

Case Law Update
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Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

[United States v. Coglianese](#), 20-12074 (My 17, 2022)

The Eleventh Circuit affirmed the sentence imposed, pursuant to a guilty plea, for numerous child sex offenses.

The 168-month prison sentence, followed by 30 years of supervised release, was not procedurally unreasonable. The district court stated that it considered the advisory guidelines and all of the factors set out in 18 U.S.C. s. 3553(a). While the district court specifically referenced some of those factors – punishment, deterrence and protection of the public – that did not render the sentence unreasonable by virtue of favoring those factors over the other enumerated factors. The district court considered the defendant’s mitigation evidence – experts regarding mental health issues – and concluded that a downward variance was not justified.

The sentence imposed was also substantively reasonable based on the totality of the circumstances. The defendant “enticed a minor, had sex with her despite knowing her age, and then traded nude photos of her.” His 168-month sentence was the bottom of the range of the advisory guidelines.

The district court also imposed a special condition of supervised release barring the defendant “from accessing computers and the internet, and from possessing any ‘electronic data storage medium,’ without prior approval from the probation office.” The defendant argued that this was excessive in scope. The Eleventh Circuit first held that the defendant’s objection in the lower court to the “computer” provision was sufficient to preserve the issue for appeal and it was therefore not subject to the plain error standard for unpreserved issues.

The offenses in this case involved the use of a computer and the defendant did have the ability to obtain permission from a probation officer to use a computer or access the internet for specified purposes. The defendant argued that earlier appellate court decisions were distinguishable because they involved the use of smart phones. The Eleventh Circuit rejected that distinction, noting other decisions involving the use of computers and again emphasizing the ability to obtain limited

consent from a probation officer. The Eleventh Circuit’s analysis with respect to the restriction on possession of electronic data storage media was the same. This included items such as a flash drive, a compact disk, a floppy disk or any other data encryption technique or program. The Court resorted to dictionary definitions for the phrase “electronic data storage media,” and ultimately deemed it to refer to a device “that can store and transmit information in a form suitable for processing by a computer.”

[Blackmon v. Secretary, Department of Corrections](#), 18-11416 (May 19, 2022)

The Eleventh Circuit affirmed the denial of a habeas corpus petition under 28 U.S.C. s. 2254 in which Blackmon challenged his conviction for robbery. The issues on appeal related to appellate counsel’s failure to raise the issue of the failure of the trial court to sua sponte inform Blackmon of the dangers of joint representation; and trial counsel’s ineffectiveness for failing to object to the prosecutor’s closing argument regarding the truthfulness of a witness’s testimony.

As to the two claims at issue, the state appellate court did not issue written opinions. The federal district court therefore looked through the state appellate court’s affirmance to the trial court’s explanation for the denial of the two claims.

With respect to the joint representation of Blackmon and his codefendant, Blackmon had expressed concerns about the consolidation of the two trials, not the joint representation. During a colloquy in the trial court, the judge responded to that concern “by explaining why Blackmon would not be prejudiced by a joint trial: because the State had charged Blackmon as a principal in the armed robbery, all of the evidence that would be introduced in Earl’s trial would be introduced in his as well. Certainly nothing in this discussion would have suggested that Eagen [defense counsel] could not effectively represent both defendants.” Blackmon had further executed a waiver of his right to separate counsel and agreed on multiple occasions throughout the proceedings that he assented to the joint representation.

In closing argument, the prosecutor addressed the testimony of witness Chester, who provided an account of the offense based on his own role and involvement in it. The prosecutor emphasized that Chester had taken responsibility for the robbery, adding that he came in and testified honestly about this involvement, and that he expected to get something for it. The prosecutor concluded: “He has been honest with us, and he has been honest with you-all here today.”

Trial counsel was not ineffective for failing to object to this. The Eleventh Circuit noted that the state trial court found that the comments were probably improper, but that counsel's decision not to object should be deemed reasonable because "reasonable attorneys could differ on that strategy." This was a reference to the trial court judge having heard many defense attorneys state that "in the absence of something very egregious, it's simply better not to object and not call attention to the State's closing." The Eleventh Circuit concluded that the state court's adjudication of the claim on the merits was not contrary to or an unreasonable application of, the United State's Supreme Court's decision of Strickland v. Washington.

[United States v. Moss](#), 19-14548 (May 20, 2022)

The Eleventh Circuit issued a revised panel opinion on rehearing. Moss appealed convictions for conspiracy and substantive health care fraud and was sentenced to 97 months in prison, and ordered to pay over \$2 million in restitution. He was also ordered to forfeit about \$2.5 million. The convictions and sentence were affirmed.

The district court quashed a subpoena served by the defense on the attorney, Hannan, for a coconspirator, Tywon. Tywon had pled guilty to conspiracy and agreed to cooperate with the government. Moss wanted to call Hannan as a witness to testify at trial to contradict Tywon's testimony. Moss argued on appeal that the exclusion of this testimony resulted in violations of the Fifth and Sixth Amendments.

