Case Law Update
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Supreme Court of Florida

State v. Johnson, SC21-20 (Mar. 17, 2022)

The Supreme Court of Florida addressed the following certified question of great public importance:

> Given the requirements of section 316.062(1), Florida Statutes, does conviction on multiple counts under section 316.027(2), Florida Statutes, stemming from a single crash involving multiple victims, expose a defendant to multiple punishments for one offense in violation of the double-jeopardy protections of the U.S. Constitution?

The Court held that section 316.027(2) "contemplates prosecution on a per-crash-victim basis, rather than on a per-crash basis," and the answer to the certified question was "no."

Under section 316.027, "when a car crash results in the injury or death of 'a person,' the driver of a vehicle involved in the crash must stop at the scene and remain there 'until he or she has fulfilled the requirements of s. 316.062.'" Section 316.062, in turn, requires the driver to provide identifying information and to render assistance to any injured person. A willful violation of section 316.027 is a felony, the degree of which depends upon the severity of the crash victim's injury.

In this case, the defendant was the driver in a three-car crash. One person died as a result of the crash and three others were injured. The trial court dismissed one of the four charges, finding that two of the victims were in the same car. The First District, in the appeal preceding the Supreme Court decision, affirmed the trial court's dismissal of the one count. The Supreme Court reversed the dismissal of the one count. Because the statute contemplates a per-crash-victim unit of prosecution, the "separate convictions for each crash victim were not multiple punishments for the same offense."

Thourtman v. Junior, SC19-1182 (Mar. 17, 2022)

Article I, section 14 of the Florida Constitution restricts entitlement to release on bail for persons "charged with a capital offense or an offense punishable by life imprisonment" when "the proof of guilt is evident or the presumption great." In this case, the Supreme Court addressed the question of "whether that provision prohibits a trial court from detaining a defendant beyond first appearance for a reasonable time to conduct a hearing concerning whether the proof of guilt is evident or the presumption of guilt is great unless the trial court makes a preliminary finding that the standard for denial of bail has been met." The Court resolved a conflict among the district courts of appeal as to whether an initial finding of probable cause at the first appearance could result in the trial court deferring "ruling on pretrial release and detain[ing] the defendant for a reasonable time to conduct a 'full' *Arthur* hearing without violating article I, section 14."

In State v. Arthur, in 1980, the Supreme Court held that "before release on bail pending trial can ever be denied, the [S]tate must come forward with a showing that the proof of guilt is evident or the presumption is great." The Supreme Curt rejected Thourtman's "view that detaining a defendant beyond first appearance and deferring a ruling on pretrial release to conduct a 'full' *Arthur* hearing is tantamount to a loss of the right to pretrial release." "Nor is there anything in the constitution or our caselaw that would require a trial court to make a preliminary finding that the proof is evident or the presumption is great before ordering a defendant detained pending an *Arthur* hearing, should the defendant choose to request one."

In addition to discussing the language in the constitutional provision, as well as language in the prior decision in Arthur, the Court emphasized concerns regarding judicial economy, the "probable lack of preparedness on either side," which would be "expected to result in multiple hearings on the same subject matter" if the trial court had to make that determination at the first appearance," and the adverse effect that a requirement for the determination to be made at the first appearance would have on the possibility that the parties could resolve the issue with a stipulation without "burdening the court with a potentially lengthy hearing."

Thus, the Court approved the Third District's holding that the trial court could "defer ruling on bail and [] detain the defendant for a reasonable time to conduct a full *Arthur* bond hearing." The Supreme Court did not set forth any specific time period for the hearing in its decision.

Eleventh Circuit Court of Appeals

Green v. Secretary, Department of Corrections, 18-13524 (Mar. 14, 2022)

The federal district court granted a habeas corpus petition, and reversed state court convictions for murder, robbery and kidnapping, on the basis of an unexhausted Brady claim. The government appealed to the Eleventh Circuit, which reversed with respect to the granting of the writ based on the Brady claim; the Court further affirmed the district court's denial of the other claims in the habeas petition, as to which Green cross-appealed.

