Case Law Update
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Supreme Court of Florida

In Re: Amendments to the Florida Rules of Juvenile Procedure, SC21-585 (Nov. 4, 2021)

Form 8.933, pertaining to a juvenile's waiver of counsel, was completely rewritten, for the purpose of making the language easier for a juvenile to understand. The form also adds an additional section, "Statement of Attorney Assigned to Discuss the Waiver with the Child," and this "requires a lawyer to acknowledge that he or she has read the wavier to the juvenile, explained it fully, and is of the belief that the juvenile has knowingly, intelligently, and voluntarily waived the right to counsel."

Eleventh Circuit Court of Appeals

United States v. Ramirez, 20-10564 (Nov. 1, 2021)

Ramirez appealed his 240-month sentence "for providing material support to a foreign terrorist organization," specifically challenging the imposition of the terrorism enhancement under U.S.S.G. s. 3A1.4. The Eleventh Circuit reversed because the district court "failed to make the required fact findings."

This enhancement applies if the "offense is a felony that involved, or was intended to promote, a federal crime of terrorism." In this appeal, the government was relying solely on the "involved" prong, and the Eleventh Circuit focused on the terms "involved" and "a federal crime of terrorism." "Involves" means "includes." A federal crime of terrorism is defined in 18 U.S.C. s. 2332b(g)5, as an offense that: "(1) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and "(2) is a violation of" an enumerated offense listed in s. 2332(b)(g)(5)(B). Ramirez was convicted under 18 U.S.C. s. 2339B, an enumerated offense. The remaining question was whether the "offense or relevant conduct was 'calculated' to influence, affect, or retaliate against government conduct."

The Eleventh Circuit accepted the definition of "calculated" as set forth in other federal circuits' decisions as imposing an intent requirement. "To do that, the government must show that the defendant's offense was planned to influence, affect, or retaliate against government conduct, even if that was not the defendant's personal motive."

The offense for which Ramirez pled guilty required "that he knew that the ELN is a designated foreign terrorist organization and that the ELN has engaged in or engaged in terrorism or terrorist activity." However, that offense does not contain the additional requirement of 18 U.S.C. s. 2332b(g)(5)A) "that the defendant's offense be 'calculated' (i.e.,, planned or intended) to influence, affect, or retaliate against government conduct. Rather, it is only the definition of a 'federal crime of terrorism' in s. 2332b(g)(5)(A) that requires the defendant's offense to be so 'calculated.'" The district court was viewed as believing that "the mere fact that . . . Ramirez had pled guilty to knowingly providing material support to a known foreign terrorist organization per se triggered the terrorism enhancement." That was incorrect. Thus, on remand, the district court was required to make the finding as to whether the "calculated" element was satisfied. The Eleventh Circuit did not express any opinion as to the sufficiency of evidence as to that.

First District Court of Appeal

Schluck v. State, 1D19-3724 (Nov. 3, 2021)

The First District reversed convictions for burglary and sexual battery because the trial court erred in admitting "a recording of the victim's statement that she thought she had been raped in her dorm room the previous night."

The victim did not testify at trial, and, over the defendant's hearsay objection, the court admitted into evidence the victim's call to the university police administrative line in which she stated, "I think that I was . . . raped last night." The First District first concluded that the hearsay issue was properly preserved for review. A hearsay objection was made in the trial court and such an objection "is generally sufficient to preserve the issue, even if the proponent of the testimony claims on appeal (or in a response to a motion for new trial) that a hearsay exception applies."

The First District then addressed two potential hearsay exceptions: public records and reports, and excited utterances. Schluck did not address the public records exception on appeal. However, the majority of the First District concluded

that the State never sought the admission of the statements under that exception in the trial court, and that Schluck's failure to address it on appeal was immaterial. There was a brief exchange in a pretrial hearing in which the prosecutor indicated that the State intended to present testimony that would constitute authentication of the recording under section 90.901; this was not, however, an effort to establish compliance with the public records hearsay exception. Authentication under 90.901 is a separate requirement, distinct from admissibility.

The trial court had admitted the statement as an excited utterance, without referencing the public records exception. Even at the hearing on the motion for new trial, the prosecutor referred only to an excited utterance. Furthermore, the public records exception did not apply. That exception required a witness who had personal knowledge of the facts. Reports in which the authors merely repeat the substance of what witnesses told the authors are not admissible as public records because "'they were not based upon the personal knowledge of an agent of the "'business."'" The hearsay statements made to the authors "must themselves fall within an exception to the hearsay rule."

