

Case Law Update
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Supreme Court of Florida

[Avsenew v. State](#), SC18-1629 (Jan. 13, 2022)

The Supreme Court of Florida reversed convictions for first-degree murder and sentences of death on direct appeal.

One witness, the defendant's mother, who described "multiple incriminating statements made and actions taken by Avsenew shortly after the murders," was permitted to testify through perpetuated testimony. The murders were committed in Broward County and the trial was conducted in Broward County. Ms. Avsenew, at the time of her perpetuated testimony, was in Polk County. At the time of the perpetuated testimony, defense counsel, the prosecutor and the judge were in a Broward County courtroom. "The two locations were connected remotely by audio-visual equipment. Ms. Avsenew's testimony was recorded on video, and the video of her testimony was played for the jury at Avsenew's trial."

The perpetuated testimony was taken in compliance with Fla.R.Crim.P. 3.180(i), which enabled such testimony if the witness resides beyond the territorial jurisdiction of the court or may be unable to attend a trial or hearing. The rule also requires a court finding "that the witness's testimony is material, and that it is necessary to take the deposition to prevent a failure of justice."

The problem in this case centered "on the format of the testimony which, due to the setup of the audio-visual equipment, prevented Ms. Avsenew from seeing Avsenew while she testified and thus violated rule 3.190(i)(3)," which requires that the officer having custody of the defendant "keep the defendant in the presence of the witness during the examination." This means that the defendant and testifying witness must "be able to see each other during the examination. However, the record conclusively establishes that Ms. Avsenew was unable to see Avsenew." While the judge inquired and confirmed that the witness could see the courtroom, the judge did not inquire as to whether the witness could actually see the defendant, and defense counsel objected that the witness was unable to see the defendant. At one point, during cross-examination, defense counsel actually elicited from the witness that although she could see defense counsel, she could not see the defendant.

Finally, based on the facts of the case and the highly incriminating nature of the witness's testimony, the error could not be deemed harmless.

Eleventh Circuit Court of Appeals

[United States v. Smith](#), 20-12667 (Jan. 12, 2022)

The Eleventh Circuit, on direct appeal, vacated a conviction for theft of trade secrets and related sentencing enhancements for lack of venue, affirmed an extortion conviction, and remanded for resentencing.

At the time of the events at issue, Smith was in Mobile, Alabama. He was a software engineer and angler “who obtained the coordinates of artificial fishing reefs in the Gulf of Mexico from a website owned by StrikeLines, a business that sells those coordinates.” StrikeLines’s office was located in the Northern District of Florida, and that is where the case was tried. Although the office was in Pensacola, the “servers where [StrikeLines’s] website and data are hosted are in Orlando.” Smith argued, in part, that the prohibited conduct with respect to the theft occurred in the Middle District of Florida, because that was where the data was accessed and obtained via Smith’s use of a web application, Fiddler, “which allowed him to see the coordinates of private artificial reefs.”

With respect to the theft charge, while the Eleventh Circuit “need not decide whether venue would be proper in the Middle District of Florida, we can say that venue would be proper in the Southern District of Alabama, where Smith was located when he took the trade secrets. But venue was not proper in the Northern District of Florida because Smith never committed any essential conduct in that location.” In rejecting the government’s argument, the Court emphasized that the “theft-of-trade-secrets statute does not define any essential conduct element of the offense in terms of its effect on the owner of the trade secret.”

The Court rejected Smith’s related argument that the venue error was structural error and that it further required the reversal of the extortion conviction as well.

The evidence for extortion was found to be sufficient on the basis of Facebook posts on Smith’s personal page. Smith posted information that he had obtained by accessing StrikeLines’s private data. Griggs, one of the business owners, contacted Smith, complaining about the problems that this was creating to both the livelihood

and reputation of the business owners. Griggs agreed to delete his post, but said that he “need[ed] help with one thing, though.” He wanted data on “deep grouper numbers,” which pertained to fishing in the Gulf of Mexico. When that data was not provided, Smith said the posts were going “back up.”

[United States v. Moore](#), 20-11215 (Jan. 13, 2022)

Moore appealed his conviction for criminal contempt and his revocation of supervised release. The Eleventh Circuit affirmed the 18-month revocation sentence and six-month contempt sentence, but vacated the term of post-revocation supervised release. The district court sentenced Moore to a prison term of 18 months, followed by 18 months of supervised release, for the revocation of supervised release.

The offense for which Moore was originally convicted carried a statutory maximum sentence of 10 years. The sentence imposed on the most recent revocation of supervised release, coupled with the new contempt, was structured as follows: 10 years on the original sentence; six months for the first violation of supervised release; 18 months for the second such violation; and 18 months for the third such violation.

