Case Law Update
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Prepared by
Richard L. Polin

Supreme Court of Florida

In re: Amendments to Florida Rules of Criminal Procedure, et al., SC21-990 (July 14, 2022)

Based on "positive outcomes and efficiencies observed during the pandemic," the Supreme Court adopted rules of procedure that "provide permanent and broader authorization for the remote conduct of certain court proceedings."

With certain exceptions, newly created Rule 3.116 addresses the use of communication technology, to "govern the use of audio-video communication technology in the manner authorized by these rules." Rule 3.116(c) addresses pretrial conferences upon the request of a party or upon the court's own motion, but requires that "before a judge may direct that the defendant participate in the pretrial conference using communication technology, the defendant or the defendant's counsel must waive the defendant's physical attendance at the pretrial conference pursuant to the parties and consider any objections they may have to the use of communication technology before directing that communication technology be used."

Rule 3.116(d) addresses "testimony." A judge may allow "testimony to be taken through communication technology if all parties consent." The rule applies to both hearings and trials, and is predicated on the consent of each party, and the party moving to present testimony through communication technology must set forth good cause for the request. The rule provides for the manner of administering an oath for testimony taken through communication technology. And, "[t]he defendant must make an informed waiver of any otherwise applicable confrontation rights."

The rule regarding first appearances, 3.130, was modified to replace prior terminology with either "audio-video communication technology" or "communication technology." Rule 3.160, pertaining to arraignments, was modified in the same manner.

Rule 3.180, "presence of defendant," was modified, and for a pretrial conference, the defendant "must" be present (replacing "shall"), unless the presence

is waived "in writing or on the record by the defendant or by the defendant's counsel with the defendant's consent." The definition of "presence" has been modified and a defendant is present if the defendant "has a meaningful opportunity to be heard through counsel on the issues being discussed and the defendant." Presence now includes both physical presence in the courtroom, or appearance through "audio-video communication technology" after the required wavier in writing or on the record "for a proceeding that requires the defendant's presence" in certain circumstances, or an authorized appearance by audio-video communication technology for a first appearance.

Rule 3.220 (discovery) has modifications as to terminology, and more detailed modification regarding pretrial conferences, consistent with the prior rule addressing the waiver of presence.

Rule 3.851 (collateral relief after death sentence imposed) contains modifications in the use of terminology. It also has more substantial revisions to the section addressing the Case Management Conferences and Evidentiary Hearings. The modification here pertains to the manner of administration of an oath for the remote proceedings, and the prior language regarding administration of the oath has been replaced by the requirement that the oath be administered in the manner provided in Rule 2.530(b)(2)(B), Fla.R.Jud.Admin.

In re: Amendments to Florida Rule of Criminal Procedure 3.720 and Florida Rule of Juvenile Procedure 8.115, SC21-1680 and SC22-214 (July 14, 2022)

Rules 3.720 (sentencing hearing) and 8.115 (disposition hearing), were both amended to provide that at the sentencing or juvenile disposition hearing, "the court must make a determination if restitution is applicable. The amount and method of restitution is to be determined as provided by law."

Rule 3.720 was further amended to require that the court "address imposition of fees and costs" under section 938.29, Florida Statutes, and to require that the court "give notice of, and afford the defendant an opportunity to contest, any amounts exceeding the statutory minimum."

Eleventh Circuit Court of Appeals

United States v. Stapleton, 19-12708 (July 12, 2022)

Stapleton appealed multiple convictions related to "his role in smuggling aliens into the United States."

