Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Grady, 20-14341 (Nov. 22, 2021)

Grady and two codefendants were associated with a religious group protesting nuclear weapons and committed acts of vandalism when they entered a naval submarine base. They were charged with conspiracy, destruction of property on a naval installation, depredation of government property and trespass. They were convicted on all charges. Prior to their trial, they filed motions to dismiss the indictment, arguing that their prosecution violated the Religious Freedom and Restoration Act. The primary issue on appeal is whether those motions were properly denied.

The defendants asserted that their actions were "'in accordance with their deeply held religious beliefs that nuclear weapons are immoral and illegal,'" "and that the government's prosecution of them substantially burdened their religious exercise in violation of RFRA." The district court, prior to trial, held an evidentiary hearing before denying the motions. The Eleventh Circuit disagreed with the defendants and affirmed the convictions and sentences.

The parties agreed that the defendants complied with three of the requirements for establishing a prima facie RFRA claim: "that the defendants were exercising sincerely held religious beliefs, the government substantially burdened the defendants' religious exercise, and the government has a compelling interest." The remaining requirement under RFRA, at issue on appeal, was "whether the government met its burden of demonstrating that criminal prosecution of the defendants was the least-restrictive means of furthering its significant compelling interests in the safety and security of the naval bade, naval base personnel, and naval base assets." The defendants argued that the least-restrictive means was their "proposed alternative of permitting their religious exercise of 'symbolic disarmament' in a designated area."

The Eleventh Circuit rejected that argument. "Here, because the defendants were seeking relief from prosecution for past religious practice, 'the particular practice at issue' for purposes of the RFRA analysis is necessarily the religious

practices engaged in by the defendants on April 4, 2018. In other words, the district court had to determine whether an exemption under RFRA could be granted for the particular religious exercises engaged in on April 4, 2018. . .. Thus, neither the district court nor this Court could consider whether lesser restrictive alternatives were available for the Plowshares group to protest in a different manner than the destructive manner in which they did. . . ."

Furthermore, "[p]ermitting the defendants to practice symbolic yet destructive disarmament in a designated area would not be an effective means of achieving the government's interest in the safety and security of the naval base's assets. Their 'symbolic' disarmament would still damage naval base property and assets." "Simply put, RFRA is not a 'get out of jail free card,' shielding from criminal liability individuals who break into secure naval installations and destroy government property, regardless of the sincerity of their religious beliefs."

There was no error under the Mandatory Victims Restitution Act, 18 U.S.C. ss. 3663, 3664, in holding the defendants jointly and severally liable for the full amount, $33,503.51, of the restitution for damage to property. The Act specifically provides that "the court may make each defendant liable for payment of the full amount of restitution," or apportion liability based on multiple factors.

There was no abuse of discretion in the district court's denial of requests of two defendants for reductions of their base offense levels for "acceptance of responsibility" for their offenses. The district court found "that neither defendant had clearly demonstrated acceptance of responsibility because they continued to deny the illegality of their actions and put the government to its burden of proof." The Court noted statements made during the lower court proceedings which "demonstrated a willingness to continue to engage in such conduct." "The defendants cannot argue that they proceeded to a jury trial in order to continue to challenge the applicability of the criminal statutes to their allegedly religious conduct, because they were not permitted to raise a RFRA defense at trial."

As to one defendant, the Court found that the district court did not abuse its discretion in using the total loss amount to increase the base offense level. The Court emphasized that this defendant had been engaged in planning the actions for over two years, and that given her overall knowledge of the "plan to conduct symbolic yet destructive disarmament, the district court did not err in determining that the acts of her codefendants were reasonably foreseeable to" her.

The district court did not err in denying a requested mistake-of-fact jury instruction. One defendant sought that instruction based on her honest belief that she was acting lawfully based on her religious beliefs. In upholding the district court's rejection of the requested instruction, the Eleventh Circuit quoted and emphasized language from a prior decision: "the fact that they engaged in a protest in the sincere belief that they were breaking the law in a good cause – cannot be an acceptable legal defense or justification."

