Case Law Update
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Supreme Court of Florida

In Re: Amendments to the Florida Rules of Criminal Procedure, SC21-1091 (Oct. 28, 2021)

The following rules of procedure were amended, effective upon the issuance of the Supreme Court's opinion:

Rule 3.693(a): The requirement, that a petition to seal or expunge include a sworn statement that the petitioner "does not have any other petition to expunge or any petition to seal pending before any court" was deleted. This rule pertains to victims of human trafficking who have committed one or more offenses as a part of a human trafficking scheme as part of that scheme.

Rule 3.393(e): The requirement that the petitioner, for a petition to seal or expunge, "bear all costs of certified copies unless petitioner is indigent," was deleted.

Rule 3.986(b): The form for a judgment of conviction was modified to include an alternative certification at the end of the judgment, for the signature of a court officer or employee, regarding fingerprints. The newly approved alternative certification may state: "I HEREBY CERTIFY that the digital fingerprint record associated with Transaction Control Number _____ contains the fingerprints of the defendant, (name), which were electronically captured from the defendant in my presence this ___ day of _____."

Rule 3.9895(b): Consistent with the above noted amendment to Rule 3.693(a), the form for the sworn statement in support of a petition to expunge or seal deletes the phrase that the petitioner does not "have any other petition to expunge or seal pending before any court." The form order to expunge, consistent with Rule 3.393(e), has deleted the provision that "costs of certified copies involved herein are to be borne by the [petitioner]."

In Re: Amendments to the Florida Rules of Civil Procedure, et al., SC21-1049 (Oct. 28, 2021)

The title of the Florida Rules of Judicial Administration was formally changed to the Florida Rules of General Practice and Judicial Administration. As a result of that change, all other rules of procedure, including the Rules of Criminal Procedure, were amended to change all references to the Florida Rules of Judicial Administration to the Florida Rules of General Practice and Judicial Administration.

Rogers v. State, SC20-1863 (Oct. 28, 2021)

The Supreme Court of Florida affirmed the summary denial of a third successive motion for postconviction relief under rule 3.851.

The motion set forth a single claim of newly discovered evidence "consisting of numerous instances of childhood sexual abuse [Rogers] allegedly experienced over the course of several years." Relying on Hearndon v. Graham, 767 So. 2d 1179 (Fla. 2000), "Rogers argued that no 'procedural obstacles' should bar him from obtaining relief." The Supreme Court agreed with the trial court's conclusion that the alleged evidence did not constitute newly discovered evidence" as this evidence "'could have been discovered with due diligence where, according to the allegations in [Rogers'] motion, [his] family members were well aware of the [alleged] sexual abuse.'"

The motion alleged that three of Rogers' brothers were aware of the alleged sexual abuse. The record from the direct appeal reflected that Rogers' trial counsel knew about those brothers. As such, "trial counsel could have asked them whether Rogers had been sexually abused as a child. In fact, Rogers has offered no explanation – here or below – why trial counsel or postconviction counsel could not have obtained this information years before through at least two of the brothers."

And, articles about extensive juvenile abuse at an Ohio facility where Rogers had been in custody had been published well before the penalty phase of the trial, and thus could have been discovered by trial counsel.

First District Court of Appeal

Craven v. State, 1D20-1184 (Oct. 27, 2021)

The First District affirmed a conviction and sentence for aggravated battery with a deadly weapon causing great bodily harm.

The trial court did not abuse its discretion in granting the State's cause challenge to prospective juror Newell based on Newell's memory problems. When asked whether he heard of the case being tried, Newell responded, in part, "I don't remember a lot of stuff. . . ." When asked about a defendant testifying, he stated that he would not want to testify because "a lot of times because of my memory. If you ask me what I done last Friday, I don't know. . . ." In response to another question about the accuracy of recollections that are closer in time to the event, he responded: "I'm really bad with names and stuff. You know, the Judge, I don't remember his name."

