Case Law Update
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Supreme Court of Florida

In Re: Amendments to Florida Rules of Criminal Procedure, SC21-637 (Dec. 16, 2021)

The Supreme Court approved amendments to the following rules, effective April 1, 2022:

Rule 3.781 – References to "defendant" were changed to "juvenile offender." The rule added a provision regarding findings under section 921.1402, Florida Statutes. "If the juvenile offender is found eligible for a sentencing review hearing, the court shall issue a written order specifying: (A) which subsection of section 921.1402(2), Florida Statutes, applies; (B) when the juvenile offender is eligible to apply for a sentencing review hearing; and (C) that subsection 921.1402(3), Florida Statutes, requires the Department of Corrections to notify the juvenile offender when he or she will be eligible to apply for a sentence review hearing."

Rule 3.802 – Subsections (2), (4) and (5), regarding review of sentences for juvenile offenders, were deleted. Those subsections had previously required the juvenile offenders to include language in Rule 3.802 motions that had not been required by section 921.1402, Florida Statutes.

Rule 3.996 – This is a newly adopted rule and "provides a form to be used by pro se inmates to assist in requesting a sentence review hearing." This pertains to individuals who were previously sentenced as juvenile offenders and are seeking a review hearing under section 921.1402, Florida Statutes.

In Re: Amendments to Florida Rule of Criminal Procedure 3.030, SC21-591 (Dec. 16, 2021)

Rule 3.030(c) specifies that certain paper documents that are required by statute or rule to be sworn or notarized "shall be filed and deposited with he clerk immediately after [the document] is filed." The amendment exempts this requirement for documents filed "pursuant to rules 3.121, 3.125, 3.140(g), 3.160,

3.190, 3.240, 3.692, 3.811, 3.840, and 3.984. This requirement also does not apply to the documents filed by attorneys pursuant to rules 3.600, 3.801(c), or 3.853(b)."

Eleventh Circuit Court of Appeals

United States v. Fleury, 20-11037 (Dec. 16, 2021)

The Eleventh Circuit affirmed multiple convictions and sentences for transmitting interstate threats and cyberstalking. The defendant used Instagram for posts and messages, "posing as various mass murderers including notorious serial killer Ted Bundy and Nikolas Cruz," and sent the posts and messages to three individuals who were either friends or relatives of the victims of the Marjory Stoneman Douglas High School shooting.

Fleury challenged the cyberstalking statute for being facially overbroad, in addition to being unconstitutional as applied to his conduct. An overbreadth challenge must establish that the statute prohibits a "substantial amount of protected speech." Fleury's challenge failed "because it ignores key statutory elements that narrow the conduct [the statute] applies to – including, for example, proof that the defendant acted with 'intent to kill, injure, harass, [or] intimidate' and evidence that the defendant 'engage[d] in a course of conduct' consisting of two or more act evidencing a continuity of purpose."

The "as-applied challenge" asserted that the speech "concerned a matter of public concern" and that the statute "impermissibly restricts the content of [Fleury's] speech." While the MSD shooting was a matter of public concern in many respects, such as gun control and school safety, among others, "Fleury's messages did not address any of these topics, attempt to engage in a dialogue concerning these issues or provide any other relevant information." His messages were threats; they "gloated over the death" of the victims, and they exacerbated the victims' grief – "a purely private matter."

As to the claim that the statute restricted the content of Fleury's speech, the relevant category for legal analysis was "that of true threats," "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" This does not require an actual intent to carry out the threat. "'Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.'" In one statement, the defendant referred to himself

as Nikolas Cruz, "declared himself a 'murderer' and threatened that '[w]ith the power of my AR-15, you all die.'"

Fleury also challenged the sufficiency of the indictment, asserting that the cyberstalking allegations were based on emotional distress to the victims, instead of true threats. The claim was not asserted in the district court, and, as a result, on appeal, the Appellant was required to demonstrate that the indictment was "so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted." The indictment tracked the statutory language, even though it might have been drafted with greater clarity. It alleged, in part, that the electronic communication was used "to engage in a course of conduct that caused, attempted to cause, and would be reasonably expected to cause substantial emotional distress. . . ."