United States v. Litzky, 20-10709 (Nov. 23, 2021)

The Eleventh Circuit affirmed convictions for child-pornography offenses. The main issue on appeal was whether the district court erred by "excluding expert testimony related to [Litzky's] intellectual disability."

Prior to trial, a doctor evaluated Litzky and concluded that her "intellectual disability coupled with her history of victimization placed her in a position of extreme vulnerability without the necessary protective support to protect herself and her children." The doctor found a mild intellectual disability and PTSD. When asked if people with an intellectual disability can form "intent," the doctor responded that it depends upon the person, and the doctor did not offer an opinion as to whether Litzky "could form the specific intent to produce child pornography."

The doctor's opinions were properly excluded. The "proffered testimony wasn't keyed to any *legally acceptable* defense theory. The Insanity Defense Reform Act has been interpreted "'to prohibit the presentation of evidence of mental disease or defect, short of insanity, to excuse conduct.'" Litzky was not asserting an insanity defense. Psychiatric evidence may still be admissible to negate the mens rea of a specific intent crime. Even if the production of child pornography constituted a specific-intent crime, the proffered expert testimony was still not admissible. Litzky "'failed to demonstrate how her psychiatric evidence would negate intent and not merely present a dangerously confusing theory of defense more akin to justification and excuse than a "legally acceptable theory of lack of *mens rea*."'" Evidence suggesting impaired volitional control is not psychiatric evidence negating specific intent.

A further opinion that Litzky would not have produced the pornographic material had she not been requested to do so by an acquaintance of hers, was also inadmissible. That testimony did not go to the relevant question of whether Litzky "knew what she was doing when she produced the pornographic images of her

children." Whether she had mental health issues or was vulnerable to manipulation were not relevant questions.

The 30-year sentence, which was 600 months below the Guidelines' recommendation, was not substantively unreasonable. The district court's findings included characterizations of the misconduct as heinous, disturbing, appalling and horrific. Based, in large part, on the video and photo images of the children, the conduct was viewed as "utterly reprehensible," and it was made worse by the fact that the victims were Litzky's children, both under the age of five. The district judge had also compared the sentence imposed to that of others imposed "for similar maternal offenders," and the average sentence of 339 months was close to Litzky's.

One judge authored a concurring opinion to note an apparent conflict between the IDRA and Federal Rule of Evidence 704(b). Although IDRA appears to have an exception for testimony that negates the specific intent element of an offense, Rule 704(b) bars "'an opinion about whether the defendant did nor did not have a mental state or condition that constitutes an element of the crime charged or of a defense.'"

First District Court of Appeal

Henson v. State, 1D20-2043 (Nov. 24, 2021)

The First District affirmed convictions for sexual battery on a minor and other offenses. The trial court did not err "in admitting and publishing to the jury child pornography [the defendant] showed his child." The First District rejected Henson's argument that it was inadmissible because it was not similar fact evidence. Henson "was charged with providing obscene material to his child and so admitting he videos and images that were shown is relevant evidence to corroborate the child's testimony."

Dicks v. State, 1D20-2402 (Nov. 24, 2021)

The First District reiterated the Florida Supreme Court's recent holding from Boston v. State, that "where a trial court applies an incorrect standard of proof at a pre-trial Stand Your Ground immunity hearing, such error is cured when the State overcomes defendant's self-defense claim at trial under the heavier burden of proof beyond a reasonable doubt."

Laster v. State, 1D20-2548 (Nov. 24, 2021)

On direct appeal, the First District affirmed the denial of a claim regarding imposition of costs of prosecution that had been raised in a Rule 3.800(b) motion pending direct appeal.

Prosecution costs in excess of $100 may be imposed for felony convictions based upon sufficient proof showing the costs exceed $100. When the State requested additional costs in this case, the judge inquired of defense counsel, who responded that there was no "legal basis to object." The court then imposed the greater amount.

A Rule 3.800(b) motion may be used post-sentencing, while the direct appeal is pending, to challenge a sentencing error, when that alleged error was not preserved by objection during the original sentencing proceedings. The error in this case, however, was one in the "sentencing process," not a sentencing error itself, when the costs were imposed without objection, notwithstanding a specific inquiry from the judge. The claim asserted was therefore beyond the scope of a Rule 3.800(b) motion. Laster did not challenge the actual sufficiency of the evidence for the greater costs until the post-sentencing Rule 3.800(b) motion.

