sentenced for those offenses.

Wallace challenged the prosecutor's opening argument: "Based on the quality of the evidence in this case, the options for the defense are severely limited. The defense may claim that, yes, although [Appellant] did all those things, there isn't a witness to testify that he got out of the driver's seat after that crash." The legal argument that the statement denigrated the defense was not preserved for appellate

review. And, even if it had been, it would not have been reversible "because the statement here was relatively minor and isolated."

Wallace argued that the trial court erred by not holding a Richardson hearing "after it was disclosed at trial that one of the Appellant's witnesses may have provided an anonymous tip which identified Appellant as the suspect." The record indicated that Wallace was aware of the anonymous tip prior to trial; he claimed, however, that "he was not provided information tying the witness in question to the tip." "However, at trial when the discovery issue arose, the State made clear that it had no specific knowledge that the witness was the tipster." Based on a review of the record, the Court concluded that "it does not appear the State had the information Appellant claims was erroneously not provided to him." As a result, there was no discovery violation and no error in not holding a Richardson hearing.

An argument that the evidence was insufficient under the circumstantial evidence standard was no longer viable, as the Florida Supreme Court abandoned that standard of review. Under the general standard which is now applicable to all claims of insufficient evidence, there was no error in denying the motion for judgment of acquittal. Wallace rented the vehicle; he was the only authorized driver; he was "seen getting out the driver's side of the vehicle on surveillance footage when he was buying window tint a short time before the accident. No one else was observed. After the accident, evidence shows Appellant attempted to hide the vehicle and fled the area after the vehicle was located."

Although the prosecutor made statements, which may have been inflammatory, during a bench conference, the judge "assured Appellant that [the court] was capable of not considering the prosecutor's arguments when sentencing Appellant." There was therefore no error in denying a motion for mistrial.

During closing argument, the prosecutor argued that he was waiting for an "explanation of why" from defense counsel "and I never heard one. That's because there is no explanation other than he did it. The Defense is choosing to ignore all of the defendant's actions." While a prosecutor may not comment on a defendant not testifying, when read in context, "it shows the prosecutor was not commenting on Appellant not testifying, but rather, the State was asking what the explanation would be for Appellant's actions if he were not driving the vehicle at the time of the accident. Such a comment is not improper. . . ."

Carsten v. State, 1D21-1623 (Sept. 2, 2021)

An untimely motion for rehearing from the denial of a Rule 3.850 motion did not delay rendition of the order denying the motion. This had consequences for the timeliness of a subsequent appeal.

Levine v. State, 1D19-3157 (Aug. 31, 2021)

The Court cited and quoted Miller v. State, 265 So. 3d 457 (Fla. 2018), for the point that section 775.087(2)(d), Florida Statutes 92014), "'permits consecutive sentences *at judicial discretion* for specified crimes committed in a single criminal episode *with either multiple victims or injuries*.'"

Washington v. State, 1D19-4487 (Aug. 31, 2021)

The Court denied a motion for rehearing en banc and clarification. Two judges wrote their own individual concurring opinions addressing the issue of "how the abuse of discretion standard applies in appellate review of juvenile resentencing cases under the Eighth Amendment jurisprudence. . . ."

One judge concluded that the United States Supreme Court's decision of Jones v. Mississippi, 141 S.Ct. 1307 (2021), did not create a federal constitutional requirement that judges "explain the manner in which they exercised their sentencing discretion." And, Jones "shifted the focus of potential juvenile sentencing reforms to the individual states, noting that the Court's interpretations of the federal constitution do not demand any particular policy approach." The second judge, addressing the facts of the individual case, found that it presented a "close question," and that judge wrote the concurring opinion to express the judge's individual view "to reject the notion that such appeals are futile." In order to reverse a trial court's sentencing judgment, "it must be that no 'reasonable [judge] could differ as to the propriety of' the sentence."