Green acknowledged that the Brady claim was not properly exhausted in state court, but relied on the actual innocence exception as his excuse for failing to exhaust that claim, and others, in state court. Before reaching the actual innocence exception to exhaustion, the Court first concluded that the claim had not been exhausted. The Court reviewed the pleadings from the state courts, including appellate court briefs, and found that the claim in question had not been presented to the Florida Supreme Court in a manner "'such that the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation.'"

Additionally, with respect to a factually detailed and specific Brady claim, as asserted in the federal habeas petition, the Eleventh Circuit further observed that the claim as asserted in the federal petition was "not the same claim that he presented to the state courts." The federal habeas statute, AEDPA, "forbids a district court from entertaining a claim that is not the *same* claim the prisoner presented to and adjudicated by the state courts on the merits."

Alternatively, even if the Brady claim was exhausted, the federal district court erred in concluding, de novo, that the nondisclosure of two statements of the trial prosecutor regarding conversations he had with two officers as to their observations on the night of the murder. These notes referenced an individual, Hallock, stating that she tied the victim's hands behind his back. The notes also referenced the officer's belief that Halleck had been guilty. The Eleventh Circuit first found that defense counsel had the factual information contained in the prosecutor's notes, even though defense counsel had not seen the actual notes themselves. The prosecutor made a representation to this effect at the state post-conviction, non-evidentiary hearing. The Eleventh Circuit noted that postconviction counsel for Green, present at that hearing, did not dispute the prosecutor's representation and did not request an evidentiary hearing as to what trial counsel for the defendant actually knew. And, as to Halleck's statement about the hands being tied, "Green failed to prove that the

statement ever existed." Green had been granted an evidentiary hearing in state court, and failed to adduce evidence that Hallock made the statement in question.

Green challenged a photographic identification as being unduly suggestive, resulting in an unreliable identification. Green's argument in the federal appeal was more limited than the challenges made in either state court or the federal district court. He primarily argued that "the fact that Hallock was informed that the suspect's photograph was included in the photo array she would be shown" rendered the identification unduly suggestive. The Eleventh Circuit, in rejecting the claim, stated that "[i]nforming an eyewitness that the suspect's photo will be part of the photo array is generally of no moment in the mine run of cases. When a witness is presented with a lineup and asked whether he or she can identify any of the individuals in the lineup, the witness will expect that the individual the police believes to be the suspect ill be included." The Court's general discussion of this issue highlights the deferential standards of review that a federal habeas petitioner must overcome when challenging a state court's adjudication of a claim on the merits.

Green challenged trial counsel's failure to challenge a juror for cause. The Eleventh Circuit held that the Florida Supreme Court's finding that the cause challenge would have failed was an ultimate finding of fact, which was based on a statement that the juror made and which the trial court believed. "A state court's findings on subsidiary factual questions are entitled to s. 2254(e)(1)'s presumption of correctness," "even when the factual findings are merely implicit."

The federal district court denied three claims which were procedurally barred in federal habeas proceedings. Green argued that the procedural bars should not be applied based on his actual innocence. The detailed new evidence that Green relied on for the claim of actual innocence was weighed against the evidence adduced at trial, and the Eleventh Circuit concluded that Green failed to show "that no reasonable juror would find him guilty on retrial." None of the new evidence was "particularly compelling."

The conclusion to the Court's opinion includes a critique of Green's postconviction legal strategy, finding that it "demonstrate[d] how his deliberately ambiguous litigation strategy in the Circuit Court, Florida Supreme Court, District Court, and this Court has delayed and confused the judicial system for decades. . . ." The Court emphasized the large number of claims asserted, compounded by the confusing use of multiple subclaims and subclaims within subclaims. Some of the claims were further deemed "inherently contradictory." Some of the claims were