The district court “plainly erred in imposing a term of supervised release because it failed to account for the terms of imprisonment [Moore] had already served for prior revocations.” The government conceded this error on appeal. The maximum term of supervised release upon the original conviction was 36 months. Moore had been sentenced to a total of 42 months imprisonment for his prior revocations. Pursuant to 18 U.S.C. s. 3583(h), “the maximum allowable supervised release following multiple revocations must be reduced by the aggregate length of any terms of imprisonment that have been imposed upon revocation.”

Moore also challenged the revocation term of imprisonment, asserting that the district court erred in extending his sentence “beyond the authorized statutory maximum for his offense of conviction based solely on ‘judge-found facts,’” contrary to [Apprendi v. New Jersey](#) and [Alleyene v. United States](#). During the course of imposing sentence, the judge referred to factual matters related to the original offense. This was reviewed and rejected under the plain error standard, with the conclusion that there was no error at all. Moore argued “that when his sentence is viewed in the aggregate – meaning his original sentence combined with the sentence imposed upon each revocation of supervised release – it totals 13.5 years which exceeds the authorized statutory maximum of 13 years (based on combining the statutory maximum term of imprisonment and the statutory maximum term of

supervised release.” Nothing in the text of s. 3583(e) “provides that the total time a defendant may serve for his original conviction and revocations of supervised release cannot exceed the combined statutory maximum terms of imprisonment and supervised release for the original offense of conviction.” The Court further rejected the application of Appendi “in the context of s. 3583(e)(3) proceedings.”

One judge dissented in part, with respect to the issue of whether the district court could impose “a cumulative sentence of imprisonment that exceeds the statutory maximum sentence the defendant faced at the time of sentencing.”

Another judge, dissenting in part, concluded that the sentence of 13 ½ years exceeded the statutory maximum of 13 years.

First District Court of Appeal

[Stephens v. State](#), 1D19-3427 (Jan. 12, 2022)

The First District affirmed multiple convictions for first-degree murder, aggravated child abuse, and aggravated manslaughter of a child. All of the convictions pertained to the same victim.

The appellate court refused to address the challenge to the sufficiency of evidence for first-degree felony murder because defense counsel, when moving for judgment of acquittal, conceded that the State had presented sufficient evidence as to that offense. Regardless, the Court would have found the evidence sufficient. The victim had been starved to death and evidence indicated that the lack of adequate sustenance had been ongoing for several weeks and that the defendant knew the victim was starving for days and weeks prior to death. First-degree felony murder was therefore adequately predicated on the underlying felonies of aggravated child abuse and aggravated manslaughter of a child.

The Court rejected Stephens’ challenge to territorial jurisdiction of the trial court. Stephens and his wife, a codefendant, left their home in Indiana to visit family in Lakeland, Florida. The victim’s death occurred while in Lakeland. Stephens elected to have his trial in Hamilton County. The victim’s body was found in Lakeland, Florida, and this generated “a presumption that she died in Florida. Through this presumption, the State provided sufficient evidence that all three offenses occurred in Florida.”

While “the trial court’s instructions as to aggravated manslaughter did not perfectly conform to the recently adopted standard jury instructions . . . , the trial court properly instructed the jury on manslaughter (culpable negligence) and the jury explicitly found Stephens guilty of aggravated manslaughter of a child and made explicit findings that Stephens, through neglect, caused the death of a child.”

There was no abuse of discretion in refusing to admit the codefendant’s out-of-court statements as statements against penal interest. The trial court found that the proffered statements were not sufficiently trustworthy. The codefendant had been “very highly sedated” at the time. The court had also found that the statements reflected a “desire to curry favor with Stephens.” There were also inconsistencies between those statements and evidence adduced at trial.

The trial court did not err in summarily denying a motion for new trial based upon alleged newly discovered evidence. The evidence was a “Confessions” letter from the codefendant. The “content of the letter was not self-inculpatory, but overwhelmingly self-exculpatory. In the letter, the co-defendant never admits to committing a crime. Instead, she tries to minimize her criminal liability by continually claiming she accidentally starved the victim. “If a part of what the declarant has said is exculpatory, the statement is not entirely self-inculpatory, and it is not therefore admissible under the statement against penal interest exception.’ . . . An attempt to minimize criminal liability removes the sole justification for allowing the declarant’s statement in evidence.”

Dual convictions for first-degree murder and aggravated manslaughter of a child did not violate double jeopardy principles, even though the offenses pertained to the same victim. The Court noted that the Florida Supreme Court had recently abrogated the single-homicide rule. The offenses each contained one or more elements that the other offense lacked for purposes of the Blockburger same-elements test. Aggravated manslaughter of a child required that the victim be a child. First-degree premeditated murder required proof of premeditation. First-degree felony murder “requires that the killing be done in the commission of certain enumerated felonies, which element is absent in aggravated manslaughter of a child.” Nor was the lesser offense subsumed by the greater offense. Finally, the Court concluded that the two offenses were not degree variants of one another. The two offenses existed in separate statutes – sections 782.04 and 782.07. While murder was classified into three distinct degrees in s. 782.04, and manslaughter was likewise classified into three separate aggravated offenses, that reflected the legislative “intent to treat murder and manslaughter as separate offenses.” The Court did,

however, certify the issue of degree variants to the Florida Supreme Court as a question of great public importance.

