

Case Law Update  
November 22, 2021  
Prepared by  
Richard L. Polin

Supreme Court of Florida

[Robinson v. State](#), SC20-408 (Nov. 18, 2021)

The Supreme Court resolved a conflict between the Second District’s decision in Robinson and prior decisions of the Fourth and Fifth Districts. The case involved an appeal from a conviction for driving as a habitual traffic offender while one’s driver license is revoked. The Supreme Court held that “proof that DHSMV provided a defendant with notice of an HTO driver license revocation is not an element of the crime of DWLR-HTO under section 322.34(5), Florida Statutes (2016).”

At trial, Robinson had sought a special jury instruction to advise the jury that the State had to prove that DHSMV “provided him with notice of his HTO driver license revocation.” The trial court denied the requested instruction. As such notice was not an element of the offense, the trial court correctly denied the requested instruction.

First District Court of Appeal

[Wallace v. State](#), 1D19-4655 (Nov. 17, 2021)

The First District granted the State’s motion for clarification of a prior opinion, withdrew that opinion, and issued the current opinion, explaining why convictions for vehicular homicide and leaving the scene of an accident in the first degree, under section 782.071(1)(b), Florida Statutes, resulted in a double jeopardy violation. “Because the charges for first degree vehicular homicide which involve a defendant leaving the scene encompass the crime of leaving the scene of a crash involving death, Appellant’s convictions for leaving the scene of the crash violate double jeopardy. . . . It is not enough that Appellant was not sentenced for these counts.”

The Court’s opinion also addresses other issues and those were previously covered in the Case Law Update of September 6, 2021.

[Addison v. State](#), 1D21-1237 (Nov. 17, 2021)

The First District granted a pretrial petition for writ of certiorari because the trial court failed “to appoint an expert to conduct a competency evaluation after finding reasonable grounds existed to question Petitioner’s competency.”

The trial court engaged in an argument with defense counsel over whose burden it was to obtain an expert and pay for an expert, with the court concluding that the Public Defender’s Office had the burden of doing that if it wished to proceed with an expert’s evaluation. In a written order, when considering this issue, the judge acknowledged that reasonable grounds existed to believe that the defendant was not competent to proceed. Subsequently, the court conducted a competency hearing without any witnesses testifying and the court concluded that the defense did not demonstrate a lack of competency.

The trial court relied on Fla.R.Crim.P. 3.210 for its conclusion. That rule gives the trial court discretion as to the number of experts to be appointed, up to three, but “it does not give the trial court unbridled discretion to deny the appointment of an expert where this would violate the defendant’s constitutional right to due process.” The trial court had also expressed concerns that the appointment of the expert by the court would “improperly involve the court in an adversarial proceeding.” The First District responded to that: “No authority supports the proposition that cost concerns can justify dispensing with Petitioner’s due process right to examination by at least one court-appointed expert.” Section 916.115(2), Florida Statutes “requires the court to pay for a competency evaluation upon granting a court appointment, regardless of who requested it.” Finally, the lack of evidence to overcome the presumption of competency “was the result of the court’s refusal to appoint an expert to conduct a competency examination.”

#### Second District Court of Appeal

[Guzman v. State](#), 2D20-694 (Nov. 17, 2021)

The trial court erred in summarily denying one claim of a successive Rule 3.850 motion without an evidentiary hearing.

The motion appended affidavits of the victim grandchildren of the defendant, recanting their trial testimony. In denying the motion, the trial court relied on the trial testimony of the victims, in which each victim “admitted to a prior inconsistent

statement given to law enforcement but testified that they lied to law enforcement and were telling the truth at trial.”

Without conducting an evidentiary hearing, the trial court could not pass on the credibility of the victims. The trial testimony of each victim was to the effect that the defendant was guilty; the postconviction affidavits were to the contrary. And, given the conflicts between the witnesses’ pretrial statements, their trial testimonies, and the postconviction affidavits, the appellate court could not conclude that the trial court record conclusively refuted the current claim of newly discovered evidence.

