Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Stines, 20-11035 (May 31, 2022)

The Eleventh Circuit addressed, for the first time in a published opinion, the interpretation of U.S.S.G. s. 2M5.2(a)(2), regarding the applicable base offense level for defendants convicted of illegally exporting weapons "if the offense involved only non-fully automatic small arms and there were no more than two weapons." "The question here is whether a defendant who exports enough weapons parts for two operable firearms, along with additional parts to service additional firearms, can take advantage of the lower base offense level." The Court answered that question in the negative.

Stines argued that the relevant sentencing conduct was based on the 23 AR-15 parts that were seized at the airport and with which he was charged. He further argued that the offense of exporting those parts involved only non-fully automatic small arms and that the number of weapons did not exceed two fully-functioning weapons. The government argued that the lower base offense level was inapplicable "because the carveout does not apply to offense involving firearm *parts*."

According to the Court, Stines' argument failed because the Guidelines "do not purport to distinguish between *assembled* and *disassembled* weapons. At least in theory, then, an offense involving nothing more than the parts of two AR-15s – that is, two AR-15s broken down to their components – could fit within the scope of s. 2M5.2(a)(2)." Stines' offense involved "eight AR-15 triggers that would service eight AR-15s. So to the extent Stines' offense involving AR-15 *parts* can be described as an offense involving non-fully automatic small arms, the number of AR-15s involved would exceed the maximum two weapons permitted by subsection (a)(2)(A)." The Court considered the canon regarding absurd results, and found that possible absurdities could exist whichever way this Guideline was interpreted.

Stines' second argument, that the district court erred in denying a request for a downward departure was not reviewable on appeal. That decision is discretionary on the part of the district court and is appealable only to the extent that a district

court erroneously believes that it lacked discretion to impose the downward departure.

First District Court of Appeal

Hayes v. State, 1D18-3876 (June 1, 2022)

The First District affirmed convictions for first-degree murder as a criminal gang member; two counts of attempted second-degree murder as a criminal gang member, and one count of discharging a firearm from a vehicle as a criminal gang member.

A fight at a concert led to an "all-out war" between two gangs, and multiple violent incidents led up to the murder for which Hayes was prosecuted. The First District concluded that the multiple violent incidents leading up to the murder were admissible as collateral offense evidence because they "were inextricably intertwined with the January 29 shooting." Those prior incidents were "indispensable to explaining the January 29 shooting. Stated another way, the evidence was necessary to establish the entire context out of which the charged crimes arose and adequately describe the events leading up to the charged crimes."

The prior incidents were alternatively relevant "to the gang enhancement of the penalties against Hayes," under section 874.03, Florida Statues. Under this statute, the State had to prove that "Hayes was a criminal gang member or associate and committed the crime 'with the intent to benefit, promote, or further the interests of a criminal gang.'" "The rape videos and prior violent encounters established the gang feud as an aim and objective of PCE [one of the gangs], and the encounters, particularly the [prior] January 16 drive-by shooting, established Hayes and the co-defendant's adoption and support of that aim. The January 16 shooting also established their ongoing participation in activities that advance that aim and objective."

One witness to the charged shooting, Ms. Brown, identified Hayes from a photo shown to her on the phone of another witness to the shooting. Hayes challenged this photo identification as being unduly suggestive. The First District rejected that argument because "there was no law enforcement involvement in Ms. Brown's initial identification of Hayes. Law enforcement neither arranged the photograph on her brother's phone nor supervised that initial identification. . . . And Ms. Brown's second identification to law enforcement using the same photograph was an exact reiteration of the earlier out-of-court identification involving Ms.

Brown, Mr. Brown, and Ms. McDowell. Because there was no state action underlying Ms. Brown's initial out-of-court identification of Hayes, the trial court did not err in denying the motion to suppress."

Richardson v. State, 1D18-4084 (June 1, 2022)

This case involves a codefendant of Hayes, the opinion discussed above. The First District issued a separate opinion in this case, addressing similar issues. Again, the Court affirmed convictions for first-degree murder, two counts of attempted second-degree murder, and one count of discharging a firearm from a vehicle. All offenses were subject to the criminal gang member enhancement.

