Case Law Update
December 27, 2021
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First District Court of Appeal

Castro-Mendez v. State, 1D19-3854 (Dec. 22, 2021)

A general hearsay objection was insufficient to preserve for appeal the claim that the trial court erred by admitting evidence of a recording of the child victim's statement during a Child Protective Team interview, based on the "absence of notice and specific factual findings that the victim's hearsay statements were reliable as required by section 90.802(23), Florida Statutes."

Second District Court of Appeal

Rogers v. State, 2D19-2714 (Dec. 22, 2021)

Rogers spent 40 days in county jail awaiting transport to the Florida Department of Corrections after his initial sentencing. This time period is not for the sentencing court to award as a credit for jail time served. It is a period of time that the Department of Corrections calculates, on its own, as time served on the sentence. Rogers was subsequently resentenced, in a de novo resentencing, and argued that at the resentencing, this was a time period that the sentencing court should have awarded as a credit for time served. The Second District disagreed. Any dispute as to whether this period of time was being awarded was still a matter for DOC to calculate, and any litigation regarding it was a matter of pursuing administrative remedies with DOC.

Costello v. State, 2D21-1384 (Dec. 22, 2021)

The summary denial of a Rule 3.850 motion was reversed for further proceedings and the trial court's order did not attach court records conclusively refuting the claim.

Costello argued that trial counsel was ineffective for "failing to note that victim injury points had been improperly included in his Criminal Punishment Code scoresheet and by affirmatively misadvising him as to the lowest permissible sentence he could receive if found guilty." Costello was charged with leaving the

scene of a crash resulting in death and tampering with evidence. He argued that the assessment of 120 victim injury points was erroneous when there "was no evidence that the victim died because he fled the scene of the accident."

Fla.R.Crim.P. 3.704(d)(9) states that victim injury points are to be scored when there is "physical injury or death suffered by a person as a direct result of any offense pending before the court for sentencing." Costello's motion requested resentencing using a corrected scoresheet. That was an insufficient prayer for relief in the 3.850 motion, and the motion was facially insufficient "because it does not include a request to withdraw his plea." "On remand, if Mr. Costello chooses to amend his motion and seeks to withdraw his plea, the postconviction court shall either attach those portions of the record that conclusively refute Mr. Costello's claim or conduct an evidentiary hearing."

Third District Court of Appeal

Abdallah v. State, 3D19-1581 (Dec. 22, 2021) (on motion for written opinion)

The Third District affirmed convictions for two counts of sexual battery and one count of burglary with assault and battery. The sexual battery charges were enhanced based on the special statutory circumstances of physical helplessness and physical incapacitation.

The victim and her friend had one alcoholic drink before taking an Uber to a bar, where they had more drinks. After a disagreement with the bartender, and feeling "bothered by two men at the bar, the two women retreated to the bathroom." The victim, K.N., felt woozy and sick. Soon afterwards, K.N. fell off a stool and hit her head; she had no further recollection of the night.

The bartender called for an Uber on K.N.'s phone. Abdallah was the driver. After some reluctance, he drove the two women to K.N.'s apartment. Upon arrival, the women had trouble getting out of the car and K.N. proceeded to lay on the sidewalk. Abdallah agreed to assist her to her apartment, and he carried her in, accompanied by the friend. The defendant used K.N.'s key fob to enter the building and apartment. Surveillance video showed the three enter the building and elevator. In the elevator, the defendant kept propping K.N. up. Eight minutes elapsed between the entry into the elevator and the departure of the defendant, by himself.

In a subsequent statement to the police, the defendant admitted to having a consensual sexual encounter with K.N., which K.N. initiated, by kissing him. The

friend, Adriana, testified that K.N. was incoherent and the defendant placed her limp body on her bed. He did not leave immediately, but stood over K.N. Adriana did not see any kiss. She told the defendant to leave, but the defendant pulled her arm and told her to join the two of them. Adriana locked herself in the bathroom, where she blacked out."