Jones v. State, 1D20-3098 (Nov. 24, 2021)

The First District affirmed convictions and sentences and rejected an argument that evidence should have been suppressed because the defendant's detention was not warranted under the Marchman Act and that the law enforcement officer did not comply with the requirements of that Act.

An officer responded to a domestic violence call and encountered Jones, who was belligerent, aggressive and apparently intoxicated. The officer decided to detain him under the Marchman Act. Upon searching Jones for the officer's safety, a crack pipe was found in a pocket. The officer did not seek Jones' consent for going to the hospital or for obtaining alcohol assistance. The Marchman Act was referenced by the officer.

The First District disagreed with Jones' argument that the officer's "observations did not meet the criteria for protective custody." In addition to indicia of intoxication, the officer observed Jones angry, yelling and screaming at people; Jones had also threatened the officer. The Marchman Act, s. 397.675, Florida Statutes, sets forth the criteria for involuntary admission based on substance abuse

impairment. The individual to detained must have "lost the power of self-control with respect to substance abuse." Additionally, one alternative for detention is predicated on the "need of substance abuse services" and the fact that the person's judgment has been "so impaired that the or she is incapable of approaching his or her need for such services and of making a rational decision in that regard. . . ."

However, the deputy failed to obtain Jones's consent or "his opinion on getting alcohol assistance." While consent is not an absolute requirement under the Act, the officer is required to give "due consideration to the expressed wishes of the person," and that cannot be done without first seeking the consent. Absent express legislative language regarding the consequences of the failure to obtain such consent, and after considering the legislatively stated policy of the Marchman Act, the First District held that the failure to obtain such consent was not a basis for suppressing evidence found on the person being detained.

Finally, the search did not result in any constitutional violation as the officer "acted reasonably in searching Appellant for the safety of both men and for those present at the hospital where the deputy intended to take him."

Beasley v. State, 1D21-2317 (Nov. 24, 2021)

The First District affirmed the denial of a Rule 3.800(a) motion to correct illegal sentence. Beasley challenged his sentence of 45 years in prison, with a 20-year mandatory minimum, under the 10-20-Life statute. Beasley was sentenced for attempted first-degree murder, and the jury specifically found that he discharged and possessed a firearm during the offense.

The offense of attempted first-degree murder is a first-degree felony, and the firearm resulted in a reclassification of the offense to a life felony. Under s. 775.082(3)(a)3, Florida Statutes, a life felony may be punished by a term of years not exceeding life imprisonment. And, the discharge of the firearm required the mandatory minimum of 20 years under s. 775.087(2)(a)2.

When a sentence in excess of the mandatory minimum of the 10-20-Life statute is imposed, there must be additional statutory authority for the portion of the sentence exceeding that minimum. That authority was found in the statute setting forth the maximum sentence for the life felony.

Moorer v. State 1D21-2617 (Nov. 24, 2021)

The First District denied a petition alleging ineffective assistance of appellate counsel. Appellate counsel, in the direct appeal, filed an Anders brief. The First District stated that the claims in the current petition were being denied on the merits and noted that while a direct appeal with an Anders brief does not foreclose every claim of ineffective assistance of appellate counsel, "an affirmance under *Anders* only extends to review of the limited class of claims that were 'apparent on the face of the record' and thereby 'necessarily considered by the court in its *Anders* review.'"

A dissenting judge disputed the conclusion that the denial of this petition was on the merits. The claim at issue raised "collateral fact questions about the trial court proceedings that counsel could not have addressed in a direct appeal, and that we cannot address here." The dissenting judge would have concluded that the petition, based on facts not apparent from the direct appeal record, failed to state a preliminary basis for relief, as such a claim was beyond the scope of a petition alleging ineffective assistance of appellate counsel.

Second District Court of Appeal

Jones v. State, 2D19-4437 (Nov. 24, 2021)

The Second District reversed the denial of a Rule 3.850 motion, with respect to one claim of ineffective assistance of counsel, as to which the trial court conducted an evidentiary hearing.

