Case Law Update
October 18, 2021
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Supreme Court of Florida

In Re: Amendments to the Florida Rules of Juvenile Procedure, SC21-627 (Oct. 14, 2021)

Most of the new amendments pertain to dependency proceedings. There are minor revisions to the criminal and civil contempt rules, 8.285 and 8.286, changing the term "shall" to "must" in all instances in which "shall" previously appeared.

Eleventh Circuit Court of Appeals

United States v. Giron, 20-14018 (Oct. 13, 2021)

The Eleventh Circuit affirmed the denial of a motion for compassionate release under 18 U.S.C. s. 3582(c)(1)(A).

This statutory provision permits release upon a judicial determination that "extraordinary and compelling reasons warrant such a reduction," "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," and "s. 3553(a) sentencing factors weigh in favor of a reduction. "If a court "finds that an extraordinary and compelling reason exists, it must also determine that '[t]he defendant is not a danger to the safety of any other person or to the community.'"

The Court rejected Giron's argument that a district court may independently assess "whether extraordinary and compelling reasons exist," and "that the confluence of his medical conditions and COVID-19 creates" such a reason "under either the medical or catch-all provisions of Section 1B1.13." The only medical reasons that suffice under the governing policy statement are for terminal illness or for conditions that "substantially diminish[] the ability of the defendant to provide self-care within" prison.

Additionally, the district court did not err by denying the motion "without weighting the sentencing factors." While the district court must make three findings in order to grant a motion for compassionate release, the findings need not be made

in any particular order, and if any single finding is determined adversely to the defendant's motion, it is not necessary for the district court to address the remaining prongs of the analysis.

United States v. Approximately $299,873.70 Seize from a Bank of America Account, 20-11107 (Oct. 13, 2021)

The government "brought an *in rem* action to forfeit money [] Chinese nationals deposited in American bank accounts as part of [a] visa scam." Some of the Chinese nationals were unable to enter the United States to attend the trial, but were represented by counsel. In this appeal, the Court addressed the issue of "whether foreign nationals have a constitutional right to enter the United States to attend a civil forfeiture trial involving their property." The Eleventh Circuit held that there was no due process violation. Relevant factors included the civil nature of the forfeiture proceeding.

First District Court of Appeal

Brinegar v. State, 1D20-0703 (Oct. 13, 2021)

The Court affirmed convictions for attempted second-degree murder shooting into an occupied dwelling, and using a firearm while under the influence, without written opinion. One judge authored a concurring opinion addressing the sufficiency of evidence for being "under the influence." The concurring opinion detailed aggressive behavior, the haphazard manner in which the defendant used his weapon, "sporadically" discharging it between 16 and 24 times over a 20-minute period, slurred speech, the smell of alcohol, the inability to walk or stand in a normal manner, and the numerous empty and open liquor bottles in the home where the defendant was.

Robinson v. State, 1D20-2907 (Oct. 13, 2021)

The First District affirmed convictions for trafficking in methamphetamine, possession of hydrocodone, and possession of paraphernalia.

There was no error in the denial of a motion to suppress the results of a search of the defendant's motel room, which was based upon a search warrant, which warrant was "based in part on a K-9 sniff of the motel's common exterior walkway that gave a positive alert for illegal drug odors emanating from Appellant's room." Robinson relied on case law which proscribed reliance on a sniff test conducted at a

private home. The private home, however, "is accorded a special, sacred status and the Fourth Amendment draws a firm line at the entrance to the house." The same rationale did not extend to a "dog sniff conducted on the common external walkway in front of Appellant's motel room. . . . The walkway was open to use by others, including other motel guests, visitors, and employees, and it was in the nature of a public, not private, area." Nor was the walkway curtilage, and motel guests did not have any "reasonable privacy expectation in a common area."

Felton v. State, 1D20-3417 (Oct. 13, 2021)

After Felton was found not guilty by reason of insanity, DCF petitioned the court under s. 916.107(3), Florida Statues, "to authorize nonemergency but essential treatment." The trial court granted the petition, and the appellate court concluded that the evidence, from Felton's doctor, was sufficient. "The physician testified that Ms. Felton is mentally ill, that the treatment is essential to her care, and that the treatment is not experimental and does not present an unreasonable risk of serious, hazardous, or irreversible side effects."