The opinion in this case addressed the admissibility of rap videos that purported to be produced by gang members and published on Facebook. Richardson argued that the five videos at issue were inadmissible hearsay. The First District disagreed, based on the coconspirator exception to the hearsay rule. One of the videos showed "Richardson and others walking down a street as the co-defendant taunts an opposing gang." This "was not offered to prove the truth of the matter asserted, as the taunts constituted no more than verbal acts." Another was not hearsay "as it contains no oral or written assertions, nor does it show any nonverbal conduct by a person intended to be an assertion." It showed "firearms spread across a bed." Three others showed "the co-defendant rapping alone in a vehicle." Assuming that they were hearsay, they were admissible under the coconspirator exception, as there was "enough independent evidence to establish an illegal joint venture between many of the PCE members – including Richardson and the co-defendant – to perform acts of violent against 187 [the second gang] members, particularly through drive-by shootings."

The trial court did not abuse its discretion in admitting "unauthenticated Facebook photographs depicting PCE members, including Richardson, displaying gang signs and donning garments with gang insignia." These photos, taken from an unidentified Facebook page, were sufficiently authenticated using the "pictorial testimony" theory of authentication. This has a low threshold, requiring testimony, based on personal knowledge, that the photos "fairly and accurately reflect the events or scene." One witness, with knowledge based on his involvement with the PCE gang, and personal knowledge of Richardson and the codefendant, "testified in detail about each photograph. He described the individuals in the photographs, the locations where the photographs were taken, the esoteric meanings of the different hand gestures displayed in the photographs, and the clothing worn by the members in the photographs."

As in the previously discussed Hayes opinion, the First District found that evidence of prior uncharged shooting was admissible collateral offense evidence, as it was inextricably intertwined with the charged offenses, and the charged offense was "a continuation and consequence of preceding events, which were violent and retaliatory." Again, the prior incidents were relevant to the statutory enhancement based on gang membership.

The First District also found that the evidence was sufficient to show that Richardson was one of the shooters. Eyewitness testimony and DNA evidence "linked Richardson to the vehicle used to carry out the shooting and the Glock 26 handgun used in the shooting. The totality of the evidence also puts Richardson in the vehicle and with the Glock 26 during the relevant timeframe."

Lovett v. State, 1D21-846, 1D21-849 (June 1, 2022)

The First District affirmed in part, and reversed in part, the revocation of probation. One of several violations found by the trial court was not supported by the evidence. The condition requiring payment of court costs and restitution was not supported by the required evidence of the defendant's ability to pay.

Condition 3 required approval before changing a residence. Lovett's probation had been transferred to Delaware. Law enforcement forcibly removed him from that residence and arrested him for resisting arrest, and a Delaware court ordered him not to return to that residence, his mother's. Based on the evidence, this alleged violation was not shown to be willful, and the finding of this violation was also reversed.

While violations of two other conditions were upheld, the appellate court could not determine whether the trial court would have imposed the same sentence for violating probation based solely on the remaining violations. The case was therefore remanded to the trial court for resentencing.

Second District Court of Appeal

Melendez v. State, 2D20-933 (June 3, 2022)

Melendez obtained a new sentencing hearing, pursuant to Graham v. Florida, for his conviction as a juvenile. The new sentencing hearing was expanded to include a plea as to two other cases that were still open. In the aftermath of the

sentencing for all of those proceedings, Melendez argued on appeal that the ultimate sentence was in excess of that to which the parties had agreed.

The Second District would not entertain that issue on appeal because it was not properly preserved for review. "'An issue concerning a sentence which exceeds the terms authorized in a plea agreement is not a sentencing error, but instead is a violation of the plea agreement which must be raised through a motion to withdraw plea." This was an absolute bar to review and could not be entertained as a claim of fundamental error. Nor could the claim be entertained as one of ineffective assistance of counsel on the face of the record for failing to object. The Florida Supreme Court, in Steiger v. State, 328 So. 3d 926 (Fl. 2021), recently held that "[b]ecause a showing of fundamental error is not required to prevail on a claim of ineffective assistance of trial counsel . . . such an unpreserved claim may not be raised or result in reversal on direct appeal."

Bourdeau v. State, 2D21-68 (June 3, 2022)

The Second District reversed a revocation of probation because the probationary period expired prior to the violations alleged in the affidavit of violation.