The government's delay in securing extradition did not violate the right to a speedy trial. The Court addressed the factors set forth in Barker v. Wingo. The length of the delay, almost four years, triggered the speedy trial analysis and weighed against the government. It did not weigh "heavily" against the government, however, because the reason for the delay was not based on bad faith or negligence. The district court had found that the countries where Stapleton resided during the four-year period both "imposed the onerous requirement of obtaining first-person affidavits from all the aliens involved in a charged alien-smuggling offense before extraditing someone," and further, "that the 33 aliens involved in Stapleton's case had arrived in the United States and 'scatter[ed] to the winds' before Stapleton was indicted." Because Stapleton could not establish that "all of the first three *Barker* factors weigh heavily against the Government, and he hasn't argued actual prejudice [the fourth factor], his speedy-trial claim fails."

A double jeopardy claim that the indictment was multiplicitous and wasn't sufficiently specific, was without merit. Counts 1 and 2 "both charged a violation of the same statute and subsections – conspiracy to encourage or induce an alien to enter the United States," but "they properly charged two different conspiracies rather than a single conspiracy continuing over time." To make this determination, the Court looked at the time of the conspiracies, the persons involved, the statutory offenses charged, overt acts charged, and places where the alleged events took place. The charges here involved conspiracies occurring ten months apart, with different co-conspirators, "including different captains for the boats involved in the migrant landings," different overt acts (different boats, stash houses, and groups of aliens), and some separate places for the events (locations of migrant landings).

Three of the charges did not result in double jeopardy violations because they involved different statutory offenses, each requiring elements not found in the others. A charge under 8 U.S.C. s. 1324(a)(1)(A)(iv) included a mens rea element – "knowledge or reckless disregard for the fact 'that the alien's coming to the United States is a violation of law.'" A charge under 8 U.S.C. s. 1324(a)(2)(B)(ii) required proof of "the purpose of financial gain." The charge under 8 U.S.C. s. 1327 required

"proof of the fact that the alien was inadmissible because of an aggravated felony conviction."

There was no error in admitting collateral offense evidence regarding Stapleton's abuse of migrant women. Stapleton argued at trial "that he was housing the migrants for innocuous reasons – placing his intent at issue," and "the fact that he repeatedly abused them with seeming impunity had probative value because it suggested that he knew the migrants were at his mercy given that they were depending on him to smuggle them to the United States." The Court also noted that Stapleton represented himself at trial, and although the district court had prevented the government from eliciting testimony regarding sexual abuse of the migrant women, Stapleton, himself, through cross-examination managed to elicit that which he had previously succeeded in excluding.

Additionally, evidence of an uncharged alien-smuggling conspiracy was not used to prove bad character; rather, it was used "to explain Stapleton's plan and intent – his modus operandi – and to refute Stapleton's trial defense that he didn't' intend to commit any crimes when he accepted money from the migrants who testified at trial."

A challenge to the serious-bodily-injury enhancement based on sexual assaults was upheld on the basis of one of the victim's testimony; the district court could rely on it notwithstanding her illegal entry into the United States.

Hesser v. United States, 19-13297 (July 13, 2022)

In a prior direct appeal, the Eleventh Circuit affirmed three convictions for tax fraud and one for tax evasion. As to the three tax fraud convictions, the Court found that under a de novo standard of review, the evidence would have been insufficient, but the claims were reviewed for a manifest miscarriage of justice based on counsel's failure to move for judgment of acquittal. As to the fourth charge – attempted tax evasion - the Eleventh Circuit noted that there was "ample evidence" from which the jury could have found tax evasion.

In subsequent proceedings under 28 U.S.C. s. 2255, the district court granted relief as to the three tax fraud convictions, finding counsel ineffective for not moving for a judgment of acquittal. The district court denied similar relief as to the conviction for attempted tax evasion. In the current appeal, the Eleventh Circuit addressed that claim and found that Hesser was entitled to relief.

The Eleventh Circuit reviewed its prior opinion and found that it was "not a model of clarity." The prior opinion held "that the Government failed to prove that Hesser's 2007 tax return was actually false under a *de novo* standard." The Court had come to the same conclusion as to the 2005 and 2006 tax returns. That left, as alleged affirmative acts in the indictment only "that Hesser had removed his assets from examination of the IRS by converting them to gold and that he quitclaimed his house to a trust." The Eleventh Circuit now addressed whether those acts "were proven to be affirmative acts of attempted tax evasion."