Second District Court of Appeal

Denman v. State, 2D19-1687, 2D19-3381 (Oct. 15, 2021)

The imposition of a $400 public defender fee was erroneous, as Denman was not given "notice and an opportunity to challenge it." Such notice and opportunity to be heard are required when the trial court exercises its discretion and imposes a fine in excess of the statutory minimum of $100.

Additionally, the written order erroneously designated Denman as an HFO after the trial court orally pronounced that it would not impose that designation. The oral pronouncement prevails over the written sentence.

Pickle v. State, 2D19-4237 (Oct. 15, 2021)

The Second District reversed a conviction for conspiracy to commit racketeering and affirmed convictions for illegally killing, possessing, or capturing alligators or eggs. The prosecution arose out of a covert operation of the Florida Wildlife Commission in which the Commission operated a licensed alligator egg processing facility. Pickle was hired by Albritton to assist with the collection of eggs from public and private lands. Albritton was licensed to collect eggs from "certain public and private lands," and was working with a farm based in Louisiana,

but importation of eggs outside the state is illegal under Louisiana law. "Albritton needed a licensed facility in Florida to hatch the alligator eggs before he could transport and sell them to the farm in Louisiana." Albritton contacted the farm operated by the FWC, "and offered to teach the officer the alligator business in exchange for the use of the facility." He hired Pickle, but Pickle did not "obtain the required farmer's agent license for the 2016 season." The State presented evidence that "Pickle knowingly collected eggs from a private property . . . without a license or permit."

The RICO conspiracy charge was based on alleged predicates of theft. Pickle argued that the theft predicates were not established because the alligator eggs at issue were not "property of another." "Taking the eggs from their nests without permission from the State, within the parameters outlined in a valid permit, was a criminal act. . . . However, it did not constitute theft sufficient to support the conspiracy to commit racketeering because no individual person owned the alligator eggs while they were in the nests – neither the private landowners nor the State.." "The authority to regulate something does not necessarily confer ownership of that thing on the State."

As to the statutory violations for intentionally killing, injuring an alligator or its eggs, etc., the trial court did not err in denying a lesser included offense instruction for what is defined as a "Level Two" violation of the statute, which applies if the defendant "has not been convicted of a Level Two or higher violation within the past 3 years." There was no entitlement to a jury instruction for this as a lesser offense. It was not a necessarily lesser included offense, because "one can avoid violation section 379.3751 while collecting alligator eggs in excess of the amount designated in the allegator collection permit." And, it was not a permissive lesser included offense because the amended information did not set forth allegations that "Pickle's taking of alligator eggs was without the agent license or egg collection permit."

Dillard v. State, 2D20-2274 (Oct. 15, 2021)

The Second District affirmed a conviction for first-degree murder of a child under Dillard's care and rejected the defendant's argument that standard jury instruction 3.12 resulted in an "unconstitutional, non-unanimous jury verdict" of the charged crime.

Dillard argued that the instruction permitted a conviction "without unanimous agreement as to whether he committed premeditated or felony first-degree murder." In several prior decisions, the Supreme Courts of both Florida and the United States had held that unanimity was not required on the issue of whether the murder was premeditated or felon-murder, as long as all jurors agreed that the defendant committed a first-degree murder. Dillard argued that the recent decision of Ramos v. Louisiana, 140 S.Ct. 1390 (2020), compels a different conclusion. Ramos held "that a unanimous jury verdict is constitutionally required to support a criminal conviction of a serious offense in state court." The Louisiana conviction in that case was the result of a 10-2 jury vote. The issue of "alternative theories" of a crime, as in the premeditated/felony-murder issue, is different from a non-unanimous jury vote.

Defuria v. State, 2D21-492 (Oct. 15, 2021)

The Second District reversed the summary denial of a Rule 3.850 motion as to one of its three claims.