The Eleventh Circuit reviewed the details of what attorney Hannan would have testified to if called and concluded that his testimony would have corroborated that of Tywon. Thus, any erroneous exclusion of the testimony was harmless beyond a reasonable doubt.

Moss was permitted to present six character witnesses at trial; others were excluded as being cumulative. Based on the quantity and nature of the evidence presented, Moss could not demonstrate a clear showing of a prejudicial abuse of discretion.

The district court limited defense counsel's closing argument when counsel was discussing whether Moss's medical practice had made a profit. "That argument would have misled the jury by treating profit as an element of the crime and the failure to prove profit as a basis for acquittal."

For sentencing and restitution, the district court calculated the loss attributable to Moss at more than \$6,000,000. “That finding was based on an intended loss of \$6,701,163. That was the amount Moss had billed to Medicare, reduced by 10 percent, which was the court’s estimate of the value of the legitimate medical services he had provided.” Moss contested both the intended loss figure and the 10 percent reduction, arguing that he knew Medicare’s billing practices and knew that Medicare would pay \$2.5 million, the amount he intended to receive, which would reduce the intended loss calculation. The Eleventh Circuit found no clear error on the part of the district court. Moss engaged in intention billing “in a way that would maximize the money he received from Medicare.” While Moss may not have expected 100% reimbursement, it was apparent that he “manipulated his billings to maximize his profits.” He did this by always “billing his claims at a rate higher than the one in Medicare’s schedules.” As Medicare always pays the lower of the billed or scheduled amount, by billing more than the scheduled amount, “Moss ensured that he always got the full amount Medicare would pay.”

The restitution calculation included a 10% reduction for services that had been legitimately provided. Moss argued that the reduction should have been greater. Moss based this argument on a single line of testimony from the trial court proceedings, and it was his burden to show that the services he provided were medically necessary. The Eleventh Circuit agreed with the district court that Moss failed to present sufficient evidence to establish the legitimacy of medical visits. “When services are not medically necessary, Medicare reimburses at a rate of \$0. Because of that, it does not matter how many medically unnecessary visits Moss and his employees may have made to patients, which was the basis of Moss’ estimate. Zero times a thousand is still zero.”

First District Court of Appeal

[Ridenhour v. State](#), 1D21-46 (May 18, 2022)

The First District reversed the granting of a summary judgment in favor of the State, finding Ridenhour to be a sexually violent predator in a civil commitment proceeding. Summary judgment was erroneously granted because there were genuine issues of material fact that had to be resolved by a jury or judge at trial.

The State’s summary judgment motion proceeded on the basis of its own experts, and asserted that Ridenhour was not presenting any experts. Ridenhour’s opposition to summary judgment included his own affidavit contesting the conclusions of the State’s experts and further argued that a dispute remained as to

whether he was likely to engage in further sexual violence if not committed, based on his advanced age, infirmity, successful treatment and family support. The First District disagreed with the conclusions of the State and trial court that Ridenhour’s affidavit presented “only self-serving conclusions of law that fell short of raising a genuine issue of material fact, or of proving the non-existence of a genuine issue of material fact.” Rather, the affidavit provided “evidence of personal factors disputing the State’s case on the crucial issue of whether Appellant was likely to commit sexual violence if left unconfined. Appellant was not required to overcome the State’s position at the summary judgment stage; he merely needed to demonstrate that the facts weren’t wholly crystallized and that a genuine material dispute remained in the case.’

[Westfall v. State](#), 1D22-171 (May 18, 2022)

The First District issued a published opinion explaining why the Court was granting appointed counsel’s motion to withdraw from a postconviction appeal.

Westfall was represented by private counsel for his trial court postconviction motion, which was summarily denied. After private counsel withdrew, the trial court, upon counsel’s request, appointed the public defender as counsel. Upon withdrawal of that office, the court appointed regional counsel.

The entitlement to counsel for postconviction proceedings, including appeals, rests within the discretion of the court. Relevant factors include the nature of the proceeding, its complexity, and the need for substantial legal research. This case was a summary denial – i.e., without an evidentiary hearing – which meant that the appellate review process was streamlined, and the record was simplified. Briefing was not required, as summary denials may be reviewed by the appellate court solely on the basis of the trial court record. For those reasons, appointed counsel’s motion to withdraw as appellate counsel was granted.

Third District Court of Appeal

[Blackman v. State](#), 3D18-1875 (May 18, 2022)

The Third District affirmed a conviction for second-degree murder and addressed a claim that the trial court committed errors with respect to an Allen charge.

The jury began deliberations on a Friday afternoon at 2:52, after a trial of almost three days. Around 5:00 p.m., the jury asked to rehear testimony from one witness. While the audio of that testimony was being prepared, the jury sent a note to the judge, saying: “if we have not made a decision, we will leave by 7:30.” The audio testimony was then played, deliberations resumed around 6:00 p.m., and at 6:47 p.m, the jury returned a unanimous guilty verdict.