With respect to the excited utterance exception, the Court noted that the defendant left the dorm building at 7:14 a.m., and the victim made the call at 7:44 a.m. And, the call related that the rape had occurred "last night," thus establishing a substantial intervening time. The victim had spoken to her roommate, who had advised her to call the police, and the victim then spent time considering hat she would do – "in other words, she did engage in a reflective thought process." Even though that did not show that she actually contrived or misrepresented anything, it showed "that her statement does not satisfy the test for the excited-utterance exception to hearsay. While a sexual battery is startling enough to cause nervous excitement and the victim was clearly upset during the call, the only evidence relating to timing shows that the call came the morning after the crime and after the victim was able to engage in a reflecting thought process."

One judge dissented. That judge concluded that the State, when referencing authentication, had been discussing the public records exception. Further, the dissent concluded that since Schluck did not address that on appeal, he "waived his ability to contest the call's admissibility on this basis." The dissent also concluded that notwithstanding a substantial passage of time, the trial court did not abuse its discretion in admitting the call as an excited utterance. The dissent emphasized that the victim's mental state would have still been disoriented and confused because of her blood alcohol level, which remained very high even at 10:45 a.m.

Segura v. State, 1D19-4266 (Nov. 3, 2021)

The First District affirmed convictions for four counts of first-degree murder. The State presented evidence that Segura killed Brenda Peters and her three children, one of whom was his son, because the son was not biologically his and he was paying child support that he could not afford. Testimony included a girlfriend of Segura saying that "he approached her close in time to the murders, shaking with rage and asking for a gun," a jailhouse informant relaying Segura's confession, and Segura's DNA on the bathtub where the children's bodies were discovered.

Segura denied committing the murders in statements to the police, although he retracted some of his earlier statements in subsequent interviews, while continuing to deny commission of the murders. At trial, he testified and admitted being present at the crime scene, owning a gun of the same caliber as the murder weapon, and acknowledged that he had lied to the police, claiming he was worried about his wife finding out about his ongoing sexual relationship with Peters. He still denied committing the murders and presented a theory based on a drug cartel hit squad.

On appeal, he asked the First District "to engage in a weight-of-the evidence review on appeal in the 'interest of justice,'" arguing that his case was unique due to "'the overwhelming nature of the unrebutted evidence of innocence,'" while further claiming that there was "'no room for rational minds to disagree about the fact that the State failed to carry its burden.'" He relied on a quote from Tibbs v. State, 397 So. 2d 1120, 1126 (Fla. 1981), "for the proposition that the interest of justice, standing alone, is 'a viable and independent ground for appellate reversal.'" This claim was rejected. While the rules of appellate procedure provide that in "the interest of justice, the court may grant any relief to which any party is entitled," that language "requires the party to first have a legal entitlement to relief. And this entitlement cannot be a re-weighing of the evidence."

Moore v. State, 1D20-1414 (Nov. 3, 2021)

The First District affirmed in part, and reversed in part, an order denying a Rule 3.800(a) motion to correct illegal sentence. The trial court found that the claims asserted were not cognizable in a Rule 3.800(a) motion.

Moore alleged in one claim that he was entitled to jail credit "for a period of incarceration in New York awaiting transfer to Florida for the underlying criminal matter." Such a claim may be raised in a Rule 3.850 motion, and, since the claim

was raised within two years of finality of the sentence, the trial court should have granted Moore leave to amend the motion and then review it under Rule 3.850.

Two other claims alleged that the sentencing scoresheet improperly included prior offenses that were more than ten years old. Relevant facts were not clear from the allegations in the motion and the claim was not conclusively refuted by record attachments. Moore was again entitled to leave to file an amended motion and if a facially sufficient claim was asserted, the trial court would then either have to attach records that conclusively refuted it, or otherwise determine "whether or not the same sentence would have been imposed with a corrected scoresheet."

State v. Kunkemoeller, 1D20-2209 (Nov. 3, 2021)

The First District reversed a downward departure sentence because the grounds relied upon were "either legally insufficient or unsupported by the record."

The defendant's convictions "arose from his involvement in the theft of state public education and charter school grant funds." His "businesses overcharged and submitted fictitious invoices to charter schools, . . . for goods and services," and hundreds of thousands of dollars were subsequently remitted back to him, the owner of the schools, and the companies owned by both. The trial court relied on six separate reasons for the downward departure, and the First District addressed each of them.

The statutory departure reason of the need for payment of restitution must outweigh the need for a prison sentence and the defendant being sentenced must be a relatively minor participant. There was no testimony in this case to support the defendant being a minor participant.