The argument of the Appellant that was addressed on appeal was "that no competent evidence supports the trial court's finding that Newell's memory problems rose to the level of mental incapacity or that they were significant enough to render him unable to perform the duties of a juror." In rejecting that argument, and noting the quotes set forth above, among other similar quotes, the Court emphasized that this case was a four-day trial, with 16 witnesses, plus documentary evidence and surveillance of the incident.

Bryan v. State, 1D21-2918 (Oct. 27, 2021)

Appellate Rule 9.141(d) did not "provide a vehicle to challenge the effectiveness of trial counsel." Bryan filed a prohibition petition, during the pendency of his criminal trial. The petition was dismissed.

Second District Court of Appeal

Morris v. State, 2D20-2796 (Oct. 27, 2021)

During the course of a direct appeal, Morris filed a Rule 3.800(b) motion, alleging that he was entitled to resentencing under the 2014 juvenile sentencing laws. The Second District affirmed the sentence, but the Florida Supreme Court reversed the Second District's mandate and remanded for resentencing. After the Second District issued its mandate, adopting the Supreme Court's reversal for a

resentencing, the case was remanded to the trial court. Prior to the resentencing hearing, the Supreme Court issued its opinion in Pedroza, that a lengthy term-of-years sentence was not a life sentence, and the trial court concluded that Morris was no longer entitled to the resentencing. The trial court then denied Morris's motion to enforce the Second District's mandate for a resentencing and Morris appealed again.

The Second District held that Morris was entitled to the resentencing based on the Second District's prior mandate, as the time for recalling the mandate had expired. Although Morris was entitled to the resentencing, the Pedroza opinion would apply to his resentencing proceeding, with the result that Morris "'may have won a pyrrhic victory because "the decisional law effective at the time of the resentencing applies."'" Thus, Morris could once again receive the same sentence that he originally received.

Jacobs v. State, 2D20-3619 (Oct. 27, 2021)

In 2002, Jacobs was sentenced to three concurrent terms of 25 years in prison for three burglaries, committed while he was 16 years old. In February, 2020, he filed a Rule 3.800(b) motion, arguing, under Kelsey v. State, 206 So. 3d 5 (Fla. 2016), that his sentence was unlawful "because he had not been provided a meaningful opportunity for early release based on maturation and rehabilitation." That motion was denied in June 2020. His motion for rehearing was granted on August 12, 2020, based on the argument that even if he was not entitled to a de novo resentencing, he was still entitled to a judicial review of the sentence after 20 years under Fla. Stat. s. 921.1402(2)(d). The court's order directed the clerk to amend the sentence and provide for judicial sentencing review after 15 years. Two weeks later, the court amended that order to provide, correctly, for sentencing review after 20 years. The clerk filed the amended sentence on September 1, 2020.

The State then sought rehearing in the trial court, arguing that it was denied the opportunity to respond that Jacobs was not entitled to any sentence review. The trial court granted the State's motion, in part, entering an order agreeing to review the State's argument in more detail.

The State then appealed the amended judgment and sentence on September 15th, and the Second District held that appeal in abeyance due to the apparently still pending proceeding in the trial court. The trial court then dismissed the State's motion for rehearing, unaware of the Second District's order, based on the belief that the State's appeal divested the trial court of jurisdiction to proceed on the State's

motion for rehearing. When advised of the Second District's order, the trial court construed it as an order "revesting jurisdiction" in the trial court and again agreed to entertain the State's motion for rehearing. Jacobs objected that the trial court no longer had jurisdiction. The trial court disagreed and vacated the prior order of August 26, 2020 which had granted Jacobs relief, and instead denied the Rule 3.800(a) motion. Jacobs appealed and the State voluntarily dismissed its prior appeal of the amended judgment and sentence.

