Case Law Update
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Eleventh Circuit Court of Appeals

Seabrooks v. United States, 20-13459 (May 6, 2022)

The Eleventh Circuit reversed the denial of a section 2255 motion in which Seabrooks, who was convicted of being a felon-in-possession, argued that "the district court erred when it instructed the jury on aiding and abetting even though the government failed to prove that Seabrooks knew his co-defendant was a convicted felon."

The conviction and sentence had been affirmed on direct appeal in 2016. While his subsequent post-2016 section 2255 motion was pending before the district court, the Supreme Court issued its opinion in Rehaif v. United States, 139 S.Ct. 2191 (2019), holding that "the government must prove that the defendant 'knew he belonged to the relevant category of persons barred from possessing a firearm' in a prosecution under 18 U.S.C. ss. 922(g) and 924(a)(2)."

The Eleventh Circuit held that Rehaif applies retroactively when brought in an initial motion to vacate. The Supreme Court's holding was deemed a "new rule," and, as such applies retroactively when challenging the conviction. The Eleventh Circuit also addressed and rejected the Government's argument that the claim could not be raised because it was procedurally defaulted. The Court noted distinctions in terminology. "A procedural bar prevents a defendant from raising arguments in a s. 2255 proceeding that he raised and we rejected on direct appeal. . . . A defendant can overcome a procedural bar when, as here, there is an intervening change in law."

"By contrast, a 'procedural default' occurs when a defendant raises a new challenge to his conviction or sentence in a s. 2255 motion. . . . If a defendant fails to raise an issue on direct appeal, he may not present the issue in a s. 2255 motion proceeding unless his procedural default is excused. . . . To overcome a procedural default, a defendant must show either (1) cause and prejudice, or (2) a miscarriage of justice, or actual innocence."

In this case, while the Court expressed doubt as to whether there was a procedural bar based on whether the government raised the issue, and even assuming

that there was, it was excused because Rehaif "caused an intervening change in the law." And, as to the government's claim of a procedural default based on Seabrooks' failure to "challenge his alleged principal liability and personal possession of the firearms on direct appeal," the government waived this argument through its failure to raise it in the district court.

Supreme Court of Florida

In Re: Amendments to Florida Rule of Criminal Procedure 3.851 and Florida Rule of Appellate Procedure 9.142, SC21-537 (May 5, 2022)

Rule 3.851(b)(6), pertaining to the appointment of postconviction counsel in a capital case, was amended and the relevant language now states: "The only basis for a defendant who has been sentenced to death to seek discharge of postconviction counsel in state court must be pursuant to statute due to an actual conflict of interest. Upon a determination of an actual conflict of interest, conflict-free counsel must be appointed pursuant to statute."

Rule 3.851(i)(6), addresses the dismissal of postconviction proceedings upon request of the defendant. The amendment added the following language regarding the colloquy that must be conducted: "The colloquy must also address whether the defendant wants to waive appellate review of the dismissal of postconviction proceedings, if granted." Rule 3.851(i)(7) adds that the court's order of dismissal "must also indicate whether appellate review has been waived."

The amendments were in response to the Court's decision in Davis v. State, 257 So. 3d 100,107 n.8 (Fla. 2018), which recognized "the discrepancy between rule 3.851(i) and the Court's case law." The Court Commentary to the 2022 amendment adds the following:

> The dismissal of a pending postconviction motion pursuant to subdivision (i) does not preclude the filing of a subsequent postconviction motion raising for the first time claims that could be raised under rule 3.851(d)(2)(A), which allows for claims based on newly discovered evidence, or rule 3.851(d)(2)(B), which allows for claims that are based on a newly established fundamental constitutional right previously held to apply retroactively, and claims that are only ripe at the time of issuance of a

> warrant, such as competency to be executed and challenges to execution protocols.

Changes to Appellate Rule 9.142(d), which correspond to the above amendments to Rule 3.851, were also approved.

Second District Court of Appeal

Brown v. State, 2D20-2651 (May 6, 2022)

A contempt conviction, for direct contempt, based on a failure to appear, was reversed as "'the failure to appear pursuant to an order should be treated as indirect contempt" under Fla.R.Crim.P. 3.840. Additionally, even under the direct contempt provisions of Rule 3.830, the trial court failed to provide required procedural safeguards, such as the opportunity to present evidence of excusing or mitigating circumstances.