"Defuria argued that defense counsel rendered ineffective assistance of counsel by erroneously advising him that he should not testify at trial." He asserted that he would have testified that he acted in self-defense when he shot the victim." His motion set forth additional details regarding his claim of self-defense.

The trial court denied the claim, finding that the allegations as to what testimony the defendant would have provided were cumulative to other testimony in the case, as the defendant's statements to law enforcement had already been admitted into evidence. The Second District rejected that conclusion, because "'a defendant's testimony cannot be "cumulative" because the impact of a defendant's own testimony is qualitatively different from the testimony of any other witness.'" Thus, the portions of the trial testimony that were attached to the trial court's order did not conclusively refute the claim. Additionally, the trial court's conclusion that trial counsel's advice was sound trial strategy was rejected because a conclusion that trial counsel acted for a strategic purpose "'generally requires an evidentiary hearing.'"

The case was remanded for further proceedings, for the court to either "attach record portions that conclusively refute the claim or hold an evidentiary hearing.'"

Mays v. State, 2D21-801 (Oct. 15, 2021)

The summary denial of one of multiple claims in a Rule 3.850 motion was reversed for further proceedings. The claim alleged that counsel was "ineffective for failing to investigate [Mays'] competency and move for a competency hearing." The motion alleged that Mays suffered from multiple, enumerated mental illnesses at the time of trial, and that counsel was aware that "he had been under psychiatric care prior to trial, had attempted suicide multiple times, and was a depressive alcoholic."

The claim, as alleged in the motion, was facially sufficient, and was not conclusively refuted "by the record excerpts of interviews presented at trial attached to the order by the postconviction court."

Rodriguez-Olivera v. State, 2D18-706, 2D20-296 (Oct. 13, 2021)

The Second District reversed convictions for capital sexual battery and two counts of lewd or lascivious molestation for a new trial.

On direct appeal, the Second District found that trial counsel was ineffective on the face of the record, for "failing to object to the admission of highly prejudicial evidence and by failing to move for a mistrial when the jury heard such evidence."

The jury heard, on two separate occasions, evidence of uncharged acts of molestation. A child protective investigator "relayed what M.S. had told her about the underlying allegations." The investigator then added that "there was another as well." After an objection by defense counsel, and a proffer of testimony regarding the second incident, the trial court agreed that an uncharged crime had been referenced. Defense counsel, after consulting with the defendant, stated that he was "not seeking a mistrial based on my client, but I leave it to the court's discretion." The court gave a curative instruction.

During the subsequent playing of a video interview of M.S., the court heard another investigator ask, "[b]eside what we just talked about, was there any other times, or any other incidents with [the defendant]?" M.S. responded: "Me, him, my dad, my stepmom – the second time that he tried to get me, but like it was like – we went to – me my dad." After another objection and a review by the trial court, that court concluded that it was not a reference to an uncharged incident, but a different version of the charged incident. The Second District reviewed the facts and came to

a contrary conclusion. Defense counsel did not correct the trial court's erroneous interpretation, nor did counsel move for a mistrial or request a curative instruction.

Even if counsel's first decision, to defer to the court, was a strategic decision to waive mistrial, "nothing suggests that a sound trial strategy was behind counsel's failure to move for mistrial (or even request a curative instruction) after the second time a State witness mentioned an uncharged crime." The collateral offense evidence was deemed highly prejudicial, resulting in the probability that a different outcome of the trial.

Counsel was also deficient for not objecting, on cross-examination of the lead detective, to an unsolicited comment on prearrest silence: "I attempted to interview the suspect in the case, but he had already obtained an attorney who did not want to give a statement." Defense counsel compounded this error by referencing the comment in counsel's closing argument. No strategic reason could be discerned for either failing to object to the comment or for highlighting it in closing. These deficiencies were also deemed prejudicial, in and of themselves, because the defendant "did not testify, [and] the only version of the events came from M.S. (and the various retellings of her story through child hearsay. . . .)."