The Second District agreed with Jacobs, that the trial court lacked jurisdiction to enter the order on appeal – i.e., the order denying the Rule 3.800(a) motion. Everything that happened after September 18, 2020, when the trial court dismissed the State's motion for rehearing, was a nullity, including the order currently on appeal. Once the trial court disposed of the State's motion for rehearing, "rendition of the amended judgment and sentence was no longer tolled (assuming that it was to begin with), the postconviction court was divested of jurisdiction by the State's earlier filing of the notice of appeal, and jurisdiction was vested solely in this court."

Third District Court of Appeal

Casanova v. State, 3D21-2019 (Oct. 27, 2021)

The Third District granted a certiorari petition which challenged the trial court's denial of an order denying dismissal under the Stand Your Ground law.

Casanova was charged with misdemeanor battery and his unsworn, pretrial motion to dismiss asserted immunity because the victim was the initial aggressor and Casanova thereafter engaged in self-defense. Agreeing with the principles set forth in Jefferson v. State, 264 So. 3d 1019 (Fla. 2d DCA 2018), the Third District concluded that the motion to dismiss established a prima facie claim of self-defense "even though the motion to dismiss is not sworn to by someone with personal knowledge or supported by evidence or testimony establishing the facts in the motion to dismiss." The trial court's rulings to the contrary, as to both of these points, were erroneous.

Fourth District Court of Appeal

Da Silva v. State, 4D20-927 (Oct. 27, 2021)

Twelve years after his conviction and sentence were affirmed on direct appeal, da Silva filed a mandamus petition to compel a court reporting firm "to provide him

cost information to secure stenographic tapes and videotapes of his 2006 criminal trial." The trial court concluded that the petition "was improvidently filed in the criminal proceeding" and denied the petition. Da Silva appealed, and the Fourth District affirmed the trial court's order.

The mandamus petition could not be filed under the criminal case number because "there was no pending matter to which [Da Silva] might be entitled to discovery of those notes." Da Silva could have filed an independent petition in a civil proceeding against the reporting firm, which firm, even as a private entity, could be subject to mandamus, as a reporting firm is the custodian of records and is required to respond to requests for their production.

The Fourth District noted, however, that under applicable rules, a reporting firm is "not required to retain the notes and tapes longer than two years from the date of preparation of the transcript, which in this case occurred over fifteen years ago."

State v. Guerra, 4D20-1932 (Oct. 27, 2021)

The Fourth District reversed a downward departure sentence because there was no competent, substantial evidence to support the downward departure.

Guerra was being sentenced for two aggravated assaults with a deadly weapon, for distinct incidents, and one battery. The trial court granted the downward departure for the reason that it was an isolated incident, committed in an unsophisticated manner, and that the defendant expressed remorse. At the sentencing hearing, Guerra presented two witnesses, who could not testify about the incidents at issue. Guerra also testified as to his good character. Addressing his "regret," he most regretted "wasting our time." The case had cost him nine months in jail and attorneys fees and was probably going to cost him his freedom.

As there was insufficient evidence of remorse, the appellate court did not have to consider the sufficiency of the evidence as to the other elements of the departure reason – an isolated incident; commission in an unsophisticated manner. By maintaining his innocence and refusing to accept responsibility, Guerra did not demonstrate remorse. He told the judge, "if I knew that I was guilty, . . . I would say I did it."

Guerra relied on the following assertion in his trial court testimony: "If she wants an apology from me I would say more that [sic] greatly that I'm sorry with no shame at all. . . . I'm sorry for letting you down, basically. *But she let me down,*

too." "[B]laming someone else for your own conduct does not demonstrate remorse for your own actions."

State v. Dhaiti, 4D21-1538 (Oct. 27, 2021)

Dhaiti, charged with possession of Alprazolam, a third-degree felony, pled no contest and moved for sentencing under the drug offender probation statute. He asked the court to withhold adjudication and place him on drug-offender probation, which statute, s. 948.20, Fla. Stat., he contended, enabled the court to do so since he was a chronic substance abuser. The State objected, arguing that Dhaiti had two or more prior withholds for felonies "that did not arise from the same transaction as the current offense," and that a withheld adjudication was therefore not permitted. The trial court agreed with the defendant, found that he was a chronic substance abuser, withheld adjudication, and ordered drug offender probation for two years. The State appealed.