"renamed" as the postconviction challenges proceeded from one court to the next. Some claims merged Brady and Strickland. One state law claim was transformed into a constitutional claim when Green reached the federal district court. "Had the State recognized the problem [i.e., transforming state law claims into constitutional claims in federal court], it could have moved the District Court to require Green to replead his petition pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, for the State's own benefit if not for the Court's. Rule 12(e) authorizes a party to move for a more definite statement 'of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.'" Similarly, the District Court, on its own, could have required such a repleading "when counsel fails in its obligations under Rule 8(a) to provide a 'short and plain statement.'" "Had the District Court required repleader here, Green (and especially his counsel) would have bee forced to either clearly align Green's federal court claims with exhausted state court claims or attempt to otherwise excuse the procedural default. Doing so would have brought a quick resolution to this case." "Judicial toleration of the litigation stratagems employed here by Green will lead inexorably to the abuse of the post-conviction process in both state and federal courts. While this Court cannot do more than recommend to the state courts that they consider requiring more straightforward post-conviction pleading, state prisoners seeking post-conviction relief in federal court may consider themselves on notice that this Court will vigorously enforce both AEDPA and Rules 8 and 11."

One judge concurred and dissented in part. The dissent extended to the issue of exhaustion of one aspect of the Brady claim. This opinion concurred with the alternative disposition of the Brady claim on the merits, as well as the disposition of other issues.

First District Court of Appeal

Fletcher v. State, 1D20-3031 (Mar. 16, 2022)

A "claim of involuntary plea on direct appeal can only be preserved by filing [a motion to withdraw plea in the trial court and] . . . there is no fundamental error exception."

Southerland v. State, 1D21-1791 (Mar. 16, 2022)

One of the violations of probation that the trial court found to exist – changing residence without notifying the probation office or procuring its consent – was not supported by sufficient evidence, as the testimony of the probation officer was

hearsay. The actual facts are not set forth, but cases cited in the opinion suggest that the probation officer was relying on the statements of a person living at the residence in question, who told the officer that the defendant no longer resided there.

Ross v. State, 1D21-2041 (Mar. 16, 2022)

New claims of ineffective assistance of counsel that were not raised in the trial court 3.850 motion could not be asserted as grounds for relief on appeal. And, the failure of the Appellant's Initial Brief to challenge the denial of the claims asserted in the trial court constituted an abandonment of those claims.

Simmons v. State, 1D21-2359 (Mar. 16, 2022)

The failure of counsel to file a pretrial motion for immunity under the Stand Your Ground law did not constitute ineffective assistance. The case proceeded to trial, the defense of self-defense was asserted, the jury was instructed on self-defense, and the jury rejected that defense. "When a jury rejects a claim of self-defense at trial *beyond a reasonable doubt*, there is no reasonable probability that a trial judge would have rendered a different judgment at a Stand-Your-Ground hearing with a lower standard of proof."

Lynch v. State, 1D21-2768 (Mar. 16, 2022)

A postconviction claim of newly discovered evidence was properly denied by the trial court. The allegations in the affidavit upon which the defendant relied were deemed "conclusory and failed to establish a prima facie claim." The appellate court rejected Lynch's effort to rely on potentially exculpatory testimony from two other individuals, where claims based on those individuals were not set forth in the trial court postconviction motion.

Buck v. State, 1D21-2897 (Mar. 16, 2022)

The denial of a postconviction claim of newly discovered evidence was affirmed on appeal. The claim relied on an affidavit, signed by the victim, naming another prison inmate as the attacker.

"First, the victim executed the affidavit and was known to the defendant and counsel when Buck entered his plea. Defense counsel had a chance to depose the victim, but he believed that depositions were unnecessary because the altercation was 'very well-documented, videotaped.' Thus, Buck and counsel could have

discovered the victim's alleged recantation at the time of the plea through due diligence."

The recantation was also found, by the trial court, to have been inherently incredible. The altercation was captured on video and it clearly showed "Buck grabbing the victim from behind and making a cutting motion to the victim's throat." The affidavit of the victim, even if presented at trial, was not of such a nature as to probably have produced an acquittal.

Second District Court of Appeal

T. H. v. State, 2D20-3217 (Mar. 18, 2022)

The Second District, in a direct appeal held that "the trial court erred in ruling that the adjudicatory proceeding would proceed via Zoom without allowing T.H. a hearing on is objection and without making a case-specific finding of necessity to limit confrontation rights." The trial court hearing was conducted on October 30, 2020.