The facts of this case were governed by the 2015 version of section 948.06(1)(f), Florida Statutes, which provided that upon the filing of an affidavit of violation of probation, and following the issuance of a warrant under section 901.02, the probationary period was tolled pending ruling by the court on the alleged violation. The Fourth District previously held that under that statute, there was no tolling following the issuance of a warrant for a 'noncriminal violation," as in the instant case, because the statutory language referenced section 901.02, which applied to warrants issued for crimes.

Section 948.06(1)(f) was amended in 2017 to remove the requirement that the arrest warrant must be issued under section 901.02. However, that amendment took effect after the expiration of the untolled probationary term.

The State attempted to argue an alternative theory – tolling based on Bourdeau absconding. As that was not raised in the lower court proceedings, and there was no record of any such absconding, the Court rejected the argument.

Wagner v. State, 2D21-3707(June 3, 2022)

The Second District granted a prohibition petition which sought the disqualification of the trial court judge. The "commentary in Judge Bell's order denying the motion for disqualification went beyond simply addressing the legal sufficiency of the motion." That, in turn, mandated disqualification.

The motion to disqualify was based on allegations of the judge's "extrajudicial activities," including "participation in a Christian faith-based organization." There were also allegations regarding political and religious statements made during a recorded "Sunday Sermon," including references to socialism, no fault divorce and abortion. As a result, the defendant alleged a fear that the judge was biased and prejudiced in a DUI case.

The Second District first found that the motion to disqualify was itself legally insufficient to warrant disqualification. However, the judge provided a detailed explanation of the denial of the motion. The judge, in the written order denying the motion "made extraneous comments challenging the allegations in the motion as to his religious beliefs and, in supporting his decision to deny as to the merits of the motion, linking the allegation in the motion by analogy to other cases where facts and their intersection with various religious tenets held by judges resulted in critical examination of that interrelation."

One judge dissented, finding that the written order "does not pass on the truth of Wagner's allegations or refute the accusation that the judge was impartial." The full text of the judge's written order denying the motion to disqualify is included in the Court's majority opinion.

The primary paragraph of the written order as to which the majority and dissent differ in their construction appears to be the following:

> Just as Judge Shadur made an analogy between Judge Brennan and the N.L.R.B. v. Catholic Bishop of Chicago . .. case, a similar analogy between Catholic Justices (Justice Brennan, Roberts, Thomas, Alito, Sotomayor, Gorsuch, Kavanaugh, and Co[n]ey Barret) and abortion related cases (eg. Akron v. Akron Center. . . or Whole Women's Health v. Jackson . . . could be made. The Defendant has presented no facts suggesting that the Court has made any statement about him personally, about the

> charge he is facing or about the law firm he has chosen to substitute in to replace his original attorney. . . . Based on this analysis Defendant's "fears" are not objectively reasonable.

Freeman v. State, 2D21-3948 (June 3, 2022)

The Second District reversed the summary denial of a Rule 3.850 motion for further proceedings.

The motion alleged that Freeman entered into a plea agreement for charges of burglary and grand theft, and counsel was ineffective for not challenging the State's calculation of restitution, because "it included the cost of a paint sprayer that was recovered from a pawn shot and released to the victim before his sentencing hearing." The trial court disposed of the claim by finding it conclusory. The Second District remanded to grant Freeman leave to try to further plead a facially sufficient motion. While not clear, it appears that the insufficiency of the claim as pled related to the absence of an allegation that the defendant was unaware that the paint sprayer had been recovered at the time of the plea agreement or that the pleas were otherwise involuntary as a result of counsel's omission.

Marcus v. State, 2D21-1637 (June 1 2022)

The Second District reversed an order revoking probation because "there was no competent substantial evidence that Marcus changed his residence without permission."

A probation officer went to Marcus' residence and Marcus' mother said he no longer lived there and she did not know where he lived. The officer did not enter the residence to look for Marcus or his belongings. There was no contact between the officer and Marcus for the next six months, and Marcus' mother did not testify at the revocation hearing. Marcus testified that he still lived there at the time of the officer's visit and that his belongings were still in the residence at that time.

