Case Law Update
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Supreme Court of Florida

McKenzie v. State, SC20-243 (Feb. 10, 2022)

The Florida Supreme Court affirmed McKenzie's two death sentences, which had been imposed at a resentencing proceeding. After the jury proceeding, the court imposed the death sentences and found that five aggravating factors were established: 1) previous capital felony or felony involving violence; 2) murders committed during the commission of a robbery; 3) murders committed for financial gain; 4) HAC; 5) CCP. The court also found two statutory mitigating circumstances: 1) murders committed while under the influence of extreme mental or emotional disturbance; and 2) capacity to appreciate criminality of conduct or to conform conduct to the requirements of law was impaired. Eleven nonstatutory mitigators were also given varying degrees of weight, from slight to moderate.

The trial court did not err in denying a defense request for an interrogatory penalty phase verdict. The defense wanted the jury to identify the facts on which it relied for any aggravating circumstances. "The required jury finding for death eligibility is the unanimous finding of the existence of one or more aggravating factors proven beyond a reasonable doubt, not the individual facts on which the jury relied to find each aggravating factor."

During the original penalty phase, the State relied on four aggravating factors. Prior to the resentencing proceeding, the State amended its notice of aggravating factors, adding HAC. After the United States Supreme Court decision in Hurst v. Florida, regarding the requirements for unanimity, the Florida legislature amended section 782.04(1)(b), Florida Statutes, adding the requirement that if the prosecution intends to seek the death penalty, notice of such including a list of aggravating factors relied upon, must be filed and provided to the defendant within 45 days after arraignment. Rule 3.181, Florida Rules of Criminal Procedure, was similarly amended. Those provisions did not apply to the resentencing hearing, as the State, prior to 2016, at the time of the original arraignment, was not required to provide such notice.

The defense sought to either exclude some victim impact evidence or limit it to the presentation of the judge alone. "The trial court was not required to exclude victim impact evidence nor to receive it outside of the jury's presence." The jury was instructed that the evidence "was not to be used for finding aggravation and was not to be considered as an aggravating factor."

The Court reiterated its own prior holding from several cases that the jury's determinations that the aggravating factors were sufficient to impose the death penalty and that they outweighed the mitigating circumstances were not subject to the beyond a reasonable doubt standard of proof. The Court also reiterated its own prior holding that the jury's sentencing determinations were not "elements" of first-degree murder and that the jury was therefore not required to find proof of them beyond a reasonable doubt.

Joseph v. State, SC20-1741 (Feb. 10, 2022)

On direct appeal, the Florida Supreme Court affirmed convictions for two counts of first-degree murder and the corresponding sentences of death. With respect to the death sentences, the trial court found the existence of four aggravating factors: 1) previous conviction of a felony and under sentence of imprisonment or on felony probation; 2) previous conviction of another capital felony or felony involving violence; 3) HAC; 4) CCP. As to one of the two murders, there was a fifth aggravator: victim under the age of 12. The court also found the existence of one statutory mitigator: no prior significant history of criminal activity; and seven nonstatutory mitigators which were given either little or moderate weight.

There was no abuse of discretion in denying a motion to exclude testimony of a firearms witness, following the trial court's holding of a Richardson inquiry. The day before trial, the State added the witness, Omar Felix, to its witness list, and further provided his firearms report, which indicated that certain cartridge cases had been identified to have come from the same unknown firearm. The defense brought this to the attention of the court on the first day of jury selection. At that time, the court granted a defense motion to appoint a firearms expert. Joseph also deposed the State's expert while jury selection was still ongoing. After the swearing of the jury and prior to opening arguments, the defense moved to exclude the witness.