After a lengthy analysis of rights under the Confrontation Clause, the Second District stated that "[t]he burden is not upon T.H. to raise a case specific reason why a videoconference is inappropriate. Nor is it a relevant consideration that a videoconference may enhance the ability of the trier of fact to perform its duty." "In cases such as this, the inquiry should ask whether the use of the video system is necessary to protect the welfare of those impacted by holding the adjudicatory hearing at its indicated location."

In this case, there was no hearing on this issue, and thus "no evidence of a necessity that suffices to overcome the constitutional preference of face-to-face confrontation provided by the Confrontation Clause of the Sixth Amendment and made applicable to juveniles through the Due Process Clause in the Fourteenth Amendment." At the time in question, the Thirteenth Judicial Circuit "had resumed holding in-person felony jury trials. Yet, the order failed to offer any analysis as to why a jury trial could afford the accused a right to in-person confrontation but a juvenile adjudicatory hearing held without the presence of a jury could not."

The Second District distinguished the Fourth District's opinion in E.A.C. v. State, 324 So. 3d 499 (Fla. 4th DCA 2021). There, the trial court did conduct a hearing on the basis of the juvenile's objection, although it could not be ascertained what the scope of that hearing was. And, at the time in question, the Fifteenth

Judicial Circuit was still in Phase 1 of the Florida Supreme Court's administrative order addressing Covid, while the hearing in this case was held during the second phase.

Acknowledging the importance of the policy of preventing the spread of Covid, the Court concluded that "the argument that the trial court need not make a case-specific finding because the country was in the midst of a pandemic does not hold up when the trial court itself admits that public health restrictions were easing and jury trials were being conducted down the hall." The Court did not reach "the issue of whether conducting an adjudicatory hearing via Zoom is unconstitutional. Our holding is confined to the procedure which the trial court followed in determining whether it was appropriate to abrogate T.H.'s due process right to confront witnesses."

One judge dissented: "because juvenile delinquency adjudicatory hearings are not subject to the constitutionally enumerated confrontation right applicable only in criminal proceedings, the trial court here as permitted to make a categorical finding that necessity demanded the juveniles only be permitted to confront witnesses against them remotely through two-way audio-visual technology."

Robles v. State, 2D21-714 (Mar. 18, 2022)

Robles entered a plea of no contest to resisting an officer without violence during a "mass virtual arraignment." A subsequent motion to withdraw plea was denied and Robles appealed. The Second District reversed as Robles "established a manifest injustice where the trial court failed to advise her of her right to appointed counsel before she pleaded." The motion to withdraw was filed under Fla.R.Crim.P. 3.170(l).

The opinion includes an extensive quotation of the judge's explanation to the present defendants of how the virtual arraignment would proceed. Relevant portions included statements that the defendants could accept the State's offer and enter pleas of guilty or no contest; that it was in the "best interests [of the defendants] to resolve the case today." That they could enter a plea of not guilty and that the case would be set for a pretrial conference in four or five weeks, "and I will discuss with you whether or not you need the representation of an attorney." If the defendants wanted to "enter a plea of not guilty, I will ask you if you [can] afford to hire your own attorney." If they could not, the Public Defender would be provisionally appointed today and they would have to fill out an application with a $50 fee for services.

Robles was later directly addressed by the court and asked it she wanted to resolve the case today, with the State's plea and a $50 fee for costs, or if she wanted to enter a plea of not guilty and "speak with an attorney." She took the plea offer.

"At the arraignment, the trial court did not guarantee Ms. Robles that she faced no imprisonment. To the contrary, it informed her that the maximum penalty was a year in jail. Further, the trial court did not render the 'Order of No Imprisonment' until after Ms. Robles pleaded no contest and was sentenced." There was no valid waiver of the right to counsel, as the "trial court did not advise Ms. Robles of her right to counsel or her right to appointed counsel at the arraignment and all subsequent proceedings." She was offered only the "ability to 'speak with an attorney' if she pleaded not guilty. The trial court's statements could have incorrectly led Ms. Robles 'to believe she was only entitled to counsel if she entered a not guilty plea.'"

