Case Law Update
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Supreme Court of Florida

Sheppard v. State, SC19-1512, SC20-422 (Mar. 10, 2022)

In postconviction proceedings in a capital case, the Supreme Court of Florida affirmed the trial court's denial of a Rul3 3.851 motion regarding the guilt-phase of the trial – the trial court ordered a new penalty phase and that was not at issue on appeal – and the Supreme Court further denied a habeas corpus petition in which Sheppard alleged that his appellate counsel from the prior direct appeal was ineffective.

Trial counsel was not ineffective in presenting a misidentification defense. An eyewitness identified Sheppard as the shooter as to one of the two victims, after having observed the shooter for four or five seconds, with "clear and strong eye contact." As to the failure to obtain a witness identification expert, trial counsel testified at the postconviction evidentiary hearing that although the main defense was misidentification, "he believed the inconsistencies in Barrett's identification of Sheppard as the shooter were not significant and that any testimony that a witness identification expert could give would be 'common sense' and would ultimately be of little use because it could not be used to identify anyone other than Sheppard as the shooter." Counsel also testified that Sheppard admitted to him that he was the shooter and counsel "was concerned an eyewitness expert would bolster" the eyewitness's identification of Sheppard. The Supreme Court agreed with the trial court that counsel's strategic decision was not deficient performance.

At the trial, counsel did not bring out inconsistencies in the eyewitness's testimony and did not present witnesses who gave varying descriptions of the car used during the shooting. Trial counsel testified that these inconsistencies were "slight," and presenting them at trial "would have highlighted the overall consistency in [the] identification of Sheppard." The witnesses presenting testimony about this at the postconviction hearing were also found to have had credibility issues.

Counsel was not ineffective for failing to challenge the victim's identification of the defendant with allegedly prior inconsistent statements regarding his description. The allege inconsistencies were found to be insignificant, and counsel

was concerned that focusing on this would provide the witness with an opportunity to reiterate her certainty that Sheppard was the shooter. The Supreme Court also accepted the trial court's conclusions that differing statements regarding a decal on the vehicle used were minor details, and that the witness's inability to provide specific details about the vehicle's tag "did not amount to an inconsistent statement, and that it was simply a gap in knowledge." The witness had also recanted a prior statement that she had previously seen the shooter and his car at an apartment complex before the shooting. Counsel's decision not to use this recantation was not a deficient performance, as counsel again expressed concerns about providing the witness with further opportunity to reiterate her certainty in the identification of Sheppard. And, counsel was not ineffective for failing to cross-examine the witness in yet another instance, as the witness, Barrett, "could not be impeached regarding her initial fear that the victim was her nephew because she made no prior inconsistent statements." At trial, Barrett testified that she was first concerned that the victim was her nephew, but later realized that it was not her nephew, but that she nevertheless "knew of him [the victim]." Statements about her initial fear were not inconsistent with any of the trial testimony.

Counsel was not ineffective for failing to retain a crime scene reconstructionist. The testimony of the proffered expert lacked specificity, as he could not pinpoint the exact location of the shooting or the eyewitness's shooting. Nothing that was presented from the expert undermined the trial testimony of the eyewitness.

Counsel was not ineffective for failing to object to the eyewitness's references to one of the victims as a "baby" or "little boy." The victim was 16-years old and the jury saw photos of the victim. The State's theory of the case was also that this victim was a rival gang member. In the prior direct appeal, the Supreme Court found that the witness's expressions of fear that the shooter might return and harm her because she was a witness did not constitute fundamental error, because she did not know the identity of the shooter at the time. Counsel's failure to object to that did not constitute ineffective assistance, as there was no reasonable probability that the outcome of the trial would have been any different.

Counsel was not ineffective for failing to challenge the admission of a videotaped interrogation on the basis of prejudicial statements by the detective. On direct appeal, the Supreme Court had already rejected a challenge to the admission of this videotape when it was asserted as a claim of fundamental error. In the postconviction hearing, counsel testified that he had already obtained a redaction of the portions he believed to be most damaging to the defense. "Mere dissatisfaction

with trial counsel's strategy is not enough to satisfy *Strickland*'s deficiency prong where, as here, the strategy was reasonable."