During the ensuing Richardson inquiry, the prosecutor explained that the failure to previously disclose this was a result of inadvertence; in a recent conversation with a detective, during which the prosecutor inquired about the whereabouts of the firearms report, the detective stated that he thought it had

previously been turned over, but, after checking, realized that he had forgotten to send the cartridges to the lab. The prosecution turned it over as soon as it knew about it. The cartridges themselves had been in evidence since the day of the murders. In finding an absence of prejudice to the defense's ability to prepare for trial, the Court observed that the casings had been in evidence since the inception; the expert's testimony was merely corroborative of other expected testimony; the defense was then given time to obtain an expert in what was expected to be a lengthy trial; Felix's testimony had no bearing on the defense – that Joseph was not the shooter.

A claim that the State was erroneously permitted to impeach its own witness was improperly raised for the first time in a reply brief, and was otherwise without merit. Contrary to Joseph's argument, the witness's trial testimony was inconsistent with a prior sworn statement. In the pretrial statement, the witness stated that Joseph had been upset because of a disagreement between two children, one of whom was a murder victim, and that Joseph was being disrespectful. At trial, the witness denied that Joseph "was upset or disrespectful during their conversation on the night of the shootings."

Out-of-court statements of two witnesses were not hearsay, as they were admissible as statements of identification, where both of the witnesses testified at trial and did not give inconsistent testimony. At trial, a detective testified that each of these witnesses identified Joseph as the shooter.

Testimony that Joseph had been yelling about the child-victim two days prior to the murder was not inadmissible collateral offense evidence. It was relevant to Joseph's motive for the murders. Joseph was upset with victim Kyra "because she kept bothering his daughter, Kamare."

The trial court did not abuse its discretion in denying a motion to interview jurors. The motion alleged that "a prospective juror had a conversation with [Joseph's mother] after the juror was excused from the venire panel." The juror allegedly said that the entire panel had been discussing the case, contrary to the court's instructions, and that all of the prospective jurors had already concluded that Joseph was guilty. The trial court found the mother's statements unreliable because they had not been brought to the court's attention at an earlier point in time, even though the mother had brought other matters to the court's attention. And, the allegations were not supported by the prospective juror, "who spoke to the trial court and attorneys about the concerns she had sitting on the case before being excused."

The HAC sentencing aggravator was supported by competent, substantial evidence. Victim Crowell sustained several gunshot wounds to different parts of the body, including the fatal shot, which entered the skull and destroyed the brain. The court heard testimony from a witness (another family member) that Crowell was alive after several shots and prior to the fatal shot. This witness heard screaming and crying, and asking for someone to call 911. HAC is applicable even if the victim perceives imminent death for a matter of seconds. Victim Kyra likewise sustained multiple gunshot wounds, including one to the skull and brain. Although there was no evidence as to the sequence of the multiple gunshots, HAC could be supported by mental torture. Kyra was inside the home when Crowell was shot, and evidence supported the inference that Kyra saw Joseph shoot her mother, or heard the gunshots directed at her mother. Another witness saw Kyra fleeing the residence while Joseph was running after her with a gun. This left "no doubt that Kyra was aware of her impending death."

The CCP aggravator was supported by competent, substantial evidence. Joseph acquired a gun a few days prior to the murders. There was no evidence suggesting a killing during a frenzy, panic or rage. There was no evidence of any provocation. Things had been "normal" in the residence on the night leading up to the murders. While reading the Bible, Joseph confronted Crowell and shot her and then chased and shot Kyra. Two days earlier, Joseph had been yelling about victim Kyra, "saying she had one more time to make him mad and that she needed to leave his daughter alone." The night of the murder turned into that "one more time." It started when Joseph confronted and then shot Crowell, the mother of Kyra.

The trial court did not abuse its discretion in denying a motion for mistrial based on comments made during the penalty-phase closing argument of the prosecutor. The trial court sustained an objection to a comment that Joseph did not care about jail and that that was why further punishment of incarceration was not appropriate. The judge gave a curative instruction upon request by the defense. The Supreme Court agreed that the comment was improper, but it was not sufficiently prejudicial as to "vittate the entire trial."