Owens v. State, 1D20-1467 (Aug. 31, 2021)

The denial of a Rule 3.850 motion was affirmed. Owens claimed that counsel was ineffective for not pursuing a competency evaluation and for not presenting mental health mitigation evidence at sentencing.

The trial court conducted an evidentiary hearing and explained that although Owens was mentally ill, "he demonstrated competence and understanding of the

legal proceeding against him and was able to assist in his defense." "'Not every manifestation of mental illness demonstrates incompetence to stand t rial; rather, the evidence must indicate a present inability to assist counsel or understand the charges.'" No evidence was presented by Owens at the evidentiary hearing regarding legal incompetence.

With respect to the absence of mitigating evidence, the Court concluded that trial counsel's strategy was reasonable, but facts regarding that strategy were not set forth in the opinion.

Miles v. State, 1D20-0989 (Aug. 30, 2021)

The First District reversed a conviction for human trafficking involving a child under the age of 18. The trial court erred "by allowing the introduction of hearsay testimony about the minor victim's age."

The defense had been unable to serve the child victim, J.D., with a subpoena for deposition, notwithstanding the various addresses provided by the State. The trial court denied a motion to sever this charge from one in which the victim was an adult. The case was then tried without participation from victim J.D. The State proved J.D.'s age at the time of the offenses through a juvenile probation officer and an investigator for the County Sheriff. Testimony referenced a review of probation records, and the investigator's interview of J.D. as well as information provided to the investigator by the JPO.

This evidence was challenged as hearsay. On appeal, the State relied on the hearsay exception "for statements of personal or family history, including statements about the declarant's birth." This exception, however, applies "only when the declarant is unavailable." The Sate attempted to satisfy the burden regarding unavailability by referencing defense counsel's pretrial comments in the hearing on the motion to sever regarding the difficulty in locating J.D. However, there was no stipulation at that time that J.D. was unavailable for a trial which was still months away from commencing. Nor did the State explain was steps were taken to locate J.D. or serve her with a subpoena.

Second District Court of Appeal

Friend v. State, 2D20-2018 (Sept. 3, 2021)

The summary denial of a Rule 3.850 motion, which alleged ineffective assistance of counsel, was reversed and remanded for further proceedings as to one of its claims – i.e., ineffectiveness "for failing to object to a sleeping juror after Friend informed counsel of the issue." The allegations in the motion were too speculative, but Friend was entitled to an opportunity to amend the claim.

Nunez v. State, 2D20-2680 (Sept. 1, 2021)

The summary denial of a Rule 3.850 motion was reversed for further proceedings.

Nunez alleged that "she pleaded guilty to four charges in 2018 without having been advised by her counsel of the 'immediate' and 'certain' deportation consequences of her pleas." Nunez received an "equivocal" warning from the trial court during the plea colloquy, which included language that the plea "may" have deportation consequences. An equivocal warning "'is not on its own sufficient to refute a claim that counsel was ineffective. . . ." When there is an equivocal warning, the defendant must set forth additional allegations to support an entitlement to relief: "(1) that the movant was present in the country lawfully at the time of the plea; (2) that the plea at issue is the sole basis for the movant's deportation; (3) that the law, as it existed at the time of the plea, subjected the movant to 'virtually automatic' deportation; (4) that the 'presumptively mandatory' consequence of deportation is clear from the face of the immigration statute; (5) that counsel failed to accurately advise the movant about the deportation consequences of the plea; and (6) that, if the movant had been accurately advised, he or she would not have entered the plea."

The record in this case did not support the trial court's finding that the "pleas at issue are not the sole basis for Nunez's deportation." Her probation was revoked in 2019 when she pled guilty to a new charge of uttering forged checks. That conviction and 22.5 months sentence "may subject her to deportation if the offense was committed within five years of her admission or within ten years if she had been provided lawful permanent resident status." This could not be ascertained from the trial court record.

On remand, Nunez was entitled to an opportunity to amend the motion to set forth a facially sufficient claim; she had not alleged that the 2018 pleas were the sole

basis for her deportation; nor did she comply with two of the other pleading requirements noted above.