Counsel was not ineffective for failing to present an expert to challenge the State's ballistics expert. At the evidentiary hearing, defense counsel explained that the primary defense was that Sheppard was not the shooter and that the ballistics testimony was therefore not that important. Furthermore, defense counsel knew the State's expert to be highly experienced and credible and knew that challenging the ballistics evidence as to whether or not a particular gun was at the scene would not have been productive. The expert was known to have been testifying on the basis of commonly accepted science.

The trial court did not err in denying two claims of newly discovered evidence. Sheppard's former cellmate, Roberts, recanted trial testimony regarding Sheppard's inculpatory statements to Roberts. Roberts, however, died prior to the postconviction evidentiary hearing, and the trial court sustained the State's hearsay objection to the admission of his affidavit at that hearing. This was erroneous, as it qualified as a statement against Roberts' penal interests "because his recantation could have resulted in his prosecution for perjury based upon his testimony at Sheppard's 2012 trial." However, even accepting the recantation as true, without deciding that, it was "not of such a nature that it would probably produce an acquittal on retrial." The evidence of guilt at trial was deemed "overwhelming," including the testimony of the eyewitness and ballistics evidence, as well as evidence identifying the car used in one of the murders as the car that Sheppard and his codefendant were seen stealing. Sheppard later confessed to having taken a joyride. The new affidavit did "not create reasonable doubt."

A second claim of newly discovered evidence was rejected based upon the conclusion that the potential impeachment evidence was cumulative of other evidence and would not have affected the outcome of the trial.

The Supreme Court also rejected three claims of Brady and Giglio violations. One of these claims pertains to the new affidavit from cellmate Roberts. There was no showing that the State "willfully or inadvertently suppressed favorable evidence as necessary to prevail under *Brady* or that the State presented testimony that it knew was false as required to prevail under *Giglio*."

Sheppard also argued that the State had a deal with another witness, Carter, to "recommend a sentence reduction in exchange for favorable testimony in Sheppard's case." In a recent motion that the State filed for a substantial assistance reduction of

sentence, "the State mentioned that Carter had recently testified in Sheppard's case." A prosecutor testified at an evidentiary hearing that Carter's conviction and sentence preceded his testimony in Sheppard's case, and the motion for sentence reduction "was for a separate matter." And, Carter's trial testimony was consistent with his pretrial deposition, which preceded his arrest on charges that resulted in a sentence.

As to a third witness, Mejors, even if the State withheld favorable evidence of her nearsightedness, and even if the State knowingly presented testimony as to its falseness, her testimony was cumulative, "and her nearsightedness would not discredit her overall testimony, which was consistent with the testimony of other witnesses." At trial, Mejors had not mentioned that she was not wearing her prescription glasses.

In the ruling on the habeas petition for ineffective assistance of appellate counsel, the Supreme Court held that the prosecutor "did not engage in misconduct by presenting evidence of Sheppard's alleged gang affiliation to the jury during the guilt phase." While the interrogation video contained some suggestions that Sheppard was in a gang, the Court considered that on direct appeal and concluded that it was not fundamental error. As such, Sheppard could not establish in the habeas petition that appellate counsel was ineffective.

Eleventh Circuit Court of Appeals

United States v. Howard et al., 18-11602 (Mar. 7, 2022)

Three codefendants, Bramwell, a physician, Howard, a pharmacist, and Stone, a retired Navy veteran, were convicted on multiple charges of paying or receiving kickbacks, and conspiring to do that. Howard was also convicted of laundering proceeds. The convictions and sentences were affirmed on direct appeal, with the exception of Bramwell's sentence, which was remanded for further proceedings. Tricare provides health insurance benefits for members of the military and their families. The convictions in this case involved "the millions of dollars that Tricare paid Howard for filling compounded cream prescriptions for patients." Bramwell wrote most of the prescriptions; Stone recruited some of the patients; Howard filled prescriptions.

Bramwell's challenge to the sufficiency of evidence focused on the government's alleged failure to consider legal reasons why "there might be a flow of traffic coming from Dr. Bramwell's office to Fertility Pharmacy, including" salesmen like Stone referring potential patients to Bramwell. However, even if there

"was a plausible innocent explanation for her extreme efforts to ensure that Fertility Pharmacy got the largest number of compounded cream prescriptions that she could write, the law is settled that the prosecution does not have to rule out every innocent explanation for the conduct that supports a finding of guilt." And, the blame-it-on Stone hypothesis of innocence was "not a reasonable hypothesis of innocence anyway." Bramwell wrongfully assumed that "no more than one person could be receiving kickbacks from Howard at any given time." And, even if Stone brought her all of the patients for whom 394 prescriptions were written and which resulted in kickbacks, she was still guilty.