The prosecutor further commented: "When that gets turned in, ladies and gentlemen, this doesn't happen unless she [the trial judge] thinks it should." The judge did not rule on a defense objection, but denied a motion for mistrial regarding it. When that occurs, the appellate court applies an abuse of discretion standard regarding the ruling on the motion for mistrial. The "State was referring to the fact that the jury makes a recommendation of death and that it is the trial court who ultimately decides whether to impose a sentence of death." This "did not diminish

the jurors' roles and was not improper," even if it was "stated ineloquently." "This doesn't happen" was deemed a reference to the jury's recommendation of death. Alternatively, any potential harm was cured by the final instructions during which the court instructed the jury regarding its recommendation, the manner in which the court would consider it, and the court's ultimate decision as to whether to impose a sentence of death.

The final prosecutorial comment was that "the person that committed them has provided no mitigation worthy to allow him to live out his days in jail." This was not an improper comment on the right to remain silent. It was a comment on the defendant's burden to prove mitigating circumstances.

First District Court of Appeal

Amison v. State, 1D18-1312, 1D18-1312 (Feb. 9, 2022) (on rehearing)

The Court consolidated appeals of the codefendants, a husband and wife, regarding multiple financial crimes, and reversed and remanded in part. The case revolved around the misuse of donations collected during a fundraiser that the Amisons hosted in support of families of firefighters who had died, as well as the family of another whose daughter died in a car accident.

Defendant Jennie's convictions for both grand theft and organized scheme to defraud resulted in a double jeopardy violation because they were based on the same conduct. Grand theft is a lesser included offense of organized scheme to defraud. If the convictions are based on different conduct, the dual convictions are permissible, but, "the double-jeopardy analysis looks solely to the charging document, and cannot be based on evidence adduced at trial." The wording of the two offenses in the information compelled the conclusion that they related to the same conduct. Both charges used the same starting and ending dates.

Although the striking of this conviction resulted in a sentencing scoresheet error, there was no need for resentencing. The scoring error was harmless, as the record reflected that he same sentence would have been imposed by the judge with a correct scoresheet. The trial court had emphasized "Jennie's lying and deceit 'like I've never seen before' and Jennie's abuse of her position of trust as a charity organizer."

The restitution award of almost $12,000 was reversed based on calculation errors regarding how much should have been donated to the families. The trial court

excluded over $5,000 from the amounts credited towards the contributions to the fund for the families. The trial court appeared to exclude this sum because it came from a tainted source, possibly from an account used by the Amisons for personal uses. Regardless of the source from which those funds were ultimately deposited to the charitable fund set up for the families of the firefighters, that sum was ultimately distributed to those families.

Mike Amison's convictions for grand theft were also found to constitute double jeopardy violations, as lesser-included offenses of organized scheme to defraud. A RICO conviction was also reversed because it lacked the statutorily required two predicate incidents. The organized scheme to defraud qualified as one of the necessary predicate incidents. The only remaining potential predicate after the striking of the grand thefts, was a predicate for the failure to apply charitable contributions in violation of Chapter 496, Florida Statutes. That, however, was not included in the statutory definition of racketeering activity and did not qualify as a predicate incident.

State v. Kunkemoeller, 1D20-2209 (Feb. 9, 2022) (on rehearing)

The First District reversed a downward departure sentence, finding that the reasons offered for it were either legally insufficient or were not supported by sufficient evidence. The defendant was being sentenced for racketeering and organized fraud, for his involvement "in the theft of state public education and charter school grant funds." His "businesses overcharged and submitted fictitious invoices to charter schools, owned by Marcus May, for the costs of goods and services, then remitted hundreds of thousands of dollars to Kunkemoeller, May, and the companies owned by them." After the defendant's sentence was affirmed on direct appeal – 55.5 months, plus ten years of probation – the trial court granted a modification and sentenced him to one-year in prison plus nine years of probation. The prior sentence had been the lowest permitted under the Criminal Punishment Code.