Hiding gold from the IRS would be legally significant for attempted tax evasion only if the gold "had been subject to a tax levied on Hesser." Although the Government offered proof of the hiding of gold, the "Government conceded at oral argument" that "the Government never provided any evidence to the jury that the gold was Hesser's." The Government argued that that did not matter since the charge was only for an "attempt." "There is a problem with this argument: attempting to do something non-criminal is not a crime." "The Government asked the jury to convict Hesser for hiding gold bullion in his house so that the IRS could not find it. But the Government never established that the gold was his."

"Without proving that the gold was actually Hesser's, the Government has left open the very real possibility that Hesser committed a mistake of law – that he though he was doing something criminal that was in fact innocuous – or that he did not even think he was doing something criminal in hiding money for the family trust."

With respect to the other act of quitclaiming his house to a family trust, while that was deemed suspicious, the Government did not prove "how Hesser doing so would have any effect on his tax liability." Although a lien was placed on the house, it was not placed on the house until after the transfer of the house to the trust. There was evidence that this was done to eliminate mortgage payments, but that did not correspond to tax evasion.

Thus, counsel was deemed ineffective for failing to move for judgment of acquittal as to this charge, and the conviction was vacated.

United States v. Butler, 21-10659 (July 14, 2022)

The Eleventh Circuit affirmed a life sentence imposed for enticement of a minor to engage in sexual activity and production of child pornography.

The life sentence was substantively reasonable. Butler argued that several relevant sentencing factors – age, amenability to treatment, acceptance of responsibility and the circumstances or prior offenses, were not considered. The Eleventh Circuit disagreed. Acceptance of responsibility "was correctly reflected in [the] Guidelines calculation." The other factors were treated by the district court as "either aggravating or irrelevant rather than mitigating evidence warranting a lesser sentence." The district court found that age was not a mitigating factor. "The court gave great weight to the fact that Butler had engaged in an 18-year pattern of sexually abusive behavior towards children, which reflected the lack of a deterrent effect by his prior convictions, sexual offender registration requirement, or the 115 months he served in the federal department of corrections from 1994 to 2010."

Butler did not identify any "irrelevant sentencing factor that the district court gave significant weight to." As to the history as a repeat sex offender, it was within the court's discretion to weigh that and related factors heavily. Finally, the weight accorded to any single factor rests within the district court's discretion, and the appellate court will not substitute its judgment.

United States v. Lewis, 20-12997 (July 14, 2022)

The Eleventh Circuit affirmed convictions for conspiracy to possess with intent to distribute, and possessing with intent to distribute, five kilograms of cocaine.

The district court did not err in denying a motion to suppress evidence – cocaine and statements from Lewis which were obtained in the aftermath of a traffic stop of a vehicle that law enforcement suspected had been involved in a drug transaction; Lewis was a passenger in the vehicle. When officers removed a bag from the vehicle, Lewis volunteered that the bag was his; it contained the cocaine. He also gave a subsequent, post-Miranda, statement.

In a prior state court prosecution against Lewis, the state trial court suppressed the evidence at issue; the State did not appeal. Lewis argued in federal court that collateral estoppel barred the federal government from relitigating the legality of the traffic stop and the subsequent search that resulted in the discovery of the cocaine. The Eleventh Circuit disagreed. "[I]ssue preclusion applies only when the same issue has been decided *against the same party*, '[and] a litigant seeking to invoke it against a third party must show some kind of privity between the original and current opposing parties." In this case, "[e]ven assuming that [issue preclusion] could apply if all of the elements were met, it would not apply here because Lewis has not

established privity between the state and federal prosecuting authorities in this case." While there was cooperation between the state and federal governments in the investigation and arrest, and while that was relevant to the "identity inquiry," it was "not a sufficient nexus. The bulk of this cooperation occurred before either prosecution was initiated. No evidence has been presented showing federal prosecutors' involvement until after the state case was dismissed. Lewis has not shown the prosecutors were acting as a 'tool' of, or were even 'substantially controlled' by, the federal prosecutors."

