

Case Law Update  
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Supreme Court of Florida

[Smith v. State](#), SC18-1763 (Oct. 21, 2021)

The Supreme Court affirmed the denial of a motion for postconviction relief and denied a habeas corpus petition. Smith presented multiple claims of ineffective assistance of trial and appellate counsel in a capital case in which Smith was convicted on three charges of first-degree murder.

A video of Smith's interrogation with detectives included portions in which the detectives accused him of having no remorse for the murders. Defense counsel introduced this into evidence, including the portions regarding the alleged lack of remorse. At an evidentiary hearing, counsel explained that this portion was included "in order to portray the detectives as dishonest and unethical and show that they were 'running all over' Smith's constitutional rights." The trial court's conclusion that this was sound strategy was supported by the evidence from the postconviction evidentiary hearing.

At trial, defense counsel stipulated to the admission of three separate booking photos of the defendant, each of which contained a statement written by a witness, which statement Smith asserted was hearsay, for which it was alleged that counsel was ineffective for stipulating. At the evidentiary hearing, counsel explained that he tried to stipulate when possible to avoid being obstructionist and to not waste time, if the matters were otherwise admissible. On one photo, the witness wrote "Terry [the defendant] I saw him shoot Desmond. . . ." There was no prejudice from this because the statement on the photo had already been introduced into evidence by the witness in question.

The second photo included a witness's statement that "He said he had shot three people, two dudes and a girl." Again, there was no prejudice, as the witness in question had already testified to the same effect. The third photo included a lengthy paragraph as to what the identifying witness observed. Although this would not have been admissible through the identifying witness on direct examination, as it was hearsay, defense counsel had cross-examined the witness and attacked his credibility based on improper motive. The paragraph written on the photo would therefore have

been admissible as a prior inconsistent statement. Defense counsel explained at the evidentiary hearing that counsel considered objecting to the statement, but concluded it was “most beneficial to Smith to be able to attack [the witness] with his plea agreement even though it would make the prior consistent statement admissible.” And, the witness had also provided a narrative account regarding the defendant’s involvement in the shooting of the three victims.

The failure to object to another prior inconsistent statement was not ineffective assistance. The statement was admissible where defense counsel had already strategically decided to attack the witness’s testimony as a recent fabrication.

The failure to present a forensic pathologist regarding gunshot wounds was not deficient performance by counsel. At the evidentiary hearing, counsel testified “that Smith confessed to him that he killed the three victims with a ten-millimeter handgun, which aligned with the State’s theory.”

Counsel was not ineffective for failing to impeach multiple witnesses. As to one of the witnesses, “counsel repeatedly highlighted the fact that Williams initially lied to detectives, claiming that he lacked any knowledge of the murders.” Another witness was a minor witness who did not provide damaging testimony, as the jury had already heard the same evidence from another witness. A third witness had not given any incriminating information against Smith. A fourth witness was not impeached with his prior four felony convictions, but the State had already noted the multiple convictions and plea deal of this witness on direct examination. Defense counsel relied on this in closing argument. Counsel also failed to call another witness, a jail inmate, to impeach the fourth witness with testimony that the fourth witness had commented on blaming the murders on Smith. Counsel considered impeachment through this jail inmate, but chose not to use the inmate, as counsel was aware of testimony that the prosecution would use to refute the witness’s allegations. The defendant was colloquied at trial and indicated that he agreed with counsel’s decision that the inmate would not be called as a defense witness.

The Court addressed several claims regarding the failure to object to allegedly improper character evidence. Testimony that Smith allowed one of his friends, Haney, to stay at his house, “knowing that Haney was wanted in connection with another unrelated shooting and attempting to evade arrest,” was not objectionable as inadmissible collateral crime evidence.” It was “relevant to explain why Smith confessed to Haney nearly a year after the murders in this case” and “its sole relevancy was not the character or propensity of Smith.” Evidence that three witnesses were afraid of retaliation by Smith was not objectionable. It explained

why these witnesses did not initially come forward and why they initially denied having knowledge of the triple homicide. The alleged failure to object to the prosecutor's closing argument as irrelevant was not ineffective assistance because such an objection would have been overruled "because the State's closing argument was not evidence or testimony."

A medical examiner testified to findings and conclusions of two other medical examiners. Counsel's failure to object under the Confrontation Clause was without merit. A "testifying medical expert may offer an opinion based on an autopsy performed by a non testifying expert without violating the Confrontation Clause." The testifying expert reviewed the files of the other examiners who conducted autopsies of two of the victims; their reports were not admitted into evidence; and the testifying expert gave his own "independent opinions, formed after reviewing technical facts contained in the reports and the photographs taken during those autopsies."