As to the child hearsay, the trial court conducted a hearing and determined that the child's statement to an investigator satisfied the requirements for the admission of child hearsay testimony. However, the State introduced additional child hearsay from several other witnesses, both prior to the introduction of the recorded interview, all of whom testified after the jury heard M.S. testify in court live, and all of whom corroborated her account. Defense counsel did not object to any of this hearsay. Counsel did not object to any of this additional child hearsay, and counsel did not object to the sufficiency of the trial court's findings with respect to the recorded interview. Counsel's performance was again deficient and the cumulative effect of these omissions was prejudicial.

M.S. had also accused another person, J.M., of molesting her. The parties agreed to exclude that testimony unless the State opened the door. During trial, the recorded interview was played, and it included the question of whether "anybody else has done anything to you like that," to which M.S. responded, "no." Defense counsel sought a ruling on whether this opened the door to the J.M. incident. Defense counsel should have been able to cross-examine M.S.. Defense counsel "did not intend to question the truth or falsity of M.S.'s allegations against J.M.[which would have been prohibited under case law]; instead, he sought to

challenge M.S.'s credibility based on her denial of any prior similar incidents of molestation."

The information alleged that the defendant committed two acts of molestation by touching "M.S.'s genital, buttocks, or the clothing covering them." There were no allegations as to the touching of M.S.'s breasts. The prosecutor argued, in closing, that the State could prove one of the two charged molestations through the touching of the breasts. The jury was instructed to that effect as well. This was erroneous, as that was an instruction on an uncharged offense.

Agenor v. State, 2D20-2052 (Oct. 13, 2021)

In an appeal from the denial of a Rule 3.800(a) motion to correct illegal sentence, the Second District reversed in part. Agenor was convicted for a burglary with an assault or battery, committed while he was 17 yeas old. He was sentenced to 25 years in prison. The trial court erred by not including an entitlement to judicial review of the sentences under sections 775.082 and 921.1402, Florida Statutes 92015). The burglary offense was a first-degree felony, punishable by a term of years not exceeding life. And, any person under 18 who commits a felony punishable by life and who is sentenced to a term of more than 20 years, is entitled to judicial review of that sentence after the first 20 years are served.

Fourth District Court of Appeal

Andrade v. State, 4D211472 (Oct. 13, 2021)

The Fourth District granted a petition for writ of certiorari. The trial court erred by revoking Andrade's admission to a drug court pretrial intervention program.

One judge found that the defendant qualified for the program. A second judge revoked that order, after hearing arguments from the State that the purported victim in the case (an attempted burglary of a dwelling) was not provided notice and was not consulted. The second judge then denied the request for the drug court program after hearing testimony from the purported victim, who urged the court to bar the defendant from the program "based on the history and severity of [his] conduct directed toward the purported victim." The second judge then found that the defendant was not eligible for drug court.

The trial court's conclusion that the defendant was not "eligible" for the program was erroneous. The defendant satisfied the statutory requirements for the

program. There are three statutory exceptions to eligibility, but they were not applicable in this case. Once the statutory eligibility requirements are satisfied, the statute provides that "the court *shall* admit an eligible person into" the program. This is mandatory, "regardless of the inclinations of either the purported victim or the trial court."

Fifth District Court of Appeal

Toomey v. State, 5D21-994 (Oct. 15, 2021)

The trial court erred in revoking probation, where the only evidence at the revocation hearing was hearsay. The affidavit of violation of probation alleged violations as to the false reporting of an address and the changing of an address without first obtaining the consent of the probation officer.

At the hearing, the probation officer testified that the officer went to the listed home address and spoke to an "unidentified individual who he believed owned the property." "The individual related that Toomey had stayed at that location for a few days but had been in Daytona for the past several weeks. . . ." The officer then "made unsuccessful attempts to contact Toomey via email and phone to verify his residence. The officer acknowledged that he did not make any attempt to enter the home or determine the identity of the individual purporting to have knowledge of Toomey's residency." Toomey testified he still lived at the residence, which had an upstairs and downstairs unit, and that he rarely "interacted with his upstairs neighbor, as the home had two separate entrances."