During polling of the jury, one juror, Dowell, started crying and when asked if she agreed with the verdict, another juror responded on her behalf that she did not “feel like she can answer.” Upon further inquiry, Dowell stated that it was no her verdict.

While the jurors went back to the jury room, the judge and counsel discussed how to proceed. Defense moved for a mistrial, arguing it was “coercive for Juror Dowell to go back into the jury room in the state she was in.” The court denied the motion for mistrial and instructed the jury that a verdict must be unanimous, and “I am going to give you a further opportunity to either become unanimous or declare that you cannot reach a unanimous verdict.” A renewed motion for mistrial was then denied.

Deliberations resumed at 7:05 p.m. and at 7:09, the jury sent a note: “We cannot reach a unanimous verdict today.” A third motion for mistrial was denied and the judge suggested an Allen charge, which the defense objected to, saying it would be further coercion. The judge then instructed the jury that they would adjourn for the weekend and return on Monday morning. A second juror, Flack, who had spoken up for Dowell at the outset, stated that she, Flack, was not feeling well and was not comfortable with everyone. She was told that she had to return on Monday. A further motion for mistrial based on Flack’s comments and the judge’s response was denied.

On Monday morning, defense counsel asked for a formal Allen charge. The State objected, because the jury had not said that they were deadlocked, and asked only for the jury to deliberate further. Deliberations resumed at 10:30 a.m., and at 10:40, Juror Dowell sent a note saying that she thought the defendant “should have a lesser sentenced due to the lack of evidence, no weapon, no fingerprints, just a reliable witness.” A further motion for mistrial and for an Allen charge was made by the defense, and both requests were denied. The judge then addressed the jury again and advised the jury that “the sentencing phase of the trial is exclusively for the Court.” Deliberations resumed at 10:52 a.m. and the jury returned with a unanimous verdict at 11:00 a.m.

A postverdict motion for new trial based on the foregoing proceedings was denied.

An Allen charge may be given when a jury is deadlocked and standard language has been crafted for it, to strike a balance between urging a unanimous decision and avoiding an atmosphere of coercion. The giving of such an instruction is itself coercive and giving it prematurely may also constitute error.

When Juror Dowell initially dissented from the verdict during polling, the trial court did what it was required to do: direct the jury to go back for further deliberations. An Allen charge was not required at that time because there was no indication that the jury was deadlocked. The jury had been deliberating for less than four hours; Dowell never said she had been coerced; and it was unclear whether “her dissent during polling was a last-minute recantation or whether she had communicated to the other jurors her disagreement.”

As to the note that the jury could not “reach a unanimous verdict today,” the jury was simply stating that it was finished for the day, not that it was deadlocked.

As to Juror Flack requesting to be excused, when the judge told her that she had to show up on Monday morning, Flack “never expressed an inability to agree to a verdict.” Her concerns and the court’s response “had nothing to do with a deadlocked jury or a holdout juror.”

As to Dowell’s note regarding a lesser sentence, the court’s response did not constitute a modified Allen charge. Dowell did not express an inability to reach a decision.

Fourth District Court of Appeal

[Caldwell v. State](#), 4D21-117 (May 18, 2022)

The Fourth District affirmed 41 misdemeanor convictions for violations of conditions of pretrial release, but reversed the portion of the sentence imposing a mental health evaluation as a special condition of probation.

Caldwell was arrested for domestic battery and ordered to have no contact with the victim as a condition of pretrial release. While in county jail, he placed

numerous phone calls to the victim and those calls resulted in the misdemeanor charges for violating conditions of pretrial release.

Caldwell argued that he did not violate a condition of pretrial release because the phone calls at issue occurred while he was still incarcerated, not while he was on pretrial release. The Fourth District disagreed with Caldwell's construction of the relevant statutory language in sections 741.29(6) and 903.047(1), Florida Statutes. "There is no language in either section dictating that a defendant must be released from jail in order to violate the condition of pretrial release prohibiting contact with the victim. To the contrary, the language in section 903.047(1)(b) expressly states that, '[a]n order of no contact is *effective immediately*.'" "

The special condition of probation, the mental health evaluation, had "no relationship to the charged crimes, and does not appear to have any reasonable relationship to Defendant's future criminality."

[Francois v. State](#), 4D21-2112 (May 18, 2022)

The trial court erred in imposing a special condition of probation – "the requirement that the defendant complete and pay for a batterers' intervention program." The defendant did not qualify for the program. "Although the defendant's interaction with the officer arose from an alleged uncharged domestic violence incident involving the defendant's family, the defendant's convictions for battery on a law enforcement officer and resisting an officer with violence did not qualify her for a batterers' intervention program." To qualify, the defendant must be found guilty of a crime of domestic violence, as defined in section 741.28, Florida Statutes. "Domestic violence" refers to a "criminal offense resulting in physical injury or death of one family or household member by another family or household member."