The first reason was based on the defendant's alleged lesser culpability than May. This factor may be used only "in departing downward *to meet a codefendant's sentence*." By contrast, the trial court in this case ended up going below May's 20-year sentence and creating an even greater disparity than the one that originally existed.

There was no evidence to support the reason that the defendant was unlikely to commit another crime. The defendant relied on the statutory factor for a

demonstration of remorse. That factor, however, requires further proof that the offense was committed in an unsophisticated manner and that it was isolated. The defendant's criminal activity here "was a complex financial scheme that took place over the span of nearly five years."

The consideration of past restitution could not serve as a nonstatutory basis for a departure. The Court first rejected restitution as a statutory mitigating factor because no evidence regarding the victim's need for restitution had been submitted. As that was an insufficient reason, the trial court could not circumvent the statutory mitigating factor for departure by simply referring to it as a nonstatutory reason for departure.

The nonstatutory reason that the defendant was an "asset to the community" was also rejected. The mere fact that he operated a business in the community was insufficient in and of itself. Similarly, "family support is not a legally valid reason for departure." Other variations of this proffered reason were rejected because they were not supported by competent, substantial evidence, including an alleged "respected reputation in [the] community."

Second District Court of Appeal

Douglas v. State, 2D20-3196 (Feb. 11, 2022)

The Second District reversed an order modifying probation after finding a violation of probation because the State "failed to prove Douglas willfully and substantially violated his probation by losing his GPS unit."

At the trial, the testimony was unclear as to how the unit Douglas had been wearing was lost. The State relied on the existence of inconsistent statements regarding the manner in which the GPS unit had been lost, including statements that it may have fallen off or that it may have been taken off of him during a dispute with someone. Absent evidence that Douglas "willfully acted in a manner to cause the loss" of the unit, the evidence was insufficient to support a violation of probation.

Hartshorn v. State, 2D21-333 (Feb. 11, 2022)

An order denying a Rule 3.800(a) motion to correct sentence was reversed. The motion alleged that a plea agreement was contingent upon a properly calculated scoresheet and that the scoresheet contained an error. A resolution of this issue hinged on factual determinations that were beyond the scope of a Rule 3.800(a)

motion and the case was remanded for consideration by the lower court as a Rule 3.850 motion, with instructions to either attach records that refuted the claim or to otherwise hold an evidentiary hearing.

Third District Court of Appeal

State v. Jones, 3D20-1220, 3D20-1302 (Feb. 9, 2022)

The Third District reversed a downward departure sentence that was imposed for burglary of an occupied dwelling and a violation of a domestic violence injunction. The trial court imposed a sentence of community control followed by probation, finding that the spread of Covid in the jail and prison systems justified the departure.

The trial court had rejected the defendant's age (60) as placing him in a high risk category according to the CDC, and further noted that the court did not receive any medical records regarding such a contention.

The fact that Jones had been under the supervision of the court for the prior year was not a valid basis for a departure. As to the Covid concerns, absent "competent substantial evidence that this defendant has an underlying medical or health condition which places him at increased risk of contracting COVID-19 if incarcerated in a county jail or state prison," this was an insufficient reason for a departure.

Fourth District Court of Appeal

Krickovich v. State, 4D21-842 (Feb. 9, 2022)

The Fourth District denied a petition for prohibition, which asserted stand-your-ground immunity as to two counts of misdemeanor battery on a juvenile.

"Petitioner complains that because the trial court granted immunity to another officer, he was entitled to similar treatment. However, the conduct of the officers was not the same. The first officer merely pushed the juvenile to the ground. The juvenile was already face down on the ground when petitioner positioned himself over him and hit the juvenile's face once into the pavement. Petitioner had the juvenile pinned down, holding his head and neck with both hands before he released his right hand and punched him once in the head. The juvenile may have tensed his

body and lifted his face from the pavement, but the video from petitioner's body camera does not show the juvenile actively resisting arrest."