Fourth District Court of Appeal

Alahad v. State, 4D19-3438 (Sept. 1, 2021)

The Fourth District affirmed convictions for second-degree murder and attempted armed robbery.

The trial court did not abuse its discretion in denying a motion to suppress an eyewitness's identification which was alleged to be an unnecessarily suggestive show-up.

After the offenses which the witness observed, police obtained a description of the perpetrator from the eyewitness. Later that afternoon, a 911 call, regarding the defendant having run through a yard with a firearm in a nearby apartment, resulted in the apprehension of the defendant and several other men. The eyewitness was contacted about three hours after the shooting and n the ensuing procedure, "was shown only the defendant," whom she identified from a distance of 30-40 feet, stating that she was "pretty positive" and the agreeing that she was "one hundred percent sure."

The defendant's argument focused on three facts: "(1) the defendant was in handcuffs and flanked by two officers, (2) the police told the eyewitness that he matched her description and that he was found in the area to which she saw him flee, and (3) although others were found in the apartment, at least one of whom matched the description the eyewitness provided, the eyewitness was shown a single person."

Neither the presence of officers nor handcuffs, "standing alone," renders a show-up impermissibly suggestive. The statements of the detectives regarding the witness viewing someone who matched the previously provided description were deemed too vague to create a substantial likelihood of misidentification. The officers told her that "they were going to show her 'a guy from [her] description' and that they wanted her to let them know if he was the shooter." The Court distinguished this from cases which involved "far more egregious statements and conduct by police." In one of the prior cases, the robber was described as a man holding a screwdriver, and, prior to the show-up, the police told the witness that "they were detaining someone who had a screwdriver and was wearing clothing fitting the description" provided by the witness.

The presence of a second individual, who matched the eyewitness's description, in the apartment where the defendant was found, was "the most troubling fact." The trial court concluded that this omission was not done to aggravate the show-up's suggestiveness. The appellate court found that reasonable minds could "differ" as to whether this rendered the show-up unduly suggestive, but, "in light of Florida case law, we cannot conclude that the trial court's determination was one that no reasonable judge would make. A neighbor identified the defendant by name, so law enforcement had a legitimate basis to zero in on the defendant for a show-up. In other words, unlike in other cases, here nothing indicated intentional misconduct or incompetence on the part of law enforcement."

State v. Piering, 4D21-350 (Sept. 1, 2021)

The Fourth District reversed an order dismissing an information. The information had been refiled after an announcement of nolle prosequi. The trial court found that the "nolle pros was entered for an improper purpose."

The state announced the nolle pros after the trial court denied its motion for a continuance, which had been based on the unavailability of a key witness, an officer under subpoena, who "was required to perform equipment maintenance" that day. The information was refiled one week later.

The "record does not support a finding that the state's action was motivated by an improper purpose." An indispensable witness was unavailable, and "nothing indicates that the officer's disregard of the subpoena was motivated by the state's misconduct."

Shaw v. State, 4D21-1859 (Sept. 1, 2021)

The Fourth District reiterated its prior holding that the Supreme Court's decisions regarding juvenile life sentences do not apply to offenders 18 years of age or older at the time of the offense.

Fifth District Court of Appeal

Barton v. State, 5D21-183 (Sept. 3, 2021)

Barton has been found incompetent to stand trial and was found to remain incompetent on at least six subsequent occasions. There were indicia that she "was

intentionally failing to cooperate with the evaluations." The State requested that malingering tests be done. Subsequent evaluations by hospital staff did not address malingering. The State then requested to have an evaluation done by its own expert. The trial court granted the motion. Barton challenged this order in a certiorari petition, which the Fifth District denied. Barton's petition failed "to establish how the trial court's order resulted in irreparable harm. In fact, Barton's petition is completely silent on these elements altogether."

This was deemed a jurisdictional defect, and although not raised as an issue by the State, the Court was required to consider the existence of jurisdiction on its own.