During jury selection, Juror 13 stated that because of her religious beliefs and personal experience, she would "have difficulty standing in judgment of someone else." She would follow the judge's instructions and render her opinion as a juror "to the best" of her ability. When asked if she could be fair to both parties, she spoke about her problems in casting judgment and that it would be a struggle for her. The district court granted the government's cause challenge. Two other jurors, 11 and 12, stated that they were "more likely to believe or disbelieve a law enforcement witness." They both said that they would follow the court's instruction to treat an officer's testimony "with equal weight." Juror 11 referenced his "respect for law enforcement," but said he could be impartial. Juror 12 had a relative who worked as a police officer, but she never spoke to the relative about that. She was not asked if she could be impartial. The court denied Lewis's cause challenges as to Juror 11, but not as to 12. Lewis then used a peremptory challenge on Juror 11, a white juror, and the government raised a Batson objection, which the court sustained, after an inquiry, and denied the defense peremptory.

On appeal, the Court addressed all three of these jurors. The cause challenge was properly granted. "Juror 13 stated that, per her moral beliefs, she was not one to sit in judgment of someone else and that would be a struggle for her. Juror 13 never confirmed that she felt capable of following the law and the court's instructions." This was "allowable even though the dismissal was based on the prospective juror's religious beliefs."

The denial of the peremptory challenge was not clearly erroneous, as there was a record of defense counsel's "disparate questioning of Jurors 11 and 12 about their tendency to believe law enforcement witnesses." This was "probative of discriminatory intent," where the two prospective jurors were of different races.

Prior to trial, the court agreed to limit information that the jury would hear about the state court prosecution, but permit the defense to elicit that the drugs no longer existed because they were accidentally disposed of and that the state case had

been terminated. On appeal, Lewis argued that the jury should have been able to hear that the state court concluded that one of the law enforcement officers who testified about the search had not been credible. The district court found that that evidence was not relevant. The Eleventh Circuit did not reach the relevancy issue, finding instead that any error in excluding the evidence was harmless. The evidence presented by the government was described by the Eleventh Circuit as "overwhelming." It included video surveillance of Lewis placing the bag in question into the vehicle before getting into the passenger seat. For similar reasons, the Court rejected an unpreserved error under the Confrontation Clause based on the inability to inquire about the foregoing matters. As "any error in excluding evidence relating to why the state court prosecution ended did not affect Lewis's substantial rights," he could not establish plain error on appeal.

United States v. Watkins, 19-12951 (July 15, 2022)

The two defendants, a father and son, both proceeded to trial pro se on charges of conspiracy to commit wire fraud and bank fraud, and multiple counts of both wire fraud and bank fraud. They were convicted on all counts. The Eleventh Circuit affirmed the convictions and sentences.

Sufficient intent was found to exist as to the father's convictions. Emails were used to show that the defendant sought large sums of money from victims, supposedly for the defendant's business projects, but that the defendant intended to use the monies "to pay expenses entirely unrelated to Senior's business ventures." As to some of the other charges, the emails again showed that monies were sought, purportedly for business ventures, but the defendant intended to use the monies for payment of large sums of past-due alimony. Other emails were used by the defendant to make purported "progress reports" on the investments, enabling a jury to concluded that those reports were sent to "investors to deter them from peering too closely into Senior's use of their investments."

Junior challenged the sufficiency of evidence, arguing the absence of false, fraudulent or misleading statements to one of the key investors, Charles Barkley. The emails between Junior and Senior sufficed. Junior was copied on the emails between Senior and Barkley. Junior also admitted to being the office manager and bookkeeper for Senior's businesses, enabling the jury to infer that Junior knew the funds involved could be used only for business purposes and not for his personal expenses, and that Junior thereby knowingly and intentionally aided his father in committing wire fraud.