In a non-statutory ground for departure, the trial court concluded that the defendant's mens rea was relatively less than that of the codefendant who owned the schools, May. While parity of sentences "serves the general principle that 'defendants should not be treated differently on the same facts,' this principle "is only an appropriate mitigating factor 'in departing downward *to meet a codefendant's sentence.*'" Here, however, the downward departure "crafted an even greater disparity than the fifteen-year difference between May's twenty-year sentence and Kunkemoeller's 55.5-month sentence." The 55-month sentence was the lowest permissible sentence under the Criminal Punishment Code, and the trial court had imposed a sentence of one year in prison followed by nine years of probation.

As to the defendant's contrition, the trial court ignored the statutory requirements that this be accompanied by evidence that the offense was committed in an unsophisticated manner and that it was an isolated incident. No evidence supported this. To the contrary, the conduct involved a complex financial scheme over a span of five years.

The appellate court also rejected the trial court's reliance on the need for restitution as a nonstatutory departure reason. The trial court could not avoid the statutory requirements for this factor by simply labeling it as a nonstatutory departure reason.

As to the reason that the defendant was an asset to the community, his operation of a business was not, in and of itself, sufficient evidence of this. His donation of PPE equipment to address COVID-19 in the community was "supported only by vague thank you letters sent to one of his companies," and were not sufficient, without more. "Family support" is not a legally valid reason for departure. And, the defendant's "respected reputation in the community" was not supported by the record and was also an invalid reason. The existence of numerous business contacts is not a valid departure reason.

A.B. v. State, 1D21-136 (Nov. 3, 2021)

The trial court "erred in ordering a commitment program for Appellant without first requesting a multidisciplinary assessment and follow-up predisposition report from the Department [of Juvenile Justice] as to its recommendation level." DJJ had recommended probation, which the trial court had rejected.

Williams v. State, 1D21-2542 (Nov. 3, 2021)

In addition to finding Williams' appeal frivolous and warning Williams of the possibility of the imposition of sanctions, the Court noted that the claim that convictions violated double jeopardy was not cognizable in a Rule 3.800(a) motion. The trial court had also found that the claim that "the basis for reclassification of his aggravate battery conviction was not orally pronounced" was not cognizable in the rule 3.800(a) motion and the First District found "no error by the trial court."

Second District Court of Appeal

Roodbergen v. State, 2D19-3250 (Nov. 5, 2021)

The Second District affirmed multiple convictions for fraud offenses, including two convictions for willfully and without authorization fraudulently using personal identification information concerning an individual sixty years or older without consent to obtain a pecuniary benefit of $5,000 or more. The jury expressly found that those two charges involved a pecuniary benefit of $5,000 or more, and the information had specifically alleged that. As a result, the trial court concluded that the three-year mandatory minimum sentence of section 817.568(2)(b), Florida Statutes (2018), was not applicable.

The statutory language regarding that mandatory minimum sentence is prefaced by "[n]otwithstanding any other provision of law, the court shall sentence . . . ." While not entirely clear from the Court's opinion, the trial court's concern appears to have been that the information, as filed, was duplicitous, joining separate offenses, or alternative means of committing a single offense, into a single count. Further, there was an issue as to whether sections 817.568(2)(b) and 817.568(6) prescribed separate enhancements or separate offenses. Although the Second District did not address that issue, that Court, pursuant to the State's cross-appeal, remanded for resentencing on those counts, to impose the mandatory minimum. The Court noted that even if the information was duplicitous, "the remedy for such an irregularity in the charging instrument is to permit the State to elect the charge on which it intended to proceed."

Third District Court of Appeal

Lucas v. State, 3D19-1941 (Nov. 3, 2021)

The Third District granted Lucas's motion for rehearing, withdrew its prior opinion, and issued a new opinion, affirming multiple convictions and reversing one conviction for aggravated battery as a lesser included offense of attempted felony murder.

Without providing any facts, the Court's opinion upholds the trial court's evidentiary rulings on several claims while providing brief parentheticals with single sentence legal principles, including: limits on examination of a witness, and rulings concerning a defendant's prior convictions, are reviewed for an abuse of discretion; the statutory requirements regarding admissibility of lay witness's testimony regarding perceptions in the form of inference and opinion.

The trial court did not deny the right to a sentencing hearing. After the verdict, the judge stated that a future sentencing date would be set. Defense counsel stated that the court could "sentence him now." The judge expressed concerns about enabling victims to attend, as the verdict had just been rendered as it was near midnight. Without explanation, defense counsel then requested that the sentencing be reset for a few weeks, but the State asked the court to proceed, stating that the victims would waive their right to speak. The defense never indicated that it needed more time to prepare in any manner; the only comment by the defense related to the late hour. Under those facts, there was no abuse of discretion in proceeding immediately to the sentencing.