The next morning, K.N. was confused upon waking partially naked. She found the Uber reference on her phone and discovered semen stains on the comforter; DNA testing resulted in a match to the defendant.

The Third District found that the evidence was sufficient for sexual battery. The defendant's statement to the police included the admission as to the sexual conduct at issue. With respect to the lack of consent, the accounts of both K.N. and Adriana, together with the surveillance video, "provide[d] the basis for a reasonable inference by the jury that K.N. did not give 'intelligent, and voluntary' consent to Abdallah." As to the element that K.N. was either "physically unable to resist" or "physically incapacitated," the evidence showed "an inebriated K.N. falling to the ground twice . . . and hitting her head with the first fall." K.N. was "drifting in and out of consciousness during the entire time she was in Abdallah's presence." K.N. had to be propped up in the elevator and she lay limp on the bed when placed there. She was unable to walk on her own. These facts sufficed to establish both of the statutory special circumstances.

The Court's opinion distinguishes its own prior opinion in Coley v. State, 616 So. 2d 1017 (Fla. 3d DCA 1993). Abdallah relied on Coley, where the victim, at trial, "conceded that she may have given consent to the acts in question," thus creating reasonable doubt. There was no such express concession in this case, and there was additional evidence in Coley, lacking in this case, that the victim "was physically able to communicate at all relevant times" and able to "describe the sexual acts charged in the information."

The evidence was also sufficient with respect to burglary, as the defendant "remained in" the dwelling to commit or attempt to commit the sexual battery.

The trial court did not abuse its discretion in denying a requested special jury instruction on the defendant's good-faith belief that "the victim was a willing participant and consented to the sexual acts." The standard instructions already included the element of intelligent, knowing, and voluntary consent. The Third District again addressed and rejected the Appellant's argument based on the prior decision in Coley, in which the Third District had stated that there was "an absence

of evidence to show defendant knew, or that it was apparent to defendant, that the victim was unable to give a knowing and voluntary consent." This language was not written to make the defendant's "state of mind a relevant consideration to the jury." Rather, it related "to the victim's capacity to communicate, not to the general state of mind of the defendant." As K.N. was not communicative and did not have the capacity to consent, Coley was distinguishable.

The trial court did not err in denying a motion to compel Uber to provide a copy of a settlement agreement between Uber and K.N.. Abdallah sought to determine whether K.N.'s statements in the civil proceedings resulting in the settlement agreement were consistent with her statements in the criminal case. The allegations in the civil proceeding were already a matter of public record. Uber appeared in the criminal proceedings and represented that the "settlement agreement itself did not contain factual statements or admissions or information related to Abdallah's criminal trial." The trial court did not abuse its discretion, even without an in camera review, in finding "that K.N.'s motives for entering into the settlement agreement, and the financial terms of K.N.'s settlement with Uber, were irrelevant to the criminal proceedings."

The State sought to preclude all references at trial to the lawsuit against Uber. The trial court permitted limited questioning, but precluded what it believed to be collateral to the criminal case. "The trial court restricted Abdallah to questions about (i) the timing of K.N.'s initial contact with Uber, (ii) K.N.'s filing a lawsuit against Uber, (iii) whether the lawsuit was settled, and (iv) whether K.N. received settlement compensation." Abdallah argued that further questioning would have explored possible contradictions between the victim's trial testimony, that she had no memory of the sexual battery, and statements made in the civil lawsuit. Abdallah sought to examine K.N. to show her financial interest in his conviction and to see if K.N. was required to testify to the same events in the criminal case as a condition of the settlement agreement.

While the appellate court concluded that the trial court's limits were generally correct, one aspect was too limiting. "Given K.N.'s inability to recollect the night's events, it appears that what K.N. told Uber regarding the events would be within the permissible scope of cross examination." Based on the totality of the circumstances, including public availability of the allegations in the civil lawsuit, however, this error was deemed harmless.