[Gordon v. State](#), 2D20-997 (Nov. 17, 2021)

Gordon was committed as a sexually violent predator. Subsequently, he has had several annual review proceedings. At the 2019 proceeding, experts presented conflicting opinions as to whether Gordon’s mental condition had so changed such that he no longer posed a danger. The trial court denied release without conducting a full evidentiary hearing, and the Second District reversed and remanded for a further hearing in the trial court.

On remand, two experts again opined that Gordon’s condition had changed and that he could now be released from commitment. An expert for the State disputed their opinions, finding that Gordon still suffered from a paraphilic disorder, based on a recent statement made by Gordon. The hearing on remand was a limited hearing to determine probable cause as to whether Gordon’s condition had sufficiently changed so as to warrant discharge. Given what the appellate court referred to as a battle of the experts, their differing opinions as to whether it was safe for Gordon to be at large and whether sexually violent recidivism was likely, were ultimate questions to be resolved at a full nonjury trial. The trial court’s order finding a lack of probable cause to believe that Gordon’s condition had changed based on a limited evidentiary hearing was again reversed and remanded, this time for a full nonjury trial.

[Williams v. State](#), 2D21-59 (Nov. 17, 2021)

The Second District reversed a conviction and sentence for driving under the influence for a new trial. The trial court erred by “directing the jury to disregard testimony and argument regarding a breathalyzer reading that indicated that Williams’s breath alcohol level was below the legal limit and precluding the defense from adducing additional evidence regarding the reading.” The trial court erred in

reaching this conclusion on the basis of the State's argument that "evidence of breathalyzer results is only admissible if it includes two separate results based on a volume of air."

Williams blew into a breathalyzer machine three times. Twice, it did not result in a sufficient volume of breath to enable a reading. The third time resulted in a .04 reading. In opening argument, defense counsel started discussing the .04 reading and referring to the absence of sufficient volume of air for the other two readings. The trial court sustained the State's objection.

Subsequently, the State's witness testified as to the .04 reading, noting that the first and third samples did not produce a sufficient volume of air. The State then sought to prevent the defense from eliciting that the defendant had only a .04 level because two samples were needed for that conclusion. The trial court barred the defense from eliciting further testimony on the .04 reading.

The jurors subsequently presented several questions regarding the test results and the court responded by saying that "there was no valid sample that was given in this case, so you are not going to consider at all a breath alcohol content in this case."

The legal issue revolved around a provision of the Florida Administrative Code, Rule 11D-8.002(12), which calls for a minimum of two results for comparison. If the results based on sufficient air volume do not include two, "each result can independently 'be acceptable as a valid breath alcohol level' if it is 'proved to be reliable.'" The Second District noted possible questions as to whether the administrative rule was applicable to the admissibility of evidence in a criminal trial. Even accepting the applicability of the rule, however, the single result would still be admissible under the administrative rule "if reliable."

Neither the State nor the trial court set forth any reason why the .04 reading was not reliable. The appellate court noted that arguments as to the weight of the evidence could be asserted in light of just the single reading. But the court also noted testimony that when multiple results are obtained, even when differing, they are "pretty close" to each other, and fluctuations would be limited, not wild. As a result, the trial court erred in excluding the defense evidence and in limiting the defense's argument.

## Third District Court of Appeal

[Toiran v. State](#), 3D19-911 (Nov. 17, 2021)

The Third District affirmed a conviction for second-degree murder.

The trial court conducted a pretrial immunity hearing under the Stand Your Ground statute in July 2017, applying the burden of proof that existed under the 2015 statute, which placed the burden on the defense. That hearing was held prior to the Florida Supreme Court's 2018 decision in Love v. State, which held that the statutory amendment in 2017, placing the burden on the prosecution, applied to immunity hearings held on or after the effective date of the amendment.