Finally, "[t]he trial court's deprivation of Ms. Robles' right to the assistance of counsel without a valid waiver was sufficient, in and of itself, to constitute prejudice and manifest injustice in this case." As a result, the Second District did not have to address the issue "of whether there was a factual basis for the charged offense."

Gordineer v. State, 2D21-2844 (Mar. 18, 2022)

The Second District granted a pretrial certiorari petition. The trial court erred in denying the Public Defender's motion to withdraw based on a conflict of interest.

The "conflict of interest arose because the public defender's office fell victim to a malware attack, and Gordineer joined a lawsuit in federal court alleging the attack breached sensitive personal information and compromised confidential case files." The federal suit was then dismissed, but the Public Defender asserted that Gordineer's involvement in the lawsuit "created a conflict of interest that prevented the public defender's office from adequately and ethically representing Gordineer."

An actual conflict of interest existed because counsel and client "had become adversaries in the federal lawsuit." "Regardless of whether the lawsuit was ultimately dismissed, Gordineer and the public defender's office were on opposite[] sides and took opposing positions in the lawsuit." There was a dispute between them as to whether the malware attack "breached sensitive personal information and compromised confidential case files." It was also irrelevant that the assistant pubic defender representing Gordineer was not "personally involved in either the attack or

the lawsuit." The conflict was "imputed." And, although the appellate court found an actual conflict existed, "in the pretrial context a showing of actual conflict is not even required – potential conflict is sufficient." Although the trial court was concerned that Gordineer was using the federal lawsuit to "shop around for a new attorney," "there was no evidence of that type of abuse whatever." Other clients of the Public Defender's Office had alleged the same conflict existed.

Third District Court of Appeal

Singletary v. State, 3D20-0951 (Mar. 16, 2022)

Singletary was convicted and sentenced in 1999 for first-degree premeditated murder and attempted first-degree premeditated murder for offenses committed when he was 17 years old. After having been sentenced to life without parole, he subsequently received a resentencing based on Graham v. Florida and Miller v. Alabama. Based on the 2014 juvenile sentencing statutes, he was resentenced to life imprisonment for both offenses, with judicial review after 25 years.

The Third District affirmed those sentences on direct appeal and addressed and rejected the argument that the sentence was improper absent a jury finding that the defendant "actually killed, intended to kill, or attempted to kill the victim." This argument was based on the assertion that Singletary was charged as a principal and that the jury did not make the express finding required. The Third District rejected the argument because the defendant was found guilty as charged as to both offenses, and the charging document explicitly alleged premeditation.

Roberson v. Junior, 3D22-0235 (Mar. 16, 2022)

The Third District denied a pretrial habeas corpus petition challenging the denial of pretrial bond following an Arthur hearing.

The defendant was charged with multiple offenses, including second-degree murder with a firearm, and four counts of attempted first-degree murder with a deadly weapon. Roberson argued that he was not charged as a principle for the shooting death of the bystander victim. There was a discrepancy in the information between the heading and text of the document, and, as a result, any such defect was waived in the absence of any objection." The language of section 777.011 "clearly encompasses the Petitioner's acts of shooting into a crowd and a co-defendant unintentionally killing a bystander." Roberson was properly charged as a principal

and the charging issue did "not alter the outcome of the bond issue on petition for writ of habeas corpus."

As to the other three offenses, Roberson was not charged as a principal. The State satisfied its burden of proof of guilt evident or presumption great through surveillance camera footage of the shooting. The Petitioner, who was identified, was shown "shooting in the direction of the victims." After the finding of proof evident/presumption great was made by the trial court, the defense did not "attempt to seek or invoke the judge's discretionary power to set a bond" even where the State satisfied its burden of proof. As the defense did not seek the setting of bond on the basis of that discretion, the petition for writ of habeas corpus could not prevail on that issue.

Fourth District Court of Appeal

Narvaez v. State, 4D20-245 (Mar. 16, 2022)

On motion for clarification, the Court withdrew its prior opinion and substituted a new written opinion. On direct appeal for convictions of attempted first-degree murder and other offenses, the Fourth District affirmed the convictions but reversed for resentencing because the trial court "erred in sentencing appellant on the battery charge as described in the amended information."

