

Case Law Update
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Eleventh Circuit Court of Appeals

[United States v. Moon](#), 20-13822 (May 10, 2022)

The Eleventh Circuit affirmed multiple convictions for production, attempted production, and possession of child pornography.

A search warrant authorized the seizure of, inter alia, tapes and video recordings. Moon argued that the seizure and search of videotapes exceeded the scope of the warrant. The Court disagreed. “The search warrant application expressly included ‘videotapes’ in its definition of ‘records’ and ‘document.’” And the warrant authorized seizure of ‘tapes.’ Given this authorization, Agent Green was entitled to examine each of the tapes he found to perceive their relevance to the crime.”

Moon argued on appeal that courtroom closures violated his Sixth Amendment right to a public trial. The record showed “that the parties had a pretrial agreement about certain closures of the courtroom. Further, there were several points early in the trial where Moon affirmatively relinquished or abandoned his public-trial right.” For example, prior to the playing of the first video for the jury, the government raised the closure issue, and, if Moon had objected, “the government would have had to prove a closure at that point was necessary. . . .” Moon, however, said nothing. On another occasion, Moon “told the court he did not mind ‘either way’ if it did not re-open the courtroom for Elaine Ward’s direct examination.” Based on the combination of the pretrial agreement to close the courtroom for some testimony, “affirmative indications early in the trial that [Moon] consented to closures that he knew exceeded that agreement,” and the “subsequent failure to object to any closures that purportedly exceeded the scope of that agreement together added up to a waive of [the] right to a public trial.”

The Court’s legal analysis on this issue concluded that a defendant “can” waive his public-trial right. The Court noted an issue as to what was required to constitute a waiver, but did “not decide exactly where that line must be drawn,” as “Moon’s actions (and lack thereof) went far past a mere failure to object to the courtroom closures and into an affirmative, knowing waiver.”

[United States v. Edwar Rodriguez](#), 20-14681 (May 12, 2022)

The Eleventh Circuit affirmed the sentence imposed for conspiracy to distribute and to possess with intent to distribute fifty grams or more of methamphetamine. The sentence was imposed after a guilty plea, without a written plea agreement.

Rodriguez challenged the district court’s finding that he was responsible for 200 kilograms of methamphetamine, “the total quantity . . . attributed to the conspiracy,” for sentencing purposes. He argued that he “quit” before a search warrant was executed, and thus “should only be accountable for the drugs he actually delivered.” That “brief statement does not sufficiently challenge the district court’s finding concerning the nature and extent of his membership in the conspiracy. As we’ve said many times, an appellant abandons an issue when he makes only a ‘passing reference’ to in in his opening brief, as Rodriguez did here.”

The Court further found sufficient evidence as to the 200 kilograms. This included a delivery of 13 kilos by a co-conspirator on the day of the search of the stash house, and a ledger showing prior deliveries of about 190 kilos.

For sentencing purposes in a joint undertaking, “a member of a drug conspiracy is liable for his own acts and the acts of others in furtherance of the activity that the defendant agreed to undertake and that are reasonably foreseeable in connection with that activity.” Based on facts in the PSI, the Court noted that this case involved a large-scale drug conspiracy for importing and distributing. Rodriguez and others “worked jointly,” and, in addition to his own criminal activities, he was in a vehicle with others who were runners in the conspiracy. He was also involved in transporting drugs from the Texas-Mexican border to the stash house in Florida; he distributed methamphetamine to customers in Florida; and he “occasionally partnered” with other individuals to distribute drugs to customers. He was the primary distributor to another distributor. He received payments ‘for wiring funds from the conspirators to their cartel contacts in Mexico.’ Based on his extensive involvement, he “properly was held responsible for his co-conspirators’ actions.”

The sentencing enhancement for possessing a firearm was properly applied. The firearm was stored by a coconspirator in the stash house. The government had shown that the possessor was a coconspirator, that the possession was in furtherance of the conspiracy, and that the defendant was a member of the conspiracy at the time

of possession. The government also established that such possession was reasonably foreseeable by Rodriguez, as Rodriguez admitted, in response to questions at sentencing, that he was a participant in the distribution of illegal drugs, that the drug trade was dangerous, and that most people involved in the drug business either carry a firearm or have one accessible.

The failure of the district court to grant a downward departure rests within that court's discretion, and the appellate court therefore lacked jurisdiction to consider that challenge on appeal. The only exception for the appellate court's jurisdiction exists when a district court erroneously believes that it lacked authority to grant a downward departure.

First District Court of Appeal

[Kirk v. State](#), 1D20-3598 (May 11, 2022)

The First District affirmed an order resentencing Kirk to life in prison for a first-degree murder he committed as a juvenile.

Kirk challenged the sufficiency of the evidence to support the sentencing court's findings. The appellate court viewed much of this as an inappropriate challenge to the sentencing court's weighing of the evidence. The appellate court thus noted that as to matters that Kirk claimed the sentencing court disregarded – age, intoxication, IQ, academic functioning, among others – “all that evidence is thoroughly discussed in the resentencing order.”

With respect to intoxication, the Court noted that Kirk gave many reasons for the shooting of the victim over the years, including going “blank,” fearing harm to himself, and coercion, but he “never claimed that he was too intoxicated to understand the consequences of his actions.” The appellate court also rejected challenges to the lower court's credibility determinations, noting that the “resentencing court was in the best position to evaluate the credibility of Kirk's testimony, and this Court will not second-guess that judgment.”