Howard's challenge to the sufficiency of the evidence was based on his prior jury argument that the 34 checks to Bramwell for $138,500 were "not to pay her for sentencing him $3.5 million dollars' worth of Tricare prescription business; that was merely a coincidence. The real reason he paid Bramwell all of that money in all of those checks was, or conceivably could have been to reward her for assisting veterans." The "government certainly is not required to disprove an unreasonable hypothesis of innocence with no evidence to support it."

One count of the indictment charged Hoard with paying one $5,000 kickback on April 1, 2015. Evidence at trial of two different checks on that date did not amount to a constructive amendment of the indictment as it did not alter the essential elements of the charge; the amount of the kickback paid was not an element of the offense.

The government cross-appealed Bramwell's sentence – probation – as being substantively unreasonable and the Eleventh Circuit agreed. The PSR calculated an advisory guidelines range of 78–97 months of imprisonment, which was not contested, and a loss amount of $4.4 million, which the district court reduced by $900,000. That did not affect the guidelines range. Bramwell sought and obtained a downward departure on the basis of more than 50 letters from friends, relatives and colleagues, attesting to her "good personal history, kind acts, and many virtues." Several appeared in person at the sentencing hearing.

Although the district court observed that Bramwell was motivated in writing prescriptions not by the welfare of her patients, but in order to generate revenue that would result in kickbacks to her from the pharmacy, the court still characterized Bramwell as a victim of the pharmacist, who was characterized as a person of "no redeeming value," who was "manipulative." The district court emphasized the numerous letters regarding Bramwell's background, adding that incarceration "would provide no deterrence at all." While noting the severity of the crime, the

district court distinguished it from other types of health care fraud that it deemed more serious. The court found that the guidelines range "overrepresented the seriousness" of the offense.

The Eleventh Circuit first concluded that the district court understated the severity of Bramwell's offenses, as they endured for more than a year and inflicted losses many times greater than those of another case to which the Eleventh Circuit compared this one. The Eleventh Circuit also disagreed with the district court's minimization of the general deterrent effect of incarceration. The district court had minimized this because of its finding that medical professionals were already facing the likely loss of their licenses, and the prospect of imprisonment would not add to that preexisting deterrence. The Eleventh Circuit observed that that rationale would "effectively blue pencil out of the United States Code for professionally licensed defendants an imperative that Congress wrote into it" – i.e., the factor of general deterrence. The focus on the significance of the loss of a professional license would also pose "the risk of building in lower sentences for those in higher socio-economic groups," and that "would not be a good revision of the guidelines."

The district court's reliance on the factor that Bramwell would have to live with her status as a convicted felon was also erroneous, as that would apply to "all but a tiny percentage of those to whom the sentencing guidelines are applied." The Eleventh Circuit further noted the disparity of the sentence for Bramwell when compared to that of Stone, who had a guidelines range of 33-41 months, but received a downward departure of only nine months. Finally, while the defendant's history and characteristics are considered under the guidelines, "that history cannot be considered in isolation and without regard to the criminal conduct for which the defendant has been convicted and the characteristics it reveals." As part of this analysis, the Eleventh Circuit criticized the district court's undue emphasis on the 50 letters, as more than one dozen of them were premised on the authors' beliefs that Bramwell was not guilty of the offenses for which she was convicted. That was obviously contrary to the jury's verdicts and the overwhelming evidence. Finally, while the district court characterized Bramwell's conduct as "aberrant," the long-term duration of the enterprise belied that conclusion.

First District Court of Appeal

Mount v. State, 1D20-586 (Mar. 9, 2022)

The assessment of costs of prosecution in excess of $100 was erroneous where the State did not present any proof of costs exceeding that amount.

Dettle v. State, 1D20-2651 (Mar. 9, 2021)

On a motion for rehearing or certification, the First District certified to the Florida Supreme Court the following question of great public importance:

> DOES THE HOLDING IN LEE V. STATE, 258 SO. 3D 1297 (FLA. 2018), PROVIDE RETROACTIVE RELIEF IN POSTCONVICTION PROCEEDINGS PURSUANT TO FLA. R. CRIM. P. 3.850?