The defendant was charged with Battery (Domestic). The jury instructions, however, referred only to the general elements of battery and did not include elements of domestic battery. A domestic battery requires, in addition to proof of a battery, that there be physical injury or death of one family household member by another family household member. The domestic violence designation under the statute then triggers a mandatory minimum sentence. Absent instructions on the required elements, sentencing for domestic battery was erroneous. On remand, the trial court has the opinion of either reducing the sentence to that for misdemeanor battery or empaneling a new jury to make the determination under the domestic battery statute.

One judge dissented in part, concluding that the State should not be provided an opportunity on remand to have a second jury consider the issue of domestic battery. The majority's conclusion on this issue was based on Bethea v. State, 319 So. 3d 666 (Fla. 4th DCA 2021) and Gaymon v. State, 288 So. 3d 1087 (Fla. 2020). The dissent argued that this case was different because the State waited until after the reversal in the original opinion before requesting this remedy; the argument had

not been made in the State's brief on appeal. The dissent would also have certified to the Florida Supreme Court a question of great public importance as to whether such a resentencing with a second jury would result in a double jeopardy violation.

Fifth District Court of Appeal

Dalton v. State, 5D21-542 (Mar. 18, 2022)

The Fifth District issued a new opinion on rehearing and reversed an 11-year prison sentence imposed for violation of probation.

The defendant was originally sentenced, pursuant to a guilty plea, for concurrent terms of five years in prison, for a third-degree felony and a second-degree felony, with the prison terms suspended upon successful completion of two years of community control. Dalton violated the community control and was then sentenced to concurrent five-year prison sentences. Two years later, the sentence was modified based on successful completion of youthful offender basic training, and Dalton was resentenced to probation for the remainder of her sentence. The order provided that upon revocation, Dalton could be sentenced to any sentence that might have been imposed before she was placed on probation.

Dalton violated probation and was sentenced to five years in prison for the third-degree felony and eleven years for the second-degree felony, to run concurrently. On appeal, she challenged the 11-year sentence.

The original sentence for the second-degree felony was a "true split sentence," and the trial court abided by that when, upon the first modification of sentence, Dalton was sentenced to five years in prison for the balance of the original sentence. Although there was a subsequent modification of sentence, Dalton never lost the benefit of that original imposition of a true split sentence.

Howard v. State, 5D21-2118 (Mar. 18, 2022)

The lower court's summary denial of a Rule 3.850 motion was reversed for further proceedings as to one claim of newly discovered evidence. The claim was insufficiently pled, as the defendant did not "explain why he could not have discovered this evidence with the exercise of due diligence." Howard should have been provided an opportunity to amend the claim if he could do so in good faith.

Hastings v. State, 5D22-0076 (Mar. 18, 2022)

The Fifth District appointed a commissioner to resolve a factual dispute after finding that Hastings filed a legally sufficient petition seeking a belated appeal in five cases.

The petition alleged that Hastings "timely instructed her counsel to file a notice of appeal on the day of sentencing, but her counsel failed to do so." The State's response asserted that it contacted Hastings' trial counsel who did not recall being asked to file a notice of appeal. Counsel recalled only a discussion about seeking a mitigation of sentence. The State's written response was "sufficient to raise a good faith dispute." Even though defense counsel did not expressly deny that Hastings requested an appeal be filed, "we do not believe the State's response needs to be so conclusive to demonstrate a good faith dispute. Indeed, given the passage of time and other circumstances, counsel might be understandably hesitant to make such a categorical statement."

One judge dissented, concluding that the State had not met its burden to warrant the appointment of a commissioner to hear evidence on the issue.

Perez v. State, 5D22-414 (Mar. 14, 2022)

The Fifth District granted a habeas corpus petition challenging a finding of direct criminal contempt for an "alleged failure to complete a court-ordered Batterer's Intervention Program." This conduct did not occur in the presence of the trial judge and was therefore not the proper subject of direct criminal contempt. And, even under the rule for direct criminal contempt, the trial court did not provide "a meaningful opportunity to offer mitigating testimony regarding his enrollment in, and completion of, the program." Nor did the court "provide a recital of the facts on which it based the adjudication of guilt."