Fleury also argued that the evidence was insufficient as to subjective intent to threaten. Evidence presented included a government expert who "concluded that Fleury intended to cause his victims anger, grief, and fear." The appellate court would not make credibility determinations or reweigh evidence. Additionally, the admission of this expert's testimony was not erroneous under the plain error standard. The doctor "explained that Fleury's attraction to the domineering and taunting characteristics of serial killers motivated him to send the intimidating messages and opined that Fleury could appreciate the impact that his messages had on the recipients." The testimony as relevant. And, although the doctor was not an expert on the autism spectrum disorder, as to which the defense had presented evidence, the government's expert was an expert on forensic psychiatry.

The jury instructions on cyberstalking were not insufficient with respect to the intent to communicate the threat. The statute did not require the "subjective" intent that Fleury was seeking an instruction for; the statute already required proof of a "true threat," one which "is made under circumstances hat would place a reasonable person in fear of being kidnapped, killed or physically injured."

First District Court of Appeal

Byers v. State, 1D21-33, 1D21-34 (Dec. 15, 2021)

Byers' designation as a violent felony offender of special concern, imposed for a violation of probation, was reversed because "the trial court incorrectly determined that his previous offense was a VFOSC qualifying offense."

In 1997, Byers was convicted of lewd or lascivious assault upon a child under section 800.04, Florida Statutes (1996). That offense is no longer included in section 800.04 and is not referenced in the VFOSC statutory qualifications. The First District rejected the State's argument that the offense was similar enough to the current version of the statute so that it could be considered as an enumerated qualifying offense under the VFOSC statute. The Court also rejected the State's argument that Byers' "underlying conduct should control rather than the conviction offense." The VFOSC statute specifically refers to the offense for which an offender was "convicted."

Glover v. State, 1D21-295 (Dec. 15, 2021)

Without setting forth any facts, the Court affirmed a sentence and found that the trial court did not commit fundamental error by relying on Glover's marital status in sentencing. The judge's comment at sentencing "was a recitation of the facts presented by Glover during his family-based mitigation argument."

Dallas v. State, 1D21-680 (Dec. 15, 2021)

The denial of a Rule 3.800(a) motion to correct illegal sentence was affirmed. A claim that the sentence imposed was vindictive was not cognizable in such a motion as that claim goes to the sentencing process, not the actual sentence.

Second District Court of Appeal

Zeno v. State, 2D20-2266 (Dec. 17, 2021)

The Second District reversed the denial of a Rule 3.800(a) motion to correct illegal sentence on the basis of a scoresheet error and remanded for resentencing as the defendant could not have received the same sentence for one of his convictions (conspiracy to commit RICO), absent the scoresheet error.

The scoresheet was off by 101 points – 92 points were "accidentally counted" for the primary offense twice, and the conspiracy offense should have been scored "at one severity level below the completed offense," resulting in an additional 9 points. The sentence imposed for the conspiracy, 30 years, exceeded the statutory maximum of 15 years for that offense, which was a second-degree felony.

Third District Court of Appeal

Johnson v. State, 3D21-1818 (Dec. 15, 2021)

In a one-paragraph opinion, affirming the summary denial of a Rule 3.850 motion based on the two-year limitations period, the Third District reiterated a prior holding that "'[t]he mere incantation of the words "manifest injustice" does not make it so,'" and does not create an exception to the two-year limitations period.

Fourth District Court of Appeal

Bankston v. State, 4D20-231 (Dec. 15, 2021)

The Fourth District affirmed convictions for kidnapping, sexual battery, and simple battery, and reversed an assessment of costs.

The trial court did not err in permitting a substantive amendment of the information with respect to the manner in which the sexual battery was committed. The defendant "waived any error by rejecting the trial court's contemporaneous offer to immediately continue the trial to another date."

The trial court did not abuse its discretion in excluding defense-proffered evidence regarding the victim's alleged financial motive for accusing the defendant of the charged crimes. The defense sought to present evidence that the victim, during a prior relationship with an 85-year-old man who was incompetent, had that marriage annulled. The defense sought to rely on that prior relationship to argue that the victim took advantage of people for her own financial benefit. Evidence was presented that the victim turned down an offer from the defendant's family to pay for her dental repair if she would drop this case. The judge ruled, and the Fourth District found no abuse of discretion, that the excluded evidence was not relevant and could not be used to impeach the victim because the "prior relationship was too dissimilar to the facts at issue here. . . ." The proffered evidence "would have been improperly used as character evidence showing a prior bad act."

An assessment of investigative and prosecution costs above the mandated statutory minimums was erroneous where the State presented no evidence to support those additional costs and the trial court did not obtain a waiver of such evidence from the defendant.