Garner v. State, 2D21-2009 (May 6, 2021)

The denial of a Rule 3.800(a) motion to correct illegal sentence was reversed as to one of its claims. Garner was charged with first-degree murder, burglary with an assault or battery, and grand theft. The State waived the death penalty and, after a negotiated plea agreement, Garner was sentenced to life in prison for the murder and to guidelines sentences on counts the other counts. The "trial court ultimately imposed a general sentence of life in prison on counts one and two as well as a concurrent term of five years in prison on count three [grand theft]." A "general sentence covering multiple counts is an illegal sentence."

Robinson v. State, 2D21-3127 (May 4, 2022)

The Second District affirmed the dismissal of a Rule 3.800(a) motion to correct illegal sentence.

Robinson argued that his "mandatory minimum life sentence as a prison releasee reoffender (PRR) is illegal because the PRR statute, section 775.082(9), Florida Statutes (2010), permits the mandatory minimum portion of a sentence to be enhanced when a trial judge finds that the defendant committed a qualifying offense within three years of being released from a correctional facility." Robinson argued that the Supreme Court's decisions in Apprendi v. New Jersey and Alleyene v.

United States, prohibit the judge from enhancing the sentence, as "any fact that increased the mandatory minimum sentence must be found by a jury."

Robinson's argument was rejected, as the same argument had previously been rejected in a Second District decision, because "*Apprendi* carved out a specific exception for recidivist statutes like the PRR statute. This court found that because a defendant's date of release from a prior prison sentence is directly derivative of a prior conviction, it need not be found by a jury beyond a reasonable doubt in order for a defendant to be subject to a PRR sentence."

Robinson had relied on a prior Circuit Court decision of the Ninth Circuit, to the contrary. The Second District noted that that decision was "not binding on trial courts within this court's jurisdiction and does not serve as a basis for relief."

Third District Court of Appeal

Christian v. State, 3D21-2218 (May 4, 2022)

Christian, pursuant to a plea, was convicted on two counts of attempted second-degree murder with a deadly weapon/firearm and was subsequently charged with violating probation. In a Rule 3.850 motion, he then sought to "correct charge and sentence," arguing that the "State improperly modifies his charges from aggravated assault to attempted murder, as he had a valid concealed weapons permit and the right to carry his firearm, and he acted in self-defense without depraved mid or disregard for human life." The trial court denied the motion and the Third District affirmed that denial on appeal.

First, it was not clear whether Christian's counsel in the probation revocation proceedings had adopted the motion. Regardless, as the motion challenged the prior convictions, it was untimely, as more than two years had expired from the finality of the convictions before the filing of the Rule 3.850 motion.

Wilkinson v. State Attorney's Office, 3D21-2287 (May 4, 2022)

In 2017, the Third District reversed a life sentence and remanded for resentencing pursuant to Miller v. Alabama. That resentencing had not yet occurred and Wilkinson had been filing numerous unsuccessful motions seeking the disqualification of the trial court judge. In the current mandamus petition, Wilkinson sought to require the State Attorney's Office and Miami-Dade Police Department to

"respond to public records requests that Wilkinson's standby counsel served on those state agencies."

The State responded in the Third District that the documents had already been produced. While the petition was pending in the Third District, another petition, seeking the same relief, had been filed and was still pending in the trial court. As mandamus is an extraordinary remedy, and Wilkinson had another adequate remedy for any claim – i.e., the trial court petition – the Third District dismissed the petition in that Court, especially given that any disposition would require a factual inquiry that the appellate court was "ill-equipped to perform."

Fourth District Court of Appeal

T.E.B. v. State, 4D20-2699 (May 4, 2022)

The Fourth District withdrew its prior opinion in this case and issued a corrected opinion.