[Smith v. State](#), 1D20-106 (Jan. 12, 2022)

The First District affirmed convictions for capital sexual battery.

A claim that closing argument comments by the prosecutor resulted in improper burden shifting was not properly preserved for appellate review. One objection, after the initial closing argument, addressed different comments than the ones raised on appeal. A second objection, directed to the comments at issue on appeal from the rebuttal argument, was made after the jury retired to deliberate and was therefore untimely. Although the objection was reiterated in a motion for new trial, that, too, was insufficient, as a motion for new trial may be used to preserve such an issue when counsel had no opportunity to object contemporaneously.

The comment at issue was one in which the prosecutor “told the jury that if they believed the victims, the burden shifted to Smith and that Smith had not proven his innocence.” This comment did erroneously shift the burden to Smith. However, Smith was not entitled to relief because he “invited the error.” Smith was offered a curative instruction but refused to accept it, and that refusal to accept the curative instruction rendered the error invited. Alternatively, even if the invited error doctrine did not apply, fundamental error did not exist. The comment was the only improper comment, and the “jury was correctly instructed on the legal standard for conviction.”

The State presented child hearsay evidence, but provided the defense with late notice. Section 90.803(23)(b), Florida Statutes, requires 10-days’ notice prior to trial; the State provided only five-days’ notice. However, Smith did not demonstrate prejudice from the late notice and the trial court therefore did not abuse its discretion by admitting the evidence. The notice pertained to a single witness, and it provided sufficient time for the defense to request a continuance to seek a defense expert, but the defense did not do so. “Counsel even admitted that there was no apparent undue influence during the interviews and said that Smith would not contest the hearsay evidence’s reliability. Plus, the State did not present unrebutted expert testimony because Ms. Conley’s only role was to introduce the child hearsay evidence, not to opine to the veracity of it.”

The State filed an amended information alleging that the offenses occurred within a one-year timeframe. The defense moved for a statement of particulars,

seeking to narrow that range. Efforts to schedule a hearing “fell through” and defense counsel “told the judicial assistant he could resolve the issue with the State without a hearing.” No hearing was ever held. On appeal, Smith challenged the failure to hold a pretrial hearing on the motion. Smith failed to show on appeal that the motion would have been granted, as the two minor victims testified that they could not remember the precise date of the offense and the State therefore lacked information to narrow the range. Furthermore, Smith’s argument of prejudice, based on the premise that the State would have presented evidence outside the narrowed range at trial would lead to an acquittal, did not hold up. “Even when the State presents evidence outside a narrowed range, the State can move to amend the statement of particulars as long as the defendant will not be prejudiced.” Smith presented no substantive argument as to prejudice from the wide date range. At trial, Smith attempted to use the wide range as a focus of the defense.

[Collie v. State](#), 1D21-103 (Jan. 12, 2022)

Without setting forth any facts, the Court’s opinion presented parenthetical quotes from prior decisions regarding drug searches, the smell of marijuana and the possibility of a driver being a medical-marijuana user. A ““well-trained dog’s alert establishes a fair probability . . . that either drugs or evidence of a drug crime . . . will be found””; ““regardless of whether the smell of marijuana is indistinguishable from that of hemp, the smell . . . from a vehicle continues to provide probable cause for a warrantless search of the vehicle””; and ““the possibility that a driver might be a medical-marijuana user would not automatically defeat probable cause.””

[Footman v. State](#), 1D21-2873 (Jan. 12, 2022)

The First District affirmed the summary denial of a Rule 3.850 motion which alleged five claims of ineffective assistance of counsel. Footman had been convicted of first-degree murder and armed robbery.

Counsel was not ineffective for failing to impeach a witness with prior inconsistent statements from a deposition. The prior statements did not contradict trial testimony. Rather, they actually corroborated the witness’s trial testimony. As such, defense counsel had no basis for using the prior statements at trial.

Trial counsel was not ineffective for not objecting when the trial court allegedly limited cross-examination of a witness. During the cross-examination, the prosecutor objected that defense counsel’s question could open the door to testimony about other crimes. After a sidebar, defense counsel chose to rephrase the

question. As a result, the court did not limit cross-examination; defense counsel made a strategic decision to rephrase the question at issue.

Counsel was not ineffective for failing to object that a juror was sleeping. The parties discussed this at trial, and neither party objected. Counsel was not deficient “because there was no basis to remove the juror. The State’s witness was offering inculpatory evidence. Under these circumstances, trial counsel’s decision not to object to the juror sleeping through testimony was strategic.”