Dual convictions for aggravated battery "for a single act committed against a single victim in the course of a single criminal episode" resulted in a double jeopardy violation. Lucas had been charged wit attempted premeditated murder of the victim and attempted felony murder of the same victim. The jury returned verdicts of guilty of the lesser included offense of aggravated battery on each count.

Evans v. State, 3D21-1735 (Nov. 3, 2021)

An order denying a motion to correct illegal sentence was affirmed. Evans sought credit for 1,116 days of time served. The record reflected that the court was granting the credit in a separate probation violation case.

Diaz v. Junior, 3D21-2088 (Nov. 3, 2021)

The Third District granted a habeas corpus petition and ordered to the trial court to conduct an evidentiary hearing on "Diaz's financial resources and all other appropriate criteria" relevant to a motion for bond reduction. At the prior hearing when the motion was denied, "Diaz was not permitted to testify as to his financial resources."

Fourth District Court of Appeal

Walding v. State, 4D21-820 (Nov. 3, 2021)

Appellate counsel in a prior direct appeal was ineffective for failing to pursue a Rule 3.800(b)(2) motion, during the pendency of the direct appeal, to challenge the assessment of costs at sentencing. While the court announced that it would impose standard fines and costs, the written order imposed $1,382 in costs, without any

breakdown. The court also assessed over $7,000 in defense fees and costs which were not orally pronounced, and this was done more than 60 days after the original sentencing.

These cost assessments appeared to have been of a discretionary nature, and Walding was entitled to notice and an opportunity to address them. The trial court was directed, on remand, to conduct a hearing on the $1,382 assessment, and was further ordered to strike any discretionary costs imposed without notice and opportunity to be heard. Neither the State nor defense provided any support in the trial court for an amount exceeding the mandated $100 public defender fee at sentencing.

Weintraub v. State, 4D21-991 (Nov. 3, 2021)

The Fourth District reversed the summary denial of a Rule 3.850 motion with respect to one of the motion's three claims.

Weintraub was convicted, pursuant to a guilty plea for felony drug charges in three cases. One claim in the Rule 3.850 motion was that counsel was ineffective for misadvising him about a prescription defense to trafficking in oxycodone. The trial court record did not refute this claim, as the State neither alleged nor demonstrated that Weintraub did not have a valid prescription or that he obtained the oxycodone illegally. The trafficking charge was based on possession. And, "[w]hether Weintraub previously sold some pills from his prescription or intended to sell them does not overcome a prescription defense to trafficking."

The Court rejected the State's argument that Weintraub's "allegation that he would not have entered the plea if properly advised" was inherently incredible. "Trafficking was the most serious charge he faced and the only one carrying a 25-year mandatory minimum sentence."

Fifth District Court of Appeal

State v. Abache, 5D21-232 (Nov. 5, 2021)

The Fifth District reversed an order suppressing evidence in a DUI case. The trial court erred in finding a Miranda violation.

A trooper responded to the scene of a collision. Abache was the alleged driver of one of the vehicles. Based on observations, the trooper believed Abache may

have been driving under the influence and advised her of his criminal investigation and read her Miranda warnings. Abache agreed to perform requested field sobriety tests. Immediately prior to those tests, "an acquaintance of Abache moved toward Trooper Mooney, held up a cell phone, stated that Abache's attorney was on the phone, and asked that Abache be permitted to speak to her attorney." A second officer directed this acquaintance to leave the area and Abache did not speak to her attorney prior to the sobriety tests. After the tests, Abache was arrested for DUI.

The trial court concluded that Abache's rights were violated "when they did not allow her to speak with her attorney." The Fifth District held, pursuant to Moran v. Burbine, 475 U.S. 412 (1986), that that was incorrect, as the Supreme Court held in Moran "that the failure of police to inform the defendant of the efforts of his attorney, who had been retained by the defendant's sister without his knowledge, to reach him did not deprive the defendant of his right to counsel or vitiate his waiver of his *Miranda* rights."

The Fifth District rejected Abache's argument that the tipsy coachman rule should be applied and that a due process violation should be found under the Florida Constitution. An "appellate court should not employ the tipsy coachman rule where the trial court has not made the necessary factual findings on the issue." The trial court did not address the due process argument and did not make sufficient findings for the appellate court "to fully address the merits of such argument." One judge dissented, finding that it was the Appellant's (State's) burden to demonstrate error and the State's initial brief overlooked Moran and its reasoning.