The Fourth District affirmed the sentence. The drug-offender probation provisions of section 948.20 prevailed over the prohibition against withholding adjudication, which is set forth in s. 775.08435, Fla. Stat. Section 948.20 was a "specific statute," and it therefore "controls over the general provisions of section 775.08435." Additionally, section 948.20 "was enacted after section 775.08435, expressing the latest legislative intent." Finally, because the "relevant sections are susceptible to differing constructions when read together, the rule of lenity requires an affirmance."

Fifth District Court of Appeal

Lepera v. State, 5D19-1965 (Oct. 29, 2021)

The Fifth District reversed a conviction for boating under the influence manslaughter and ordered a new trial. The trial court "abused its discretion in excluding all expert opinions offered by Dr. Ling Lu, a biochemical engineer."

At trial, the State sought to prove that Lepera "was operating the boat when it struck the dock," which resulted in the ejection of the victim, who died. The State relied on incriminating statements from the defendant and called the only other survivor as an eyewitness. That witness testified that Lepera operated the boat.

Dr Lu proffered two opinions. First, she "identified the location of Lepera at the time of impact, and in the other she identified the location of [the victim]. Both

of Dr. Lu's opinions were based upon injuries suffered by Lepera and [the victim]." "A qualified biomechanical expert may offer an opinion about injury causation if the mechanism of injury falls within the field of biomechanics." "What a biomechanical expert cannot do, unless he or she also has a medical degree, is render an opinion that requires medical expertise."

The trial court concluded that Dr. Lu's opinions constituted medical opinions. The Fifth District disagreed. "Dr. Lu did not opine about the severity or permanency of Lepera's nasal fractures or black eye. Rather, the fact that Lepera had injuries on the front of his face but not the back of his head told her something about his location when the collision occurred. It told her that Lepera's body moved forward and down after the impact. It told her that the back of his head never hit a hard surface, thus allowing her to rule out certain locations on the boat Lepera might have been when the collision occurred. Dr. Lu's analysis did not require her to know Lepera's medical history because his pre-existing medical conditions and differing tolerance levels were irrelevant to her inquiry."

A second and distinct question was "whether Dr. Lu's opinion concerning Lepera falls within the field of biomechanics." "Biomechanics is 'the study of the application or relation of the laws of mechanics to the body. . . . It has also been defined as the study of what happens to the body when the body strikes certain parts of a vehicle or the interior parts of a vehicle."

As to one opinion, based on "the absence of injuries on the back of Lepera's head," Dr. Lu looked to both the injury pattern and the lack of injury pattern "to determine 'whether those are consistent with the type of body contact involved in the accident.' Dr. Lu's explanation laid a proper foundation for the trial court to conclude that her opinion fell within her field of expertise."

The second opinion, regarding the victim's location, was problematic. Dr. Lu "evaluated the size, shape, and spacing of puncture wounds on Kedzierski's forehead and then compared those puncture wounds to objects with which he might have collided." These findings resulted in the opinion that the victim "must have been standing near the helm . . . at the time of impact." The Fifth District did not decide whether an opinion based on the size, shape and spacing fell within Dr. Lu's field of expertise. The foundation laid during the proffer was deemed insufficient. As a result, the exclusion of this opinion was within the trial court's discretion.

The trial court also excluded Dr. Lu's opinions as cumulative to testimony previously presented through an accident reconstructionist. While a trial court

generally has discretion to limit the number of experts, here the "two experts offered complementary conclusions but based their conclusions on different scientific methods recognized within their separate fields of expertise."

The erroneous exclusion of the first of Dr. Lu's opinions was not harmless. The locations of Lepera and the victim were critical facts in the case.