Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Nicholson, 19-11669 (Jan. 24, 2022)

The Eleventh Circuit affirmed convictions for multiple sex offenses.

The evidence was sufficient as to the intent elements of the offenses: intent to engage in criminal sexual activity when transporting a juvenile across state lines; and the intent to engage in illicit sexual conduct. The Court rejected Nicholson's argument that the evidence of what actually happened – i.e., no sexual contact – was the best evidence of intent. There was "powerful evidence" of the intent even if Nicholson did not follow through. He sexually abused JF in Alabama, and "JF testified that Nicholson's abuse escalated in the time leading up to their trip. Moreover given that Nicholson took KM on the trip to have sex with her, one could infer that he took JF for the same reason."

There was sufficient evidence to establish venue in the Northern District of Alabama for the charge of production of child pornography. This revolved around a text message. Nicholson communicated with KM "by text message using a phone that she received only after she was placed in the custody of a family in Trusssville, Alabama, in the Northern District." Nicholson "requested that she take and send the explicit image forming the basis of Count Six using this phone. The record gives us no reason to think that KM, a minor child, would have texted Nicholson from anywhere else than from the district in which she lived at the time."

Challenges to the denial of suppression motions regarding two searches were rejected. An addendum to a search warrant regarding Nicholson's computers required that any search under the warrant be completed within 60 days of the date of the warrant, subject to extension for good cause. The warrant was dated December 18th. It was executed the next day. The laptop computer was shipped to, and received by, the FBI's Birmingham office on January 31st, and the agent there was unaware of the 60-day limit. The government conceded that the timing of the search did not comply with the 60-day requirement and there were no requests for an extension. The failure to comply with that requirement, however, did not violate

the Fourth Amendment and did not require suppression. The Fourth Amendment does not include a requirement for expiration dates on search warrants.

A separate search of a truck's contents occurred after state police directed a wrecker service to hold the property for the FBI, and the FBI delayed obtaining a warrant until much later, prior to the search. The government admitted that "this months-long, government-directed seizure of Nicholson's property violated the Fourth Amendment." Suppression was not required because the government "did not deliberately violate Nicholson's rights. The Kentucky police reasonably believed that, having arrested Nicholson on a warrant at the request of the FBI, the FBI would quickly follow-up with a warrant to search the contents of his vehicle." The FBI did not search the vehicle at the time of arrest and was later unaware that the wrecker service was holding its contents, and did not know that the service was acting on advice of state police. "Absent a 'systemic error or reckless disregard of constitutional requirements,' . . . this kind of negligent mistake does not warrant suppression."

The publication of three photographic images which were presumed to have been inadmissible by the Eleventh Circuit, did not warrant a mistrial. The district court, on objection, ruled that they were inadmissible and gave a curative instruction to the jury to disregard them. Nicholson had urged the district court to give such an instruction. This also occurred in the context of "substantial uncontested evidence bearing on the charged offenses, most notably JF and KM's extensive trial testimony."

Reeves v. Commissioner, Alabama Department of Corrections, 22-10064 (Jan. 26, 2022)

The Eleventh Circuit affirmed the granting of a preliminary injunction under 42 U.S.C. s. 1983 and the Americans with Disabilities Act.

Reeves was awaiting a scheduled execution by lethal injection. The civil action alleged that based on Reeves' intellectual disability, Alabama failed to provide him with "a reasonable accommodation under the ADA." The district court granted a preliminary injunction preventing the State from executing Reeves by "any method other than nitrogen hypoxia before his ADA claim can be decided on its merits." The State DOC represented in lower court proceedings that a "final nitrogen hypoxia protocol was going to be ready soon."

At this stage of the proceedings, Reeves demonstrated the requisite "injury in fact," that "lethal injection is significantly more painful than nitrogen hypoxia." Reeves also satisfied the causation requirement, by establishing that the State failed to offer him a reasonable accommodation under the ADA or by "preventing him from receiving the benefit of choosing nitrogen hypoxia as a method of execution." Reeves further established the required "redressability for his claimed injury, by requesting that the district court require the reopening of a statutory 30-day opt-in period for completion of the election of the method of execution.

Although the government may have been correct that there was no "statutory obligation to provide death row inmates with any election form, once they undertook to do so they were required to comply with the ADA."

First District Court of Appeal

Lack v. State, 1D20-3536 (Jan. 26, 2022)

Lack appealed the denial of a motion to withdraw his plea. Although that denial was affirmed, the First District reversed a misdemeanor DUI conviction.

That misdemeanor conviction did not arise from the same circumstances as a prior domestic battery felony. A circuit court's jurisdiction over misdemeanors is limited to those that arise out of the same set of circumstances. Lack's acquiescence to the circuit court's jurisdiction did not provide the circuit court with subject-matter jurisdiction.