Although the trial court erred in applying the wrong burden of proof at the pretrial immunity hearing, the fact that the defendant was convicted at a jury trial after raising a claim of self-defense rendered the error at the pretrial immunity hearing harmless. The Third District relied on the Florida Supreme Court's decision in Boston v. State, 2021 WL 4613829 (Fla. Oct. 7, 2021), where this issue was decided. Thus, Toiran was not entitled to a new immunity hearing.

The Third District further concluded that the evidence was sufficient to support the conviction for second-degree murder with a firearm.

. . . Assuming that the victim was the initial aggressor when he pushed Toiran against the wall on the day of the shooting, and Toiran fired two shots because the victim was attempting to get on top of him, those two shots missed the victim. The State presented evidence that after those two shots missed the victim, the remaining shots were fired when Toiran was standing up and the victim was attempting to retreat. The victim sustained gunshot wounds to the side of the abdomen, the back of his head, the mid back, and the lower back, and two to the upper back.

[Perdomo v. State](#), 3D19-2475 (Nov. 17, 2021)

The Third District affirmed a conviction for conspiracy to commit kidnapping or murder, or both.

The Court found that the evidence was sufficient, briefly noting that a co-conspirator testified that Perdomo “was involved in recruiting participants for the conspiracy. That testimony, together with the State’s cell phone records and other exhibits and testimony presented at trial, constitute the requisite competent substantial evidence for the jury to find that Perdomo entered into an agreement to kidnap or murder” the victim.

[X.B. v. State](#), 3D20-1915 (Nov. 17, 2021)

The Third District held that the evidence was sufficient to prove that X.B. trespassed on school grounds when he was a suspended student.

X.B. was suspended due to an incident with another student in the physical education classroom. X.B. was given an “exclusionary letter,” explaining the suspension, which is used when the school cannot reach parents. The letter states that the student cannot return to school “until a parent or guardian comes to school.” X.B. returned to the same physical education class the next day.

X.B. challenged the sufficiency of the evidence because the State did not introduce the exclusionary letter into evidence. “There is no requirement that the State must introduce the written notice of suspension or exclusionary letter to prove the suspension element” of the offense. Nor is there a requirement that there be a written suspension order. The testimony from the dean of the school that X.B. was suspended was sufficient.

X.B. also challenged the sufficiency of the evidence as to the “willful” element of the offense. X.B.’s mother testified that X.B. told her he was suspended, but did not give her the exclusionary letter, and that she did not believe him. As a result, the next day she took him back to school. X.B. then argued that his mother created the situation by returning him to school and that she failed in her statutory duty.

The Third District first rejected X.B.’s effort to interject juvenile policy language from chapter 985, Florida Statutes, into the trespass statute in chapter 810. The Court then found that there was no language in the trespass statute requiring the State to prove that the trespass was “intentional.” Nor does the trespass statute impose a requirement that the offense be “willful.” Nor did X.B. have a valid reason for being at school because his mother brought him to school. Any legitimate reason he had for being on school premises terminated with the suspension and there was no testimony that he was unable to comply with the suspension.

[Stroud v. State](#), 3D21-1959 (Nov. 17, 2021)

An appeal from an order denying a Rule 3.800(c) motion for mitigation of a sentence was dismissed. Such orders are not appealable. Review regarding the timeliness of such a motion may be obtained through a certiorari petition, but the merits of the denial of the motion are not reviewable.

Fourth District Court of Appeal

[Dabbs v. State](#), 4D20-607 (Nov. 17, 2021)

The Fourth District affirmed convictions and sentences for manslaughter and other offenses.

The trial court did not abuse its discretion in denying a defense objection to a peremptory challenge by the State. During voir dire, the prospective juror, a Hispanic female engineer, responded to the court’s question to the panel as to what their verdict would be if the judge sent them to deliberate prior to hearing any evidence. The prospective juror “loudly and quickly responded ‘not guilty’ because criminal defendants are presumed innocent.”