Kirk also argued that the sentencing court abused its discretion in imposing the sentence of life with judicial review after 25 years. The appellate court again emphasized that the lower court's order did address the multiple issues Kirk claimed that it had disregarded. The lower court's finding that Kirk did not take full responsibility for the murder was supported by the evidence, both prior to and after the guilty plea. This included multiple changes in the stories about who shot the

victim; letters proclaiming innocence; and a 2016 exculpatory interview with an investigator.

While a defense expert gave testimony that Kirk was “predisposed to violence because of his traumatic childhood environment,” he, himself, “testified that because he had witnessed many murders while growing up on the streets, he knew the effect it would have on the family of the victim. And his expert also testified that he knew it was wrong to shoot the victim”

Finally, the Court rejected Kirk’s argument based on Miller v. Alabama, reiterating prior holdings that Miller “does not require a finding of permanent incorrigibility to support a sentence of life in prison with judicial review after twenty-five years.”

[Sanders v. State](#), 1D22-0747 (May 11, 2022)

Habeas corpus is not available in Florida as a collateral postconviction remedy. Relief must be sought under Fla.R.Crim.P. 3.850.

Second District Court of Appeal

[LoRusso v. State](#), 2D21-1325 (May 13, 2022)

The Second District cautioned appellate counsel with respect to adhering to the procedures required for the filing of an Anders brief. In this case, the Court observed that LoRusso had been permitted to represent himself in the trial court proceedings, but numerous trial transcripts, including the hearing at which LoRusso was first permitted to represent himself, had been omitted from the record on appeal.

[O’Connell v. State](#), 2D20-142 (May 11, 2022)

The Second District reversed an order summarily denying a motion for return of seized property. When summarily denying such a motion, the trial court must “attach portions of the record showing that the property was seized pursuant to a lawful investigation or held as evidence.” The motion sought the return of a desktop computer and an external hard drive. The order attached a search warrant which referenced the impounding of a personal computer, but did not reference the external hard drive. And, even assuming the lawfulness of the original seizure of the computer, the affidavit did not show that the computer itself, “as opposed to digital files that the State recovered from the computer, was seized as evidence.”

[Nugent v. State](#), 2D21-2196 (May 11, 2022)

The Second District affirmed the denial of a motion for postconviction relief. Nugent had been convicted and sentenced for a murder and robbery committed when he was sixteen.

Nugent pled guilty to the second-degree murder and armed robbery and was sentenced to concurrent terms of 25 years in prison, followed by 15 years of probation for each offense. Years later, he sought relief as to the sentences based on the decisions in Graham v. Florida and Kelsey v. State, arguing that the sentences did not afford him a “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” He also argued that he was entitled to judicial review under the subsequently enacted juvenile sentencing statutes.

As the sentences were not illegal, Nugent was not entitled to resentencing. The Florida Supreme Court, in Pedroza v. State, held that Graham applied only to a life sentence or its functional equivalent. A sentence of 25 years in prison was not a life sentence or its functional equivalent.

Nugent was not entitled to judicial review. His offenses occurred prior to July 1, 2014, the effective date of the juvenile sentencing statutes, and his sentences, as imposed, were legal. The Second District further rejected Nugent’s argument that Second District case law was in conflict with decisions of the Fifth District.

Fourth District Court of Appeal

[Graham v. State](#), 4D21-1763 (May 11, 2022)

A conviction for possession with intent to sell a counterfeit substance was reversed on appeal based on insufficient evidence.

Graham was charged under section 831.31(a), Florida Statutes. The Fourth District agreed with Graham’s argument that the statute “requires that the counterfeit substance either be labeled or identified as a controlled substance, and the evidence at trial failed to show either.” This argument was not presented in the trial court, but it was deemed fundamental error, as there was a total absence of evidence to support the charge.

Graham was found in possession of a cigar tube, containing what a detective believed to be rocks of crack cocaine. The rocks tested negative. Graham then gave a statement that he had purchased what he thought was crack cocaine but that the substance was not real cocaine.

Construing the statutory language, the Court stated: “Thus, for the State to prove a violation of section 831.31(1)(a), the State must present evidence either of some labelling, which contains some identifying mark, number, or likeness of a trademark of a manufacturer other than the person who in fact manufactured the product. Alternatively, the State must prove that the substance is falsely identified as a controlled substance listed in section 893.03.”

Fifth District Court of Appeal

[Corbett v. State](#), 5D21-3166 (May 13, 2022)

The Fifth District denied Corbett’s prohibition petition, in which Corbett sought relief based on the Stand Your Ground statute.

Corbett was charged with simple battery. At a hearing on his motion to dismiss, the trial court erred by accepting the State’s argument that the burden was on Corbett to show that she was entitled to immunity by a preponderance of the evidence.

Although the trial court used an erroneous burden of proof, prohibition was not a proper remedy to pursue. When the issue is procedural, such as the correct evidentiary burden, relief must be sought in the appellate court through a certiorari petition. Prohibition is the correct remedy only when raising a substantive challenge in the petition. The appellate court did not entertain the petition, in the alternative, as a certiorari petition, because the petition was untimely for certiorari review. Certiorari petitions must be filed within 30 days of the rendition of the order being reviewed. Prohibition petitions are not subject to the same time limitation.