T.E.B. appealed an order adjudicating him delinquent for committing attempted first-degree murder, two counts of felony battery, and robbery. T.E.B. sought to present testimony from a neuropsychologist, Dr. Sesta, "that appellant lacked the capacity to form specific intent due to sickle cell disease and mental illness." Dr. Sesta would have said that T.E.B.'s "intelligence and overall neurocognitive ability fell below 2% compared to other juveniles his age," and that he "lacked the capacity to premediate attempted first-degree murder due to his major neurocognitive disorder and associated neurological defects. Alternatively, appellant's actions resulted from an inability to regulate and control his behavior due to brain impairment, likely owing to his sickle cell disease." The trial court excluded the proffered evidence based on case law holding that there is no defense of diminished capacity, as that falls short of the defense of insanity.

The trial court did not err in excluding the evidence because "evidence of diminished capacity is inadmissible." Additionally, the proffer of testimony was not sufficiently preserved. T.E.B. relied, in the trial court, on an unsworn affidavit from Dr. Sesta and a report from the doctor. "However, the substance of these documents showed that appellant sought to admit evidence of *both* his sickle cell disease *and* mental illness. It is clear that evidence of mental illness constitutes diminished mental capacity and thus is inadmissible. . . . At no point did appellant seek to introduce evidence of sickle cell disease alone." And, T.E.B. did not "secure a ruling on the admissibility of evidence of sickle cell disease in and of itself."

T.E.B. further argued that there was insufficient evidence as to felony battery and that counsel was "ineffective for conceding that the battery counts could be enhanced to felony battery." Battery is a first-class misdemeanor and may be enhanced to a third-degree felony based on a prior predicate conviction for battery. T.E.B.'s prior battery, however, was not a conviction; it was a withhold of adjudication which did not qualify as a battery. The two convictions for felony battery were therefore reversed and remanded with directions to reduce them to simple battery. The convictions for attempted murder and robbery were affirmed.

Wattiez v. State, 4D21-1146 (May 4, 2022)

The Fourth District affirmed a conviction and sentence for driving under the influence.

At the sentencing hearing, the defendant did not seek to allocute during counsel's presentation. After both parties completed their presentations and the judge began to orally pronounce the sentence, the defendant then asked for permission to address the court and it was denied. The Fourth District held that the trial court did not deny the defendant her right of allocution. Such a request must be made prior to sentencing, not during the oral pronouncement of sentence.

Dennis v. State, 4D21-1723 (May 4, 2022)

The Fourth District affirmed a conviction for battery by strangulation. The Court found that the evidence was sufficient to sustain the conviction.

The offense of domestic battery by strangulation requires proof that the perpetrator knowingly and intentionally, against the will of another, impeded the normal breathing or circulation of the blood of the victim, "so as to create a risk of or cause great bodily harm by applying pressure on the throat or neck" of the victim.

The victim testified that the defendant picked her up by the neck and, inter alia, held her in "the crook of one arm while he held the victim's hair with his other hand." She said that she did not lose consciousness, but was spitting from her mouth and was "trying to get a breath." An officer stated that there was a little bruising to the neck, but it was difficult to see in a photograph. The defendant testified and claimed that the victim had started the incident by punching and kicking, and scratching his face. He admitted hitting her with an open-handed slap in response, and that it was hard enough for her to have fallen to the ground.

As to the claim that the State "did not present evidence to show that he intentionally impeded the victim's breath," that is generally a question for the jury. He "could have applied the requisite pressure to the victim's neck when he suspended the victim's entire body weight off the ground by holding her 'in the crook of his arm.'" "The jury could also obviously infer that the victim was unable to breathe when she testified that she was 'trying to get a breath.'" Additionally, the Florida statute requires only "impeding" of the victim's breath, not that it be cut off entirely. The State need not prove a loss of consciousness or injury from a lack of circulation. This was also a case involving credibility issue and conflicting testimony, matters for a jury to resolve.

The Appellant also argued that "the state did not prove that he created a risk of or caused great bodily harm to the victim, in part because the photographs of her injuries did not prove injury to her neck." The State, however, was not required to prove injury to the victim, only the risk of great bodily harm. The act of picking the victim up by her neck with his arm and "shaking her around while her feet dangled above the ground was sufficient to create a risk of great bodily harm."

Fifth District Court of Appeal

Navarro v. State, 5D21-405 (May 6, 2022)

After private counsel withdrew from the case, the defendant filed a pro se motion to withdraw plea and the court erred by not conducting an indigency hearing at that time and then, if finding the defendant indigent, by failing to appoint counsel.