Shea v. State, 4D20-1511 (Dec. 15, 2021)

One ground for revocation of probation – failure to pay court costs and the cost of supervision – was reversed because "the court failed to inquire whether Shea had the ability to pay these costs."

Lacue v. State, 4D21-1892 (Dec. 15, 2021)

Appellate counsel from the prior direct appeal was found ineffective for failing to preserve and raise the meritorious claim that the trial court failed to order a PSI report.

In the aftermath of Miller v. Alabama, Lacue, who had been a juvenile offender, was resentenced to life in prison, with judicial review after 25 years. On the direct appeal from that resentencing, appellate counsel did not raise the PSI issue. In the current habeas petition, the Fourth District held that the PSI issue could have and should have been raised on the direct appeal through a Rule 3.800(b) motion. The Fourth District rejected the State's argument that his claim was beyond the scope of issues that could have been raised in the 3.800(b) motion. The Court also rejected the argument that the error was harmless because the trial court considered similar sentencing factors in its sentencing decision, albeit without the benefit of the PSI report.

Matos v. State, 4D21-2485 (Dec. 15, 2021)

The Fourth District granted a petition for writ of prohibition on the basis of the statute of limitations. The "State did not present evidence that it conducted a diligent search to locate Matos, which resulted in an unreasonable delay in service of process."

The information, filed in July 2019, alleged that Matos committed a misdemeanor – using the name or title of a contractor without being certified or registered. The offense was alleged to have occurred in March 2018. A return of service of a summons issued for Matos "was filed as unserved with a written comment that the [Sheriff] spoke with the new resident at the address, who had lived there for two months and did not know Matos." This occurred in August 2019.

In October 2019, the State filed a motion for capias stating that it was unable to serve Matos. Over the next nine months, the court issued three notices regarding probable cause for the issuance of a capias, all sent to the same address as the first

unsuccessful attempt to serve Matos. The capias was ultimately issued in October 2020. Four months later, Matos filed "a request to recall the capias and provided his current address and phone number."

Matos sought dismissal because the prosecution was not timely commenced within two years of the date of the offense where the "capias, summons, or other process was not served upon Matos within the limitations period and without reasonable delay." At a hearing, it was elicited that Matos had been living and working out of Florida in March 2021, but this was after the expiration of the limitations period. The trial court, in denying dismissal, relied on the Florida Supreme Court's pandemic administrative order suspending all time periods involving the speedy trial procedure. The only documentation produced by the State was a DAVID search regarding driver and vehicle information from 2019, and the single attempt at service by the Sheriff. The State argued "that the delay in process was not unreasonable because 'resources have been stretched thin' by the pandemic. . . ." The State further argued that the pandemic resulting in the stalling and postponement of trial court proceedings.

The pandemic-related arguments had not been asserted in the trial court. The sole evidence in that court – the single DAVID search and the single attempt at service – was "not sufficient evidence of a diligent search."

Fifth District Court of Appeal

Lucas v. State, 5D21-2403 (Dec. 17., 2021)

The denial of a Rule 3.800(a) motion to correct illegal sentence was affirmed.

Lucas argued that the trial court lacked jurisdiction to impose the current sentences for a violation of probation. Lucas was originally sentenced to four years in prison, followed by four years of sex offender probation. The prison sentences were completed on June 5, 2004. The affidavit of probation was filed in May 2008. In October 2008, the court extended the concurrent terms of probation, nunc pro tunc, from June 5, 2008. Subsequent probation violations were charged and in 2010, Lucas was designated a sexual predator.

Lucas argued that all sentences imposed after June 4, 2008, were illegal because the original term of probation was "not tolled in May 2008 when the affidavit of violation of probation and the contemporaneous arrest warrant were issued because he was charged with a technical, non-criminal violation," and that

the probation expired shortly after June 4, 2008, and the subsequent sentences were imposed when the trial court no longer had jurisdiction.

The trial court dismissed the current postconviction motion as moot, because "Lucas had admitted he fully served his post-violation of probation prison sentences." Once "a defendant has served an invalid or illegal sentence to completion, the trial court cannot set it aside because the issue has become moot." As to the sexual predator designation, the Florida Supreme Court recently held, in State v. McKenzie, that a trial court does not lack jurisdiction to impose that designation after a sentence has been fully served.