After the prosecutor exercised a peremptory strike, the defense objected under [Melbourne v. State](#), and the trial court conducted an inquiry. “When asked for a gender and race neutral reason for the strike, the State responded that the juror ‘seem[ed] exceptionally very smart in terms of technical stuff’ and that as a result she would ‘get lured . . . into looking too far into things.’ The prosecutor emphasized that they did not have a pattern of striking either females of Hispanics. In response, defense counsel countered that this juror had not spoken much and that the State’s concerns were based only on ‘conjecture and speculation as to how she would act or react.’ The judge noted that all jury speculation was speculative and confirmed that it was a viable strategy to strike ‘super smart people’ from jury panels. Further, the court stated that the law prohibits striking individuals based on their gender or religion but this strike did not ‘touch[] on that.’ The court then expressly found that the strike was gender and race neutral as well as genuine.

The Fourth District set forth the requirements for analysis of a challenge to a peremptory strike under [Melbourne](#) and then concluded that “the trial court properly followed the procedure set forth in *Melbourne*, and appellant failed to rebut the

presumption that the State’s peremptory strike was genuine or show that the trial court’s ruling was clearly erroneous.”

While the trial judge made inappropriate comments throughout the trial, the Fourth District found that they did not rise to the level of requiring disqualification prior to the sentencing hearing. The defense filed the motion to disqualify prior to the sentence, referencing statements in which the judge “reveal[ed] displeasure” with prior decisions of the Fourth District, including one that reversed the original conviction in the case. One comment was quoted, in which the trial judge stated that he was relieved that he did not have to “deal with that ridiculous opinion out of the Fourth DCA about mathematical formulas in picking juries.” As part of the analysis, the Fourth District addressed the difference between personal bias on the part of a judge which arises from an extrajudicial source and provides a sufficient basis for disqualification, and “judicial bias,” which “is based on the judge’s feelings regarding a certain legal principle or court opinion.” Such “judicial bias is almost never legally sufficient for disqualification.” “[W]hen read in context, [the comments] merely evidence a personal disagreement with the legal underpinnings of the decision rather than an expression of disfavor with the reversal for new trial.”

[Maldonado v. State](#), 4D21-1396 (Nov. 17, 2021)

The Fourth District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence. Maldonado argued that he was entitled to a new sentencing hearing using the 1994 sentencing guidelines, pursuant to Heggs v. State, 759 So. 2d 620 (Fla. 2000). The Fourth District found that he was not, because the reasons for the trial court’s upward departure were valid under both the 1994 and 1995 sentencing guidelines. Heggs had held that the 1995 legislation amending the sentencing guidelines had violated the single-subject provision of the Florida Constitution.

Subsequent decisions construed Heggs as applying to those who were “adversely affected” by the Heggs decision. And, a sentence imposed as an upward departure sentence was viewed as being outside the guidelines, and therefore did not result in a defendant being adversely affected by Heggs.

Fifth District Court of Appeal

[Bridger v. State](#), 5D20-2385 (Nov. 19, 2021)

The Fifth District affirmed the revocation of probation, but struck the trial court’s finding that Bridger violated one of the conditions, because that particular



condition had not been alleged as a violation in the affidavit of violation of probation. Probation may not be revoked on the basis of an uncharged violation.

[Mediate v. State](#), 5D21-2277 (Nov. 19, 2021)

The Fifth District granted a petition for disqualification of the trial court judge. Prior to presiding over a judicial sentence review under Fla.R.Crim.P. 3.802, the judge made two statements requiring disqualification. First, he “stated that the Petitioner is ‘an older, dedicated unrepentant rapist [who is] driven to sexually offend [and who] has a low possibility of rehabilitation.’” Second, he stated that the Petitioner “is and will remain as long as he lives, irredeemably incorrigible.”

These comments, made prior to the hearing at which the judge would consider factors such as maturity, rehabilitation, the current risk to society, sincerity and remorse, sufficed to demonstrate a “well-founded fear” that the Petitioner “would not receive a fair trial or hearing before the presiding judge.”