Mackey v. State, 1D21-1326 (Jan. 26, 2022)

The First District granted a petition for writ of prohibition based upon the expiration of the statute of limitations.

The drug offenses in question allegedly occurred in June 2012. One was a second-degree felony, one a third-degree felony. Bench warrants for Mackey's arrest were issued in January 2013, capiases were issued in June 2013, and those capiases were served in July 2020. The information was filed in May 2013. Under section 775.15(4)(b), Florida Statutes, "where a person has not previously been arrested or served with a summons, prosecution commences when an indictment or information is filed provided that 'the capias . . . is executed without unreasonable delay.'"

Int his case, the delay was unreasonable. The court agreed with the petitioner that there was no diligent search by the State for almost five years. The trial court conducted an evidentiary hearing. During a 2 ½ year period starting in April 2014, "the only purported 'search' for Petitioner was a single advertisement each year in the *Gainesville Sun* newspaper. For 2017 and 2018, there was no evidence presented of any search or even a newspaper advertisement." There was evidence that Petitioner had been arrested in Georgia in November 2016 on the basis of Georgia offenses from January 2015. There was, however, "insufficient evidence to show that Petitioner was absent from the State of Florida for any time other than the one day in January 2015 and one day in November 2016." While the limitations period is tolled during continuous absence from the State, no such continuous absence was demonstrated.

One judge dissented.

Second District Court of Appeal

Hodo v. State, 2D20-495 (Jan. 28, 2022)

The Second District affirmed convictions for sale/delivery of a controlled substance and trafficking, but reversed a conviction for driving while a license was cancelled, suspended or revoked. The 2018 version of section 322.34(2)(a), Florida Statutes, did "not apply to Hodo as it does not appear that he was ever issued a driver's license."

The statute at issue applied to one whose driver license or driving privilege had been canceled, suspended or revoked. The phrase "driving privilege" had previously been held by the Supreme Court to refer to "all individuals who may lawfully operate vehicles on Florida's roads, even if they do not possess a Florida driver license.'" No such privilege existed for one driving in Florida "without ever having obtained a license or having an exemption to licensure."

The statutory language was amended in 2019 and it now "explicitly takes into account an individual who never had a driver's license but whose right to drive has been suspended, canceled, or revoked." It was not applicable at the time of the offense in this case.

Third District Court of Appeal

State v. Avila, 3D21-0565 (Jan. 26, 2022)

The trial court erred in granting a motion for postconviction relief and directing the clerk of the circuit court to modify criminal history records without first directing the State to respond and then conducting an evidentiary hearing.

Avila's motion asserted that the computerized criminal history noted in his case history in the court's computer records incorrectly noted the degree of the offense for which he was convicted. The original trial court documents on the case reflecting the nature of his plea, conviction and sentence, dated back to 1989. Avila's motion did not qualify as a motion to correct an illegal sentence and was therefore treated as a motion under Rule 3.850. Under Rule 3.850, if a motion is deemed legally sufficient, the trial court must direct the State to respond and then convene n evidentiary hearing, unless the court records conclusively show that there is no entitlement to relief. There were discrepancies in the caption and text of the charging document as to whether the case involved a plea to the charge of burglary of a dwelling or burglary of a structure. Further proceedings were required on remand.

Perez v. State, 3D21-0874 (Jan. 26, 2022)

Without setting forth any facts, the court affirmed the denial of a motion to correct illegal sentence, quoting the prior ruling of the Florida Supreme Court that a "sentence is 'illegal' if it 'imposes a kind of punishment that no judge under the entire body of sentencing statues could possibly inflict under any set of factual circumstances.'"

Fifth District Court of Appeal

Simmons v. State, 5D21-2917 (Jan. 28, 2022)

The Fifth District affirmed the denial of a motion to correct illegal sentence.

Simmons challenged his sentences a Prison Releasee Reoffender, arguing "that a jury must make the factual finding under section 775.082(9) as to whether the crime for which he was subject to PRR sentencing was committed within three years of being released from prison." The Fifth District rejected Simmons' arguments, which were based on Apprendi v. New Jersey, regarding the need for

jury findings as to facts that increase a penalty beyond the statutory maximum for an offense. His argument overlooked the exception to Apprendi for "the fact of a prior conviction."

The fact of a prior conviction would require a jury finding when that fact is either an element of the offense for which a defendant is being sentenced, or when the prosecution is seeking an upward departure sentence. However, for the purpose of the PRR sentencing statute, "establishing the date of release from prison is simply a ministerial act." The date of release from prison "implicates neither the level of the offense, the facts of the underlying offense, nor the character of the offender as it relates to aggravation of a sentence."