The trial court denied the claim – that counsel failed to call exculpatory witnesses at trial – based on the court's conclusion that the witness, Thomas, would have presented inadmissible testimony at trial concerning a legal question. Jones was convicted of four counts of contracting without a license. Although Jones had a personal license at all relevant times, the State maintained that he had been contracting in the name of his business, and that the business was not licensed. Witness Thomas, deputy general counsel for the Department of Business and Professional Regulation, would have testified "that a business cannot be licensed by the department as a contractor." A licensed contractor "qualifies" the business and acts as its qualifying agent.

The Second District agreed with Jones that Thomas's testimony "did not concern a legal question." Thomas "merely explained that the department does not

license businesses but only individuals and that businesses can be qualified through the license of a contractor." Thomas was not engaged in the interpretation of the statute under which the prosecution was proceeding. The trial court had concluded that trial counsel was not deficient for failing to present this testimony. As that conclusion was erroneous, the case was remanded to the trial court with direction to determine whether Jones was prejudiced as a result of the failure to call Thomas as a witness.

Pinkston v. State, 2D20-611 (Nov. 24, 2021)

The Second District reversed an order summarily denying a Rule 3.850 motion as to one ground set forth in the motion. The Court also affirmed an order dismissing a Rule 3.800(a) motion.

In the Rule 3.850 motion, the defendant alleged that trial counsel failed to disabuse the sentencing judge of the notion that the court was required to impose consecutive sentences for two distinct armed robberies. During the sentencing hearing, the prosecutor asserted that the court had no discretion as to this, and following a few comments to the same effect, including one by the court, defense counsel asserted, "You were correct, Judge."

At issue were the 10-year mandatory minimum sentences under section 775.087(2)(a), Florida Statues, based on possession of a firearm during the offenses. The statute "only mandates consecutive sentences if one of the offenses is a qualifying offense listed in paragraph (2)(a) and the other offense is not. However, if both offenses are qualifying offenses under paragraph (2)(a), the statute does not require consecutive sentences, although the trial court retains the discretion to impose consecutive sentences for the two qualifying offenses should it choose to do so."

This case presented the further question of whether consecutive sentences were required if the offenses "occurred during separate criminal episodes." Here, too, the Second District found that the statute did not mandate consecutive sentences.

In the Rule 3.800(a) motion, the defendant presented the related claim that the two mandatory minimum sentences had to run concurrently, not consecutively. This was properly dismissed by the trial court as a successive motion. The Rule 3.850 motion had previously been denied, and its claim of ineffective assistance of counsel hinged on the issue of whether the sentences could be concurrent or consecutive. The Rule 3.800(a) motion was also erroneous, as the mandatory-minimum statute

did not prohibit consecutive sentences; such consecutive sentences were still within the discretion of the trial court.

Gary v. State, 2D20-740 (Nov. 24, 2021)

A conviction for third-degree murder with a firearm was reversed for a new trial. The trial court erred "by denying [a] request for an 'independent act' jury instruction."

Gary's theory of the case was that he "'set up a drug deal, and as soon as he saw a gun, he ran. And it wasn't – it was never intended for it to be a robbery. . . .'" Gary had "arranged for his cofelon to buy marijuana from Mr. Guzman, who was shot and killed during the transaction."

A defendant is entitled to a jury instruction on a theory of defense if there is any evidence to support the jury instruction. The State's argument that there was no entitlement to the instruction was that the "murder was within the scope of the planned criminal activity." That "improperly assumed that Mr. Gary and his cofelon intended to rob the victim drug dealer, a fact which was disputed at trial." Gary testified to being a middleman in the drug deal, but he did not have a gun, did not know his cofelon had a gun, and did not know there was going to be a robbery. "It is for the jury, not the court, to determine what weight to give the defendant's evidence" as to the alleged independent act.

Archer v. State, 2D20-1025 (Nov. 24, 2021)

The Second District reversed Archer's sentence for DUI manslaughter, which resulted from an open plea to the charge. The trial court failed to impose mandatory probation under section 316.193(5), Florida Statues (2018). Archer was sentenced to 15 years in prison, with a four-year mandatory minimum term, the lowest possible sentence under the criminal Punishment Code.