The Court also rejected the argument that the petitioner was entitled to immunity under section 870.05, Florida Statutes. That statute, however, is not an immunity statute. It must be read in conjunction with section 870.04. Both statutes were enacted in 1868, and the language used was consistent with the presentation of a defense "at trial." Section 870.05 addresses what an officer may do confronting unlawful, riotous or tumultuous crowds.

Fifth District Court of Appeal

Faulstick v. State, 5D21-0600 (Feb. 11, 2022)

The Fifth District affirmed the revocation of probation, but found that one of the violations found to exist was not supported by the evidence. The case was remanded for reconsideration of the sentence to determine if the court would impose the same sentence without the additional violation.

The alleged violation at issue was that the defendant failed to undergo a Batterer's Intervention evaluation. The only testimony at the hearing was the defendant's, "that he was in a hospital emergency room with a work-related injury on the date he was to attend the program evaluation." That was insufficient to sustain this as a ground for revocation. The defendant further testified that upon release from the emergency room, he attempted to attend the program, but was told not to come because of Covid.

The evidence was also insufficient as to a finding of a violation of the "peaceful contact condition." The affidavit alleged that this was violated by virtue of the defendant's arrest for battery against the victim. The trial court, however, based its finding of a violation on three jailhouse calls from the defendant to the victim. As that was not the basis of the allegation in the affidavit of violation, it could not serve as the basis for the court's finding as to this charged violation. The arrest for battery, however, was deemed sufficient as to a different alleged violation.

The calls in question, however, were properly admitted into evidence and did serve as the basis for violation of a different allegation in the affidavit of violation of probation.

Wall v. State, 5D21-984 (Feb. 11, 2022)

A motion to suppress evidence seized from the defendant's purse was erroneously denied.

Wall was a passenger in a car, along with the driver and two other passengers. Two passengers exited the case and entered a supermarket and purchased several gift cards. When they returned, the driver exited and bought more gift cards. The store manger suspected that the credit card used for the purchases was cloned and called law enforcement to report possible fraud; the three individuals were described. Wall never left the vehicle and was not described to law enforcement.

An officer responded and observed a matching vehicle and stopped it based on an expired tag. A second officer arrived and began a fraud investigation. All of the occupants were detained and told to exit and sit on the adjacent curb. "Walls' purse remained in the vehicle, out of Walls' reach and out of the reach of the co-defendants." Upon discovering an active Texas warrant for Wall's arrest, she was arrested and her purse was searched, without a warrant. Assorted identification and credit cards not belonging to any of the vehicle occupants were found. The vehicle's owner arrived shorty after Wall's arrest, hoping to retrieve his vehicle. The local police department had no policy prohibiting such release, but conducted an inventory search and towed the vehicle.

Although he trial court agreed that the search of the purse incident to Wall's arrest was not permitted "because the search bore no relation to her arrest under the Texas warrant," the court concluded that the evidence would have inevitably been discovered.

The Fifth District observed that the search of the purse was improper because it was beyond the reach of Wall and all other occupants of the vehicle at the time of her arrest and there was no evidence that there was probable cause that the purse contained evidence related to the Texas warrant. And, as to the inevitable discovery doctrine, there was no evidence to support impoundment of the vehicle. The State failed to demonstrate that the police department "was operating under a standard of criteria" before impounding the vehicle for an inventory search. The only testimony in this case was from the officer who "simply testified that he did not normally release vehicles back to the owners. When asked whether the vehicle should have been released to its owner pursuant to department policy, he stated, 'It could have, but it was not.' He could not detail what the actual policy was, and when asked what the purpose of the inventory search was, he simply stated, "The car was gong to be

towed.' He explained that 'we don't just let the people who pick up the vehicles just take them.'"

As to the State's contention that even absent impoundment, "Wall's belongings likely would have ben transported to the jail and examined as part of an inventory due to her arrest on a lawful warrant," "there was no evidence presented that Wall would have chosen to take her purse to the jail upon her arrest rather than leave it with the owner of the vehicle."