The Court also found sufficient evidence as to the conspiracy convictions for both defendants. Junior was his father's overseer of administrative functions of the business, handling any necessary bank transactions; Junior was copied on multiple emails between Senior and the investors, many of which contained false statements; and "Junior himself devised a plan to solicit money from Charles Barkley, money that would be used to pay personal, not business, expenses."

As to the father's bank fraud conviction, neither the father nor another individual the father was using to obtain a large bank loan, informed the bank that the loan was intended for the father, as opposed to the individual the father was using to obtain the loan. That individual, acting in concert with the father, misrepresented the purpose of the bank loan. The father argued that there were no misrepresentations as to "the requested loan amount or the terms of the agreement," and that concealing the true recipient, i.e., the father, was thus irrelevant. "Senior seems to suggest a bank has no interest in truly knowing who it is lending its money to or what purposes they intend to put the money towards." "This argument is plainly nonsensical."

First District Court of Appeal

Richardson v. State, 1D21-1022 (July 13, 2022)

Richardson challenged the sufficiency of the trial court's findings as to the admissibility of child hearsay statements. This argument was not preserved for appellate review. The "trial court must be put on notice of the alleged deficiency after its ruling."

Second District Court of Appeal

Massad v. State, 2D21-849 (July 15, 2022)

The Second District reversed the conviction of the former mayor of the city of Port Richey for conspiracy to obstruct justice falsely under the color of law; the evidence was insufficient.

Massad was in the Pasco County Jail, on unrelated charges, after having resigned as mayor. He was charged with conspiring with the subsequent acting mayor, Terence Rowe. Rowe had requested the file on the officer who arrested Massad in the unrelated charges. Shortly afterwards, a jail call between Massad and Rowe was recorded, and the two discussed Massad's prior plan to disband the city

police department and replace it with the County Sheriff's Office, and to use funds from the disbanding of the city police department to support a dredging project. Massad believed he had been investigated and arrested because of his plan to disband the city police department and he urged his successor to be careful.

With respect to the firing and subsequent rehiring of the officer who arrested him, Massad believed that that officer was "in on everything," and told Rowe that "anything you can do is good." After further discussions of the dredging project and the city police department, Rowe responded, "I am on top of it." Over the next few days, Rowe followed up on the request for the officer's file, which had not yet been produced. After he received it, he requested further documents regarding that officer's arbitration hearing. When the City Manager learned of these requests, he warned the officer that Rowe was coming after him. The officer contacted FDLE, which resulted in the investigation of Massad in this case. Rowe and Massad were both arrested.

Here, "there was no evidence that anyone acted falsely under color of law in an attempt to influence, intimidate, harass, or retaliate against Officer Howard. The only evidence presented by the State was that Mr. Rowe asked the clerk for a copy of Office Howard's personnel file and documents associated with Officer Howard's arbitration proceeding. The State stipulated that these files were public records subject to disclosure under chapter 119, Florida Statutes. Mr. Rowe requesting and obtaining these files can hardly be said to be illegal, nor considered 'acting falsely under color of law.' While it is certainly conceivable that Mr. Rowe could have used these documents in an attempt to intimidate or retaliate against Officer Howard, there was no evidence of such an attempt, nor was it the topic of any discussion between Mr. Massad and Mr. Rowe." Nor was there evidence of any agreement to use the documents for retaliations against Officer Howard.

The Court included admonitions regarding the misuse of conspiracy charges, adding that here, "two friends and coworkers talking about one person's pending criminal case does not amount to criminal conspiracy."

Thompson v. State, 2D21-3734 (July 15, 2022)

After a guilty plea and imposition of community control and probation, Thompson sought to strike the special condition that he "consent to random warrantless searches by law enforcement officers and the community control/probation officer." The trial court denied the motion to strike and on appeal

from the convictions and sentences, the Second District held that that condition was erroneously imposed.