The trial court did not err in permitting an expert, whose lab tested K.N.'s blood an urine, "to give opinion testimony as to whether K.N. had been drugged on

the night in question." The expert reviewed the surveillance video and testified that "K.N. did not behave like a woman who had consumed merely three alcoholic drinks. . . . [K.N.'s] behavior was more consistent with a mixing of alcohol and a central nervous system depressant." There was no testimony suggesting Abdallah drugged K.N.. The testimony was probative on the issue of consent and physical incapacitation and its probative value outweighed its prejudice.

Finally, the surveillance video was admitted with proper authentication. Under the "pictorial method," both K.N. and Adriana testified that they "recognized themselves and the environment depicted in the video." K.N. recognized her clothing. Adriana recognized the defendant. Under the "silent witness" method, a detective obtained the full surveillance video and there was testimony that the video recovered was the same as that which was introduced into evidence. There had been testimony that the first video downloaded from the building security office to law enforcement was missing a relevant period; the missing video clip was subsequently obtained.

Fourth District Court of Appeal

Penna v. State, 4D20-345 (Dec. 22, 2021)

The Fourth District reversed convictions for two counts of first-degree murder and other offenses for a new trial because of a violation of Penna's Miranda rights.

"After the defendant had invoked his *Miranda* rights, but later made spontaneous statements regarding his crimes to a deputy guarding him at a hospital, the deputy failed to specifically give the defendant his *Miranda* rights again before asking him questions which were reasonably likely to elicit, and did elicit, incriminating responses which the state presented at trial in their entirety. Because those elicited incriminating responses proved and/or corroborated each of the crimes, and further undermined the defendant's insanity defense, the trial court erred in denying certain portions of the defendant's pre-trial motion to suppress his incriminating responses."

After stabbing the two victims, Penna stole their SUV. During the course of his flight, he stopped the SUV, tried to take another man's car, stabbed that man, who survived, and fled on foot. Officers caught up to him, and, during a confrontation, he was shot four times and taken to a hospital. The two murders had occurred in Palm Beach County. The ultimate confrontation which resulted in apprehension occurred in Brevard County.

While at the hospital, in police custody, he was given Miranda warnings and further questioning ceased when he immediately requested a lawyer. After the detective left the room, a second detective entered and attempted to question him. He again requested a lawyer and further efforts to question him ceased. Four weeks later, he was still hospitalized and in custody of law enforcement. A deputy who was guarding him called local police "to ask whether the defendant had been read his *Miranda* warnings and whether they wanted him to obtain statements from the defendant." The local Brevard officers, who were investigating the Brevard crimes, advised the guard to contact the Palm Beach County detectives. The guard did so, and was advised that Penna refused to speak and requested counsel.

Later that day, Penna initiated a conversation with the guard, who was a deputy with law enforcement. Penna initiated other conversations in the ensuing days and weeks. The deputy/guard did not give Miranda warnings at any time, even though he "directed questions to the defendant during those conversations." While some questions were not likely to elicit incriminating responses, some were. These conversations occurred on five separate dates over a three-week period.

The trial court denied the subsequent motion to suppress, concluding that the statements were all initiated by Penna.

Although some of the statements were properly admitted as they were spontaneous and unelicited, the deputy failed to give necessary Miranda warnings before "expanding the conversation to ask [] questions which were reasonably likely to elicit, and did elicit, incriminating responses." The Fourth District then addressed each of the individual conversations.

The first conversation (12/17) was admissible in its entirety. Penna asked why he was in the hospital. The deputy replied, "You don't know why you are here?" Penna did not respond. "He shook his head, turned away, and closed his eyes." While this could have triggered an incriminating response, it was not reasonably likely to have done so, as Penna could simply have responded that he did not remember. Thirty minutes later, Penna volunteered that he stabbed a couple of people. The passage of 30 minutes in between resulted in this being deemed spontaneous and not the result of the earlier query.