The failure of counsel to advance Smith's theory of defense was not ineffective assistance. Smith confessed to counsel. At an evidentiary hearing, Smith testified that he told counsel about a third party who committed the murders. Counsel testified to the contrary. As an evidentiary hearing was held, and the trial court found that Smith's testimony was not credible, the Supreme Court upheld the trial court's conclusions.

A claim of newly discovered evidence was without merit. Witness Haney, to whom Smith had confessed, recanted the confession. After the evidentiary hearing, the trial court found that the recantation was not credible, emphasizing that the recantation was contrary to both Haney's own trial testimony and other trial testimony. And, given the other testimony adduced at trial, the absence of Haney's testimony about the confession "would not probably produce an acquittal on retrial."

Appellate counsel from the direct appeal was not ineffective for failing to raise three hearsay objections. Each of the three witnesses recounted what Breon Williams told them about seeing the defendant shoot one of the victims. Trial counsel objected on hearsay grounds, but the trial court found that the statements were admissible as prior consistent statements. Two of the trial court's rulings were not erroneous. Defense counsel had cross-examined Williams, pointing out his original denial of knowledge of the shootings, emphasizing that he incriminated Smith only after Williams, himself, was facing potential charges and a life sentence. The existence of that motive to lie enabled the prosecution to elicit the prior consistent statements, which were made before that motive to lie existed. The prior

statement elicited from a detective’s testimony was erroneously admitted, because that statement was made after the alleged motive to fabricate existed. Had appellate counsel raised the issue in the direct appeal, it still would have failed under harmless error analysis because the substance of the testimony from the detective was already properly before the jury through other witnesses.

At trial, one witness testified that Smith had seen the gun, a ten-millimeter, used by Smith in the shootings in Smith’s possession on prior occasions. The failure of appellate counsel to raise this on direct appeal, based on the denial of an objection and motion for mistrial, was not ineffective assistance. That testimony “was highly relevant and probative because ten-millimeter casings were found at the crime scene, and all wounds to the victims were consistent with ten-millimeter bullets.”

### Eleventh Circuit Court of Appeals

[United States v. Wheeler](#), 17-15003 (Oct. 21, 2021)

Three codefendants appealed convictions for wire fraud, mail fraud and conspiracy, based on their involvement in “a telemarketing scheme to defraud stock investors.” The government appealed post verdict motions for judgments of acquittal as to two other codefendants.

As a preface to the discussion of the sufficiency of evidence for the substantive mail and wire fraud charges, the Court emphasized that “the government must prove not only that the defendants had the intent to *deceive*, but also that they intended to *harm* the victim, meaning that they intended to deceive the victim about something that affected the value of the bargain. . . . A defendant can do this in two ways: (1) lying about the price; or (2) lying about the characteristics of the good. . . . However, if a defendant lies and says, for example, ‘that he is the long-lost cousin of a prospective buyer – then he has not . . . “schemed to defraud”’ because that misrepresentation does not go to the value of the bargain.”

The Eleventh Circuit agreed with the government that the evidence was sufficient with respect to the two defendants, Long and Wheeler, as to whom the district court had granted judgments of acquittal. While some of the misrepresentations by those two defendants were not sufficient to establish the offenses – such as claims that the two “were employees of the company they were pitching, or that Wheeler’s name was ‘Matt Williams,’” others sufficed. Both “misled investors to believe that FCF [a company whose stock the defendants were promoting through a phone room that they operated] had made millions of dollars in

profit and was closely associated with high-profile companies and executives. Long told investors that Apple was a partner with FCF and that John Sculley, a renowned CEO, was involved in the company.” Wheeler and Long also falsely told investors that they did not make commissions on stock sales and were paid only in company stock, and that the investors’ money would go back into the company. These assertions related to “essential characteristics of the stock that would alter the nature of the bargain.”

The sufficiency of evidence regarding the conspiracy as to Wheeler and Long hinged on the question of whether they knew about the “overarching fraudulent scheme” perpetrated by others, to “make off with investors’ money.” Explaining prior case law on the subject, the Court derived “the following rule: to prove that a defendant was part of a conspiracy, there must be some evidence that the defendant knew the objective of the conspiracy charged in the indictment and decided to join it. In this case, there was sufficient evidence to support a finding that Wheeler and Long knew about a conspiracy to sell stock by lying to investors; but there was little to no evidence that Wheeler and Long knew about a plot by Sizer and Mesa to misappropriate a large percentage of investor funds for themselves.” The Court therefore looked to the indictment to determine which conspiracy had been charged. The language in the indictment was viewed as pertaining to the conspiracy for which the evidence sufficed, and the government therefore did not have to prove that the two defendants knew what the other perpetrators were up to.

