Case Law Update
August 1, 2022
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

King v. State, 20-14100 (July 28, 2022)

King sought to challenge his sentence in a habeas petition filed under 28 U.S.C. s. 2255, arguing that he was entitled to relief pursuant to the Supreme Court's decision in United States v. Davis, 139 S.Ct. 2319 (2019), which held that the residual clause of 18 U.S.C. s. 924(c), pertaining to crimes of violence, was unconstitutionally vague. King raised the claim in a second motion under section 2255, and the district court found that King had waived the right to pursue the claim by virtue of his having originally entered a guilty plea and waiving the right to appeal the sentence.

By virtue of the waiver of the right to appeal the sentence, King gave up the right to challenge the sentence unless it exceeded 84 months in prison or resulted in an outside-the-Guidelines sentence, as that was the scope of his waiver of the right to appeal the sentence. The current argument, based on Davis, did not challenge the sentence on either of those limited grounds.

There are also some categories of unwaivable claims, such as sentences exceeding the statutory maximum, but those categories were not involved here. "[L]egal developments that may or may not someday occur," do not fall into the category of an unwaivable claim. When parties enter into an appeal waiver, they "understand that a higher court could later announce a new legal rule relevant to the defendant's conviction or sentence." "That possibility generates risk that the plea agreement may someday be open to attack, whether on direct appeal or through collateral review. An appeal waiver eliminates that risk for the government; the waiver is valuable precisely because it allocates the risk to the defendant. If a new constitutional rule favoring the defendant is later announced, no underlying assumption of the plea agreement or its appeal waiver has been upended. All that has happened is that the government's wager has paid off – just as the defendant's wager pays off in the many cases in which no new rule provides a basis for appeal."

First District Court of Appeal

Department of Children and Families v. State Attorney, Fourth Judicial Circuit, 1D21-2815 (July 27, 2022)

A trial court ordered the Sheriff to transport a criminal defendant "to a mental health treatment facility designated by [DCF]," "within 72 hours, and upon notification of an available bed space by [DCF]." When that did not occur after 27 days, the public defender initiated contempt proceedings against DCF and the trial court ordered DCF to reimburse the county jail for daily expenses at the rate of $67 per day for days "that exceeded 15 days from the date of the commitment order."

DCF challenged the sanction through a certiorari petition, which the First District treated as a final appeal and the First District reversed the contempt order. "Because [DCF] was a non-party in the underlying criminal case, the contempt order requiring it to pay the Sheriff's Office constitutes a final appealable order."

The First District had difficulty determining whether the contempt order was civil or criminal contempt, and reviewed it under standards applicable to both. If it was intended to compensate for loss, there was no evidence establishing the jail's actual loss. The trial court adopted $67 per day based on its "own sources."

Alternatively, if the order was intended as "a coercive sanction unrelated to actual damages to force the department into providing the defendant with bed space in a mental health treatment facility, then the order needed to include a purge provision. . . . Here, [DCF] asserted that it could not comply or purge the contempt due to personnel and financial limitations beyond its control. And no party presented evidence to the contrary."

Finally, as to criminal contempt, "the trial court did not consider evidence of the Department's willfulness, even though the Department asserted that the unavailability of treatment facility space was out