The next conversation (12/19) was also admissible in its entirety. Penna initiated this conversation by stating that he was in a bad mood. When the deputy asked why he was in a bad mood, Penna made multiple statements to the effect that

he had messed up his life and was going to prison for the rest of his life. The deputy's query as to why Penna was in a bad mood did not constitute interrogation. While a subsequent inquiry as to why Penna thought he had messed up his life presented a closer question, given the possibility that Penna could have been referring to other events in his life, it was therefore not an inquiry which was reasonably likely to elicit an incriminating response.

Most of the next conversation (12/20) was inadmissible. While Penna and the guard were talking, Penna asked, "What do you think I will get?" The deputy asked what he meant, and Penna referenced the two murders. The deputy then asked, "What do you mean, what do you think you're being punished for?" Penna then provided a lengthy narrative of the multiple crimes. While the first question, "What do you think I will get?" was spontaneous and admissible, the deputy's follow up was a close question, but, once again, it was found that the deputy's follow-up query was still not interrogation. Once the conversation reached the point where the deputy inquired, "What do you mean, what do you think you're being punished for?", the questioning was such that the deputy should have realized his question was likely to elicit incriminating responses and Miranda warnings should have been given prior to Penna's responses at that point.

Most of the next conversation (12/25) was inadmissible. Penna started with admissible questions about how much time he could get for the crimes he committed. This was spontaneous. The deputy then launched into several questions which constituted impermissible custodial interrogation without Miranda warnings. The questions that triggered the incriminating responses were: "what crime did he think he would get the most time for"; "what his second worst crime was"; "if God's voice guided him in every crime which he committed:' and "if the defendant considered turning himself into [sic] the police or just sopping and calling for help."

Most of the final conversation (1/7) was inadmissible. This started with an admissible spontaneous question to the deputy, asking "whether the deputy thought the defendant was going to prison." The deputy then launched into a series of questions that constituted impermissible custodial questioning, without Miranda warnings, as the questions were reasonably likely to elicit incriminating responses. The questions from the deputy to Penna were: "what he thought his sentence might be for his crimes:" "what the defendant's interpretation of being reborn was"; "if the defendant saw himself as a bad person"; and "if the defendant knew the law regarding taking a life."

The erroneously admitted statements were not harmless. The deputy's testimony was deemed to have become the "centerpiece" of the prosecution. And, in addition to providing corroboration of the commission of the offenses, the inadmissible statements undermined the insanity defense. These statements "served as the state's strongest evidence to show that the defendant *knew* what he was doing and its consequences, and by his reasons for flight, *knew* it was wrong (i.e., consciousness of guilt)."

A partially concurring and partially dissenting opinion would have certified a question of great public importance to the Florida Supreme Court. This opinion concurred with the majority that the Fourth District's prior decision in Quarles v. State, 290 So. 3d 505 (Fla. 4th DCA 2020), requires that law enforcement "re-read the *Miranda* rights before commencing further conversation" after the initial invocation of rights. This judge, however, would have certified the following question:

> DID *SHELLY V. STATE*, 262 SO. 3D 1 (FLA. 2018), ABANDON THE "TOTALITY OF THE CIRCUMSTANCES " TEST SET FORTH IN *OREGON V. BRADSHAW*, 462 U.S. 1039 (1983), IN FAVOR OF THE REQUIREMENT RECOGNIZED IN *QUARLES V. STATE*, 290 SO. 3D 505 (FLA. 4TH DCA 2020), THAT LAW ENFORCEMENT MUST RE-READ *MIRANDA* RIGHTS BEFORE COMMENCING FURTHER INTERROGATION WITH A SUSPECT WHO HAS RE-INITIATED COMMUNICATION SUBSEQUENT TO INVOCATION OF HIS OR HER *MIRANDA* RIGHTS?

This partial concurrence/dissent also disagreed with the majority's conclusion that the erroneously admitted statements were not harmless.