As to the three codefendants who appealed their convictions – Smigrod, Sgarro and Topping – the evidence was also sufficient. Smigrod “hid from investors that he made commissions as high as twenty percent.” He also failed to disclose that stock he was selling was restricted. Sgarro aided and abetted, even if she did not personally participate. She provided significant contact information to another perpetrator, Sizer, regarding one investor, establishing that “she did so knowing Sizer would defraud G.S. Second, she told G.S. that if he reported her to the authorities, she would deny everything. We have held that discouraging a victim from going to the authorities amounts to aiding and abetting the crime.”

Sgarro made false representations to an investor, A.O., that a major deal was on the verge of being completed and that the company in question “had recently received two large orders that would generate over \$10,000,000 in revenue.” Toppings’ main claim, that he did not have any contact with the victims named in the counts of the indictment, is an argument which had previously been rejected in other cases. It is “enough to show that the defendant ‘participated in a scheme to defraud all buyers.’” Toppings grossly overstated the level of profits of the

company; he, too, falsely stated that prominent people were involved with the company; he promoted the sale of “institutional shares,” suggesting that there was something special about them when there wasn’t. And, he concealed the commissions he was making.

The Court also addressed a claim of prosecutorial misconduct, which issue was termed a “close question.” The “theory-of-defense instruction” explained that there was a “difference between deceiving and defrauding.” It was “cause for concern that the prosecutor told the jury that this instruction was ‘not the law.’” In context, however, the comments were not improper. The judge, when instructing the jury, had used problematic language, and attempted to make a distinction between a theory of defense and an instruction which described the law. Based on the judge’s comments during the charge conference, “the prosecutor could reasonably have believed his remarks were proper.”

Although mail fraud does not require proof that victims suffered an actual loss, such testimony was admissible and relevant “to illustrate that the defendants would learn about the victims’ personal lives, gain their trust, and then use that trust to exploit them.” This included testimony of victims struggling to pay for a child’s surgery or college expenses.

The government impeached a defense witness, Miller, on a collateral matter, in the process, labeling Sgarro as a drug dealer. This was a close question, as to whether the impeachment was admissible. The district court did not abuse its discretion because it “was relevant to illustrate Miller’s bias, rather than simply to portray Sgarro as a drug dealer.”

## Second District Court of Appeal

[Washington v. State](#), 2D19-1671 (Oct. 22, 2021)

The trial court erred when conducting a previously mandated resentencing proceeding by not conducting a de novo resentencing.

Washington was convicted and sentenced for first-degree murder and kidnapping, crimes committed while he was a juvenile. The Second District, in the first appeal, remanded for reconsideration of the proportionality. After that resentencing, the appellate court reversed because the trial court erroneously determined that Washington had the intent to kill the victims, “a finding that only a jury is empowered to make.” The appellate court again remanded for resentencing

under the juvenile sentencing statutes. The trial court refused to conduct a de novo proceeding and merely amended the sentence to provide for judicial review of the sentence after 15 years, pursuant to section 775.082(1)(b)2., Florida Statutes.

The most recent mandate for a resentencing contemplated a de novo sentencing hearing. The error of the trial court was not rendered harmless by the inclusion of the provision for judicial review after 15 years. Resentencing was once again ordered, this time, before a different judge, because the judge who had imposed all of the challenged sentences had also considered an impermissible factor when the judge “commented on Washington’s decision not to enter a plea.”

[Fason v. State](#), 2D20-1444 (Oct. 20, 2021)

In the prior case of [Morgan v. State](#), 293 So. 3d 1081 (Fla. 2d DCA 2020), the Second District held that an order granting a Rule 3.800(a) motion to correct illegal sentence is not a final appealable order, and that a trial court can vacate that order prior to resentencing. [Morgan](#) certified conflict with decisions of the Fourth and Fifth Districts and the Supreme Court has granted review of [Morgan](#). The Second District, in [Fason](#), again certified the same conflict.

[Miller v. State](#), 2D20-2954 (Oct. 20, 2021)

While affirming an order revoking probation, the Court remanded for correction of multiple scrivener’s errors, and noted the principle that a trial court’s oral pronouncement prevails when there is a conflict with the written order of revocation.

Fourth District Court of Appeal

[Bartolone v. State](#), 4D19-3920 (Oct. 20, 2021)

On rehearing, the Court withdrew its prior opinion and issued the current opinion.