Lee held that the determination of whether dual convictions for solicitation of a minor, use of a two-way communication device, and travelling to meet a minor to engage in sexual acts, when based on the same conduct, should be determined solely on the basis of the allegations in the charging document.

Smith v. State, 1D21-2982 (Mar. 9, 2022)

A rule 3.800(a) motion was correctly denied when the motion challenged the procedure leading to the sentence and not the sentence itself.

Roberts v. State, 1D21-3003 (Mar. 9, 2022)

In addition to finding a Rule 3.850 motion untimely, the Court alternatively found that two convictions for selling cocaine within 1,000 feet of a school did not result in a double jeopardy violation. The case involved two distinct criminal acts during separate criminal episodes; the opinion does not provide factual details as to the acts involved.

Smith v. State, 1D21-3201 (Mar. 9, 2022)

The First District affirmed the denial of a Rule 3.800(a) motion in which Smith argued that his PRR sentences were illegal "because the trial court, not a jury, found that he qualified for such a sentence." This argument was based on Apprendi v. New Jersey, 530 U.S. 466 (200) and Alleyne v. United States, 570 U.S. 99 (2013), which require a jury determination as to facts that result in sentencing enhancements. Those cases, however, are not applicable to recidivism factors regarding prior convictions and the dates of release from incarceration on those prior convictions and sentences.

Freeman v. State, 1D21-3274 (Mar. 9, 2022)

The First District affirmed the summary denial of a "motion seeking judicial review of the sentence imposed for a crime he committed when he was a juvenile." Freeman did not qualify for judicial review.

Freeman's offense was committed in 2002. Although section 921.1402(1), addressing judicial review for certain juvenile sentences applies retroactively, that retroactive application extends "only to a narrow class of offenders – those juvenile offenders who committed an offense before July 1, 2014, **and** whose sentences are unconstitutional under *Miller [v. Alabama]* or *Graham [v. Florida]*."

Statham v. State, 1D21-3305 (Mar. 9, 2022)

The First District reversed the summary denial of a Rule 3.850 motion as to one of the claims in the motion. That claim alleged that "counsel failed to inform him of the possibility of being sentenced as a habitual felony offender and a prison releasee reoffender and of the potential penalties that these enhancements carried."

Counsel advised the defendant of the State's notice to seek a sentencing enhancement as an HFO or PRR two days prior to trial. At jury selection, the defendant advised the court that he had just learned this on that day. The State noted that the defendant rejected a plea offer of 72 months in prison and the defendant then chose to proceed to trial. The lower court concluded that the defendant "affirmed that he wanted to proceed to trial after hearing about these enhancements."

The First District concluded, on the record before that Court, "that Appellant's counsel did not make him aware of his eligibility for these enhancements until after he rejected the Stat's plea offer." The defendant did not expressly allege that he would have accepted the State's plea offer had he known about it, that the State would not have withdrawn the offer, and that the trial court would have accepted it. The claim was not sufficiently pled, and the trial court should have stricken it with leave to file a facially sufficient motion within 60 days.

Second District Court of Appeal

Smitherman v. State, 2D19-3104 (Mar. 11, 2022)

The Second District reversed three of four convictions for trafficking or possession of controlled substances due to an unconstitutional search.

A customs agent at an airport in Chicago intercepted a suspicious practice that had been sent to Smitherman in Fort Myers. The package contained MDMA. A second agent forwarded the package to law enforcement in Lee County, who then arranged for a controlled delivery to Smitherman's address. Some of the narcotics had been left in the package, and a tracking device was installed inside the box. The package was delivered and a woman answered the door and confirmed that Smitherman lived there, accepting the package. A drone enabled law enforcement to observe Smitherman arrive home and then leave with the unopened package, which he took to a home that he had been house-sitting and living in for several months. At that location, once inside, he opened the package. Smitherman was then arrested in the home's open garage, holding the tracking device and the narcotics that had been left in the package. After seizing the package, officers obtained a warrant for the house where Smitherman was apprehended.