Section 316.193(5) provides that "[t]he court shall place all offenders convicted of violating this section on monthly reporting probation. . . ." On remand, the trial court was ordered to conduct a de novo resentencing hearing and then impose a sentence between 126 months and 15 years, which would include "a probation period of sufficient length to allow Archer to complete the substance abuse course requirement of section 316.193(5). The Court also certified the same question that the Fourth District previously certified to the Supreme Court:

DOES SECTION 316.193(5)'S REQUIREMENTS OF "MONTHLY REPORTING PROBATION" AND COMPLETION OF A SUBSTANCE ABUSE COURSE VITIATE A TRIAL COURT'S DISCRETION TO IMPOSE THE MAXIMUM FIFTEEN-YEAR PRISON SENTENCE PROVIDED IN SECTION 775.082, FLORIDA STATUTES?

Barnett v. State, 2D20-1226 (Nov. 24, 2021)

Although the trial court corrected a sentence on a Rule 3.800(b) motion, the written rendition of it was insufficient. After the oral pronouncement, the clerk "filed an amended Uniform Commitment to Custody which reads at the top of the first page, '[B]eing re-recorded to correct pg 10 of 10.' Page ten was then amended to read, '[C]ts. 1 + 6 (PCJ) to run concur w/cts. 2, 4, + 5.'" The sentencing corrections that were announced required a full written sentencing order.

The Second District reiterated its prior admonition to the Tenth Circuit regarding its practice of using "snap-out memoranda of sentence forms," as they can cause problems for both appellate review and future proceedings.

Hurtado v. State, 2D20-2478 (Nov. 24, 2021)

The Second District reversed an order denying a motion to remove the requirement that Hurtado register as a sexual offender under section 943.04354, Florida Statutes (2019).

For some qualifying offenders, removal, under enumerated circumstances, is within the discretion of the trial court. However, that discretion is not unbridled and the denial of the motion requires that the court set forth the basis for its determination.

Happel v. State, 2D20-2490 (Nov. 24, 2021)

The Second District reversed the summary denial of one claim of ineffective assistance of counsel in a Rule 3.850 motion for further proceedings.

The claim alleged that counsel failed to investigate facts, including potential surveillance videos from surrounding establishments that captured the incident. The trial court rejected the claim as conclusory and speculative. While the Second

District agreed that some of the statements in the motion were conclusory, others were adequate to set forth a facially sufficient claim, including specific allegations "that the videos existed and would have shown that he did not shoot at the officers."

As the motion set forth a facially sufficient claim, on remand, the trial court must either attach court records that conclusively refute the claim or otherwise conduct an evidentiary hearing on the claim.

Romo v. State, 2D21-779 (Nov. 24, 2021)

Romo appealed convictions for leaving the scene of a crash involving unattended property and making a false report. The Second District held that the evidence was insufficient for the offense of leaving the scene of a crash.

The evidence showed that Romo stopped, as required under section 316.063(1), Florida Statutes (2020). The State argued that Romo "did not intend to stay." However, he never left the scene. "The statute does not criminalize an intent to leave the scene; a person must have actually failed to stop."

Third District Court of Appeal

Rodriguez v. State, 3D19-2371 (Nov. 24, 2021)

The Third District reversed a conviction for second-degree murder, concluding that the State failed to present competent, substantial evidence.

This case was determined under the newly enunciated standard of review of Bush v. State, 295 So. 3d 179 (Fla. 2020), in which the Florida Supreme Court dispensed with the prior special standard of review for circumstantial evidence cases. The victim was found in her apartment bedroom, with a kitchen knife stuck in her throat. There were no signs of forced entry. A written letter noting how the victim wanted her body to be handled upon death suggested the possibility of a suicide. Members of the victim's family were permitted to enter the apartment and clean up. In the process, they cleaned up blood and threw a broken drinking glass into a dumpster. The family then realized that the victim's purse, wallet and cellphone were missing.