A conviction for possession of THC with intent to sell was affirmed, with the Court finding that there was sufficient evidence of joint constructive possession. The “State introduced evidence that while surveilling the property over the course of months, officers observed Appellant outside the property multiple times. They discovered Appellant’s fingerprints on various items throughout the house – namely, a box of paraphernalia, a grinder used to grind cannabis into smaller pieces, five

separate THC vape cartridges, and a trash bag containing vacuum sealed baggies of cannabis residue. Appellant also possessed a key to the residence.”

Several claims regarding improperly assessed costs were adequately preserved through a Rule 3.800(b) motion, which was filed during the pendency of the direct appeal. Investigative costs of \$50 were erroneously assessed where the record did not reflect that they were requested by the State. Prosecution costs of \$200 were improper, as costs in excess of \$100 require notice of intent to seek a higher amount, as well as proof to justify the higher amount. While noting case law that might bar giving the State an opportunity on remand to provide evidence for the greater amount, the Fourth District abided by its prior decisions and provided the State with another opportunity.

An unexplained award of “court costs” of \$418 was remanded for further proceedings. An assessment of \$225 is required for any felony conviction. No statutory authority was provided for the remainder, and the Court remanded for the trial court to specify any statutory authority that might support that balance.

An assessment of \$125 for the drug trust fund was stricken because the trial court did not make the finding that the defendant had the ability to pay the fine.

The Court certified to the Supreme Court of Florida the following questions of great public importance:

Is the State entitled to a second opportunity to establish discretionary prosecution and public defender fees and costs established by sections 938.27(1) and (8), Florida Statutes, and section 938.29(1)(a), Florida Statutes, that were imposed by the trial court upon a defendant without having been requested or properly supported at sentencing?

Is the State entitled to a second opportunity to establish discretionary Drug Trust Fund fees and costs established by section 938.21, Florida Statutes, that were imposed by the trial court upon a defendant without having been requested or properly supported at sentencing?

[Robinson v. State](#), 4D21-838 (Oct. 20, 2021)

The summary denial of a Rule 3.850 motion was reversed and remanded for an evidentiary hearing as to one of the claims in the motion.

The claim alleged that counsel was ineffective for failing to convey a plea offer of 20 years' imprisonment. Robinson "alleged that the only option counsel gave him was 'to either open plea and get a split sentence or go to trial.' Despite telling Robinson these were his only options, counsel stated in a motion to sentence Robinson as a youthful offender ('YO') that the state had made a 20-year offer to resolve all of Robinson's cases. . . . Robinson claimed that despite counsel's apparent knowledge of the offer as demonstrated in the YO motion, counsel never conveyed the offer to Robinson."

The State, in the trial court, responded that it "defies logic and common sense' to contend Robinson would have accepted an offer of 20 years' imprisonment when he was seeking a YO sentence, and there is no indication he would have accepted a mandatory minimum sentence of 20 years' imprisonment in one of the cases, which was required."

The Fourth District stated that "there is nothing in the record *conclusively* refuting Robinson's claim that he was never actually informed of the offer, nor is there conclusive proof that Robinson was given a copy of the YO motion or was otherwise made aware of the offer in any manner."

#### Fifth District Court of Appeal

[Ooten v. State](#), 5D21-741 (Oct. 22, 2021)

A written order revoking probation was remanded for the purpose of having the trial court specify which conditions of probation were violated.

[Anthony v. State](#), 5D21-1536 (Oct. 22, 2021)

A certiorari petition was granted, ordering the dismissal of proceedings without prejudice to the State to refile if Anthony is declared competent to proceed in the future.

In 2017, Anthony was charged with several offenses and found to be incompetent because of mental retardation and intellectual disability. He was placed in a competency restoration program and subsequent evaluations resulted in differing opinions on competency. By 2019, all doctors found that he was incompetent due to mental illness or intellectual disability.

In 2021, Anthony sought dismissal, as it had been “more than two years since he was found incompetent due to intellectual disability, and the court had never deemed his competency restored.”

Fla. Stat. s. 916.303(1), pertaining to incompetence due to intellectual disability, requires dismissal within no more than two years if the defendant remains incompetent to proceed. Section 916.145(1), which pertains to incompetence due to mental illness, requires dismissal without prejudice if the defendant remains incompetent to proceed for five continuous, uninterrupted years. The 2019 order of the trial court did not alter the findings of the 2017 order, which referenced intellectual disability. As that order referenced intellectual disability and had never been modified, it was operative, the two-year period had expired, and dismissal without prejudice was required.