The Supreme Court, in Grubbs v. State, 373 So.2d 905, 906 (Fla. 1979), previously held that such a warrantless search by a probation officer is allowed, but "such general authority does not extend to all law enforcement officers." Based on Grubbs, which was partially superseded by United States v. Knights, 534 U.S. 112 (2001), law enforcement officers other than the probation officer or community control officer require "reasonable suspicion that the defendant on community control or probation is engaged in criminal activity."

Williams v. State, 2D21-3795 (July 15, 2022)

The summary denial of a Rule 3.850 motion was reversed for an evidentiary hearing.

The motion alleged a claim of newly discovered evidence, based on an attached affidavit from a witness who stated that he witnessed the fight in question, and that Williams remained in the backseat of a car while the driver and front seat passenger had exited the car and struck the two victims, while Williams did not participate.

The trial court, in concluding that this new evidence was not likely to produce an acquittal on retrial, erred by "weighing the evidentiary conflicts between Mr. Alexander's affidavit and the trial testimony without the benefit of an evidentiary hearing."

Third District Court of Appeal

Estache v. State, 3D18-2322 (July 13, 2022)

On appeal from multiple convictions, including first-degree murder, attempted first-degree murder, burglary with an assault, attempted home invasion robbery, attempted armed robbery and unlawful possession of a firearm during a criminal offense, the Third District reversed the convictions for attempted home invasion robbery and unlawful possession of a firearm, while affirming the remaining convictions. The convictions that were vacated had resulted in a double jeopardy violation.

First, the dual convictions for burglary with an assault and attempted home invasion robbery violated double jeopardy and the crime of burglary of a dwelling with an assault was subsumed by the offense of home invasion robbery. Thus, the conviction for attempted home invasion robbery was vacated.

Likewise, the conviction for attempted armed robbery was "completely assumed within the crime of attempted home invasion robbery," and, once again, the attempted home invasion robbery had to be vacated. As it had already been vacated based on the prior double jeopardy issue, this argument was moot.

Finally, the conviction for unlawful possession of a firearm resulted in a double jeopardy violation, as the "double jeopardy clause bars both a conviction and sentence for the crime of possession of a firearm during the commission of a felony" and the conviction for the felony which was enhanced based on the firearm.

State v. Rojas, 3D21-1018 and 3D21-1019 (July 13, 2022)

The defendant moved to dismiss the State's appeal from prison sentences imposed upon revocation of community control because Rojas completed the sentences pending the State's appeal. Rojas argued that the State's success on appeal, requiring service of additional prison time, would violate double jeopardy where the current sentence had already been completed.

The Third District disagreed. Once a sentence has been fully satisfied, even if illegal, "a trial court may not increase or amend the sentence, as this would violate a defendant's double jeopardy rights." However, "a defendant does not have an expectation of finality that triggers double jeopardy when the government is pursuing a lawful appeal of a sentence." "Where, as here, the sentencing order under which the defendant has completed his sentence is on direct appeal, the defendant is imputed with knowledge of the pending appeal and, therefore, cannot have a legitimate expectation of finality until the appeal is completed." The motion to dismiss based on double jeopardy was therefore denied.

Fifth District Court of Appeal

A.L.P. v. State, 5D22-1566 (July 15, 2022)

A petition for writ of prohibition to disqualify a judge was granted. Factual details of the allegation in the motion to disqualify are not set forth in the opinion, but the Fifth District notes that: "here, the motion to disqualify alleged that the trial

judge made specific comments, before evidence was ever introduced in the case, that would put a reasonably prudent person in well-founded fear of not receiving a fair or impartial hearing. While a trial judge may form mental impressions and opinions during the course of a hearing, he or she may not, as it appears the presiding judge did here, prejudge the case."