Counsel was not ineffective for coercing Footman to stipulate to autopsy evidence of multiple gunshot wounds. The court “conducted a sworn colloquy with Footman about the stipulation and Footman did not state any objection to the stipulation.”

Second District Court of Appeal

[West v. State](#), 2D20-1818 (Jan. 14, 2022)

The summary denial of a Rule 3.850 motion was reversed for further proceedings because the claims were not conclusively refuted by the trial court record and the trial court “applied the incorrect standard in assessing” the claims.

The trial court denied claims of ineffective assistance, finding an absence of prejudice by assessing whether there was a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. This was the wrong standard because Mr. West’s case was not tried.” The “analysis should have focused on whether there was a reasonable probability that, but for his counsel’s misadvice and omissions, Mr. West would have insisted on going forward with the revocation hearing.” And, while a transcript attached to the lower court’s order showed that West advised the court of counsel’s failure to investigate defense witnesses and the court’s finding that counsel was not deficient, the transcript in question did not demonstrate that West was referring to the same witness to whom he referred in the current 3.850 motion.

[Macias v. State](#), 2D21-2534 (Jan. 14, 2022)

The Second District reversed the summary denial of a Rule 3.850 motion because the trial court failed to attach documents refuting two claims and failed to address one subclaim.

One claim alleged that counsel was ineffective for failing to object to irrelevant and prejudicial evidence. The trial court erred in concluding that the claim was facially insufficient. The evidence, in a sexual battery/kidnapping case, related to the age of the victim, 21, and the age of the defendant, 42; the State made the victim's age a focus and the prosecution made repeated references to this age difference.

In another claim, it was alleged that counsel was ineffective for failing to object to collateral offense evidence. The lower court found that the State had filed a notice of intent to rely on Williams rule evidence and attached that notice to the order denying the Rule 3.850 motion. That notice, however, did not cover the collateral offense evidence to which the 3.850 motion pertained. The attached notice therefore did not refute the claim as alleged.

A third claim, which was not addressed by the lower court, and which was facially insufficient, required leave to amend.

And, due to the errors with respect to those three claims, the lower court's rejection of a claim alleging ineffective assistance based on the cumulative effect of the errors had to be reconsidered on remand.

Fourth District Court of Appeal

[Brown v. State](#), 4D20-1426 (Jan. 12, 2022)

The Fourth District affirmed convictions and sentences arising out of a no contest plea to charges of robbery with a deadly weapon while masked, and burglary of a structure while armed and masked with an assault or battery. The trial court did not commit fundamental error "by conducting the sentencing hearing with the defendant appearing remotely by video." The ultimate sentencing hearing was conducted by Zoom during the pandemic.

Any error in not having the defendant physically present for sentencing was not fundamental error. The "defendant did not object to appearing by video for his sentencing hearing." The anticipated scheduling of the Zoom hearing had been referenced at a prior appearance. The Court cited six reasons to support its conclusion of the lack of fundamental error. First, "neither the defendant nor his counsel ever requested to speak privately with one another at any point during the sentencing hearing." Second, the defendant had effective assistance of counsel. Counsel was familiar with the facts of the case and the prior change of plea which

preceded the pandemic. Counsel could have sought a continuance, but did not do so. Third, the defendant presented all desired evidence and argument. Fourth, the defendant alleged that he inaccurately believed he was addressing the judge, rather than the prosecutor, during cross-examination, due to the limits of the video technology. However, there was no showing that anything would have differed had the defendant known by whom he was being questioned.

Fifth, appearing by video “did not hinder the defendant’s ability to express remorse.” This claim was based on the masking of the defendant’s face and the face being obscured by the angle of the camera. The judge, however, expressly found that the defendant was remorseful and rejected a downward departure sentence for totally unrelated reasons.

Sixth, to the extent that the defendant may have been unable to watch surveillance video being shown to the judge, neither the defendant nor defense counsel “ever requested the prosecutor’s laptop be maneuvered to permit the defendant to watch the surveillance video.”

[Guerra v. State](#), 4D21-1692 (Jan. 12, 2022)

The Court noted the general principle that “multiple final orders may be reviewed by a single notice, if the notice is timely filed as to each such order.” In this case, the notice of appeal was untimely as to one of the orders in question and that portion of the appeal was dismissed.

The Court then addressed the other order, which denied a motion to withdraw a plea of guilty based on alleged misadvice of counsel regarding eligibility for gain-time. The trial court concluded that there was no duty to advise of this because it was a collateral consequence. This case, however, involved a claim of affirmative misadvice, not a failure to advise, and such misadvice may be a basis for motion to withdraw plea. The Fourth District ordered that the trial court permit Guerra to withdraw his plea on remand.