> In this case, the probation officer relied on Marcus's mother's hearsay statement that Marcus no longer lived with her and that she did not know where he was. After checking the jail, local hospital, and the FCIC and NCIC databases, the probation officer assumed that Marcus had changed his residence without permission. But checking

> such databases and contacting the jail and a hospital does nothing to establish that a probationer moved from his or her residence.

There was no nonhearsay evidence to corroborate the mother's hearsay statement to the probation officer, and a revocation may not be based solely on hearsay.

Third District Court of Appeal

Jean-Marie v. State, 3D18-1870 (June 1, 2022)

Jean-Marie was convicted for first-degree murder, RICO and other offenses. The RICO predicate offenses included the murder for which the defendant was convicted.

The issue addressed on appeal was whether the RICO statute of limitations was governed by section 895.05(1), Florida Statutes (five years "after the conduct in violation of provision of this act") or the murder limitations period, where murder was a predicate charge of RICO, under the 1996 statutory amendment to section 775.15, providing that for a "felony that resulted in death," there was no limit on when the criminal prosecution could be commenced.

The Court found that the legislature, when amending section 775.15 to provide that a felony that resulted in death could be commenced at any time, was presumed to be aware of "the existing statutory landscape." And, when two statutes are in conflict, "'the later promulgated statute should prevail as the last expression of legislative intent." Based on those rules of statutory construction, the Third District held that the more recent provision in section 775.15(1) ("at any time"), was the controlling provision.

Fourth District Court of Appeal

Marquez v. State, 4D21-1287 (June 1, 2022)

Marquez was prosecuted for violating a Palm Beach County Ordinance for solicitation and distribution on public roads. Adjudication was withheld and he was sentenced. Pending appeal, based on an alleged First Amendment violation, the ordinance was repealed.

As a result of the repeal of the ordinance, the appellate court was deprived of power to enforce the penalty. The Fourth District ordered that the case be reversed and remanded for dismissal of the charge.

Masiello v. State, 4D21-1638 (June 1, 2022)

After a plea agreement, the defendant was released on bond and ordered to return for a scheduled sentencing hearing, with an agreed-upon sentence, subject to the court's discretion as to any lawful sentence if the defendant filed to appear. After several agreed-upon continuances, the sentencing hearing was scheduled and the defendant failed to appear. The court issued a bench warrant and the defendant was subsequently located.

Prior to the ultimate sentencing hearing, the defendant filed a pro se motion to withdraw the plea, arguing that it was involuntary, because counsel misadvised him as to the length of the sentence, and further arguing that he was not advised that his "post plea release before sentencing was part of his written plea agreement." At the next hearing, discussions were held as to whether the defendant wanted to proceed pro se, and whether current counsel should withdraw. The defendant was confused as to why he had to make the decision prior to sentencing. He ended up withdrawing his pro se motion to withdraw plea and proceeded to the sentencing hearing. He was never informed that the could request representation by conflict-free counsel.

On appeal, the defendant argued that he should have been provided conflict-free counsel. The Fourth District rejected the argument because portions of the plea colloquy conclusively refuted the defendant's allegations and he was therefore not entitled to conflict-free counsel for the hearing on the motion to withdraw plea. There was an extensive plea colloquy where the 60-month sentence was referenced, along with the fact that he was being released on the condition that he appear for sentencing. The consequences of a failure to appear were explained in detail, including the possibility that the court could impose a much harsher sentence.

In affirming the conviction and sentence, the Fourth District summarized the state of the law: "When a represented defendant files a *pro se* rule 3.170(f) motion to withdraw plea, the trial court is not required to appoint conflict-free counsel unless it determines: (1) that an adversarial relationship exists, and (2) the defendant's allegations are not conclusively refuted by the record."

Fifth District Court of Appeal

Isom v. State, 5D22-763 (June 3, 2022)

The Fifth District reversed the summary denial of a Rule 3.850 motion as to one of two case numbers, concluding that the trial court erred in finding it untimely.

In a prior direct appeal in that particular case, the Fifth District, on June 12, 2020, dismissed the direct appeal, without prejudice to Isom's "right to seek appropriate and timely postconviction relief below." Isom had two years from that date to file his motion. The two-year period under Rule 3.850 begins to run on the date of dismissal of the direct appeal, even though no mandate was issued by the appellate court.