"The search warrant affidavit in this case did not establish a *reasonable* probability that further evidence of drug trafficking would be found in the Cal Cove residence," which was the residence Smitherman had been house-sitting. While the affidavit contained details with respect the residence to which the package had been mailed, the affidavit was "devoid of any allegation suggesting a probability that the Cal Cove home was involved in any illegal conduct beyond the presence of Smithermn's parcel, which law enforcement had already recovered when they applied for the warrant." The only pertinent allegations were that Smitherman brought the package to that residence and was apprehended at that address.

"While Smitherman's opening of the package at the Cal Cove home may have suggested some link between the home and Smitherman's alleged trafficking, that event, standing alone, did not create a *probability* that further narcotics or similar evidence of trafficking would be present at that location." The State relied on the good faith exception to the exclusionary rule, but the Second District found that "[a] reasonably trained law enforcement officer would have known that the affidavit in this case failed to establish probable cause for the search, so the good-faith exception does not apply."

The Court also addressed a challenge to the denial of a motion for judgment of acquittal as to the one count based on the MDMA inside the parcel that was delivered to Smitherman at the first residence. Although this was couched as a challenge to the sufficiency of the evidence, it was based on a chain-of-custody argument, which related to the admissibility of the evidence. The evidence had not

been the subject of an objection at trial and, as a result, this argument could not serve as the basis for a challenge to the sufficiency of evidence.

Weaver v. State, 2D21-61 (Mar. 11, 2022)

An order revoking probation was reversed because the State failed to present sufficient evidence.

Weaver was charged with violating probation by failing to comply with obligations to report to his probation officer and to complete community service hours. While Weaver testified at the hearing, and referenced the paralysis of his right arm and problems that that was causing him, he was not asked about the alleged failures to report or perform community service. His probation officer testified that she knew the conditions were outstanding because the probation office "had no proof of them."

Absent objection to the insufficient proof of these alleged violations in the trial court, the issue was reviewed on appeal for fundamental error, and here, "the State wholly failed to prove that Weaver willfully violated any conditions of his probation." The Court further noted, as to the community service, that that condition "did not require Weaver to submit proof of his completed" hours. Nor did the State present evidence that the alleged failure was willful. And, "the evidence did not even establish that there had been community service opportunities for Weaver given his disability." The absence of an explanation by Weaver for his alleged violations was irrelevant, as it was not his burden "to establish that he made a good faith effort to comply with the conditions of his probation. Rather, it is the State's burden to 'prov[e] by the greater weight of the evidence that the violation was willful and substantial.'"

Third District Court of Appeal

Nelson v. State, 3D21-1655 (Mar. 9, 2022)

On rehearing, the Court withdrew its prior opinion and issued a new opinion, partially granting a petition for writ of certiorari as to a "lower court order denying . . . motions for protective order and to quash a subpoena duces tecum."

While Nelson was jailed for armed robbery, the alleged victim was murdered in front of her young daughter. Before the identity of the victim was made public, Saiz, Nelson's attorney, contacted the prosecutor and reported the death of the

victim, claiming he received that information from Nelson, "who had purportedly informed Saiz he learned of the murder from a news outlet." The State issued a subpoena duces tecum for Saiz to appear for deposition and produce 1) an audio/video recording "involving the victim and an individual affiliated with the underlying robbery case"; 2) "billing and payment details relating to his representation of Nelson"; and 3) "telephone numbers for the affiliate and her associates." The subpoena did not limit areas of inquiry for the deposition. Saiz and Nelson asserted that the targeted information was protected by attorney-client and work-product privileges.

There was no error regarding the production of the recordings, billing and payment records, and telephone numbers. These were "at best, fact work product, and the State has made a reasonable showing of need and inability to obtain eh substantial equivalent without undue hardship. . . . Further, nothing in the trial court's order precludes the redaction of any mental impressions or opinions prior to disclosure."

With respect to the deposition, the Court addressed the attorney-client privilege. The issue was whether there was a waiver of the privilege. "In the instant case, the State proffered only that Saiz disclosed the privileged communication to the prosecutor. Saiz disputed the details of the conversation. There was no evidentiary inquiry or further proffer concerning the context of the disclosure."

Furth District Court of Appeal

Penna v. State, 4D20-345 (Mar. 9, 2022)

On motion for certification of a question of great public importance, the Fourth District certified the following question to the Florida Supreme Court:

> WHETHER A DEFENDANT'S FIFTH AMENDMENT *MIRANDA* RIGHTS ARE AUTOMATICALLY VIOLATED WHEN AN OFFICER FAILS TO RE-READ A *MIRANDA* WARNING FOLLOWING A DEFENDANT'S VOLUNTARY RE-INITIATION OF CONTACT.