Evidence that the State relied on included: a fishtail on a kitchen counter, suggesting the victim was preparing food on the day of her death; the defendant's DNA on a shard of the broken drinking glass and on the victim's fingernail clippings;

markings on the victim's face which were consistent with a left-handed assailant striking her, and the defendant was left-handed; testimony from the medical examiner that the victim was hit with a blunt object, asphyxiated by hand, and stabbed in the neck; testimony that the victim kept a very neat home and washed her hands before preparing a meal; cell site data putting the victim's phone between ¼ and ½ of a mile from the defendant's home; the absence of security log entries for visitors to the victim on the day before her body was found. The defense consisted of testimony from family members who stated that they all went to the victim's home on the day prior to the body being found, and they all had something to drink while visiting. There was testimony that the defendant hugged the victim during that visit.

The legal analysis regarding the sufficiency of the evidence focused largely on the facts and holdings of Hodgkins v. State, 175 So. 3d 741 (Fla. 2015). Hodgkins was decided prior to the Supreme Court's Bush decision. In Hodgkins, a case which presented a similar collections of circumstantial evidence, the Supreme Court held that the purely circumstantial evidence was insufficient under the then-existing special standard of review for circumstantial evidence cases. The Third District found that Hodgkins went beyond that, and set forth a second holding, that the State also failed to meet the alternative burden of proof.

After finding that Hodgkins mandated the conclusion that the circumstantial evidence in this case was insufficient under the post-Bush standard, which requires "competent, substantial evidence to support the verdict," the Third District certified to the Florida Supreme Court, a question of great public importance regarding the scope of the Hodgkins decision:

> Does Hodgkins' determination that the State failed to present competent, substantial evidence on which a jury could find, beyond a reasonable doubt, that Hodgkins killed the victim remain valid, notwithstanding the Florida Supreme Court's abandonment, in Bush, of the special standard of appellate review applied in purely circumstantial evidence cases?

Toirac-Aguilera v. State, 3D21-1799 (Nov. 24, 2021)

The Third District found that the trial court did not follow the necessary procedures when dealing with frivolous and successive pro se postconviction motions. The trial court ordered the defendant to show cause why he should not be held in contempt of court. He moved for an extension of time for 45 days and it was

tendered to prison officials on July 23, 2021, but was not received and docketed by the trial court until August 2, 2021. The case came up for hearing again on August 5th, but the judge had not yet received any response to the order to show cause and imposed sanctions.

The trial court's original order was solely to show cause why the defendant should not be held in contempt. That order did not direct the defendant to show cause "why he should not be prohibited from filing any further pro se pleadings. . . ." "As such, the court's order did not furnish the requisite notice that Toirac-Aguilera would be barred from pro se filings before imposing sanctions." "[C]urbing a pro se litigant's abuse of the judicial process by precluding pro se filing is not the same as finding him in contempt."

Fourth District Court of Appeal

Gursky v. State, 4D20-532 (Nov. 24, 2021)

Gursky's convictions were reversed for further proceedings because the trial court "erred in finding her competent to proceed notwithstanding the uncontested expert testimony to the contrary."

In rejecting the conclusions of the experts, the trial court had emphasized that "the experts testified that she had to be redirected and would often go off on tangents while discussing matters with them. However, it should be noted that she eventually did provide and assist the examination with appropriate responses. The fact that it may have taken a longer time because she needed to be redirected does not mean that she is incompetent." The trial court also stated that the two experts "agreed the only area of concern was the Defendant's capacity to testify relevantly."

The Fourth District found that the trial court's "factual" assertions were incorrect, and "the trial court did not address Defendant's ability to disclose pertinent facts to counsel, let alone make a finding rejecting both experts' uncontested testimony that Defendant lacked such capacity." Even as to the factor of the ability to testify relevantly, the trial court's reasoning was rejected. "Although both experts testified that Defendant provided them with relevant information, they also testified that it took a tremendous amount of effort and constant redirection to get that information. Moreover, Dr. Ardity also testified that despite repeated attempts to redirect Defendant, '[o]ften you could not redirect her."

The lower court record did not provide any basis for rejecting the uncontested testimony of the two experts.