Brown v. State, 4D20-1426 (Mar. 9, 2022)

On rehearing, the Fourth District withdrew its prior opinion, issued a new opinion, and certified a question of great public importance. The Court affirmed a conviction and sentence entered for a juvenile, charged as an adult, as a result of a plea of no contest. The Court addressed the issue of whether the trial court erred "fundamentally, by conducting the sentencing hearing with the defendant appearing remotely by video."

The sentencing hearing was conducted via Zoom as a result of administrative orders regarding the COVID-19 pandemic. There was no objection and the issue was reviewed for fundamental error. The Court concluded, "under this case's facts, the defendant's appearance by video for his sentencing hearing did not violate his due process." The Court's opinion addressed two prior opinions on the subject – E.A.C. v. State, 324 So. 3d 499 (Fla. 4th DCA 2021) and Clarington v. State, 314 So. 3d 495 (Fla. 3d DCA 2020).

The Court set forth six reasons for its conclusion. First, in response to the claim that the defendant did not have confidential access to his attorney, "the record shows 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 a "meaningful opportunity to be heard through counsel" at sentencing. The same attorney had represented the defendant at the prior change of plea and was familiar with the case, and that attorney had previously obtained a continuance to review relevant information and to prepare a case for sentencing mitigation.

Third, all evidence the defense sought to present was presented at the hearing, without any request for additional time or a continuance.

Fourth, as to the claim that the defendant erroneously believed he was speaking to the judge, not the prosecutor, during cross-examination, due to the limits of the video technology, "nothing in that discussion indicates the defendant said anything to damage his mitigation argument, or that his responses would have been different if he had known the questions had come from the prosecutor and not the judge."

Fifth, as to an alleged inability to show remorse because the defendant was masked or obscured by the video camera's angle, the judge found that the defendant was remorseful.

Sixth, as to the alleged inability to see what was occurring in the courtroom, including the surveillance video which was shown to the judge during sentencing, neither the defendant nor counsel requested that the prosecutor's laptop computer be repositioned to enable such viewing by the defendant.

The Court certified the following questions to the Supreme Court:

> WHETHER FUNDAMENTAL ERROR OCCURS WHEN A CRIMINAL DEFENDANT, PURSUANT TO *IN RE COMPREHENSIVE COVID-19 EMERGENCY MEASURES FOR THE FLORIDA STATE COURTS,* FLORIDA ADMINISTRATIVE ORDER AOSC20-23, AS AMENDED, VIRTUALLY ATTENDS HIS SENTENCING VIA A VIRTUAL MEDIA PLATFORM, BUT DID NOT EXPRESSLY WAIVE HIS SIXTH AMENDMENT RIGHT TO BE PHYSICALLY PRESENT IN THE COURTROOM, YET DID NOT REQUEST CONFIDENTIAL ACCESS TO HIS ATTORNEY.

Bowman v. State, 4D20-2514 (Mar. 9, 2022)

The Fourth District, in an appeal from a resentencing after a revocation of probation, struck one condition of probation, corrected some cost and scrivener's errors, and affirmed the revocation of probation.

The condition of probation that the defendant submit to random, warrantless searches by law enforcement officers while on probation was precluded by Grubbs v. State, 373 So. 2d 905 (Fla. 1979). The Fourth District rejected the State's argument that Grubbs as overruled by subsequent decisions of the United States Supreme Court. In so holding, the Fourth District distinguished probationers from parolees, who were the subject of the Supreme Court's opinion in Samson v. California, 547 U.S. 843 (2006).

Fifth District Court of Appeal

King v. State, 5D22-513 (Mar. 8, 2022)

The Fifth District granted a certiorari petition because the trial court had not held a competency hearing within the timeframe required by Fla.R.Crim.P. 3.210(b).

Trial counsel filed an amended motion asserting reasons to believe the defendant was not competent to proceed, specifically citing the rule requiring the competency hearing to be held no later than 20 days after the date of the filing of the motion. The trial court granted the motion and appointed an expert. Although the court set a hearing date, it was not within the 20-day period and further suggested that the scheduled hearing was for a status conference. The Fifth District ordered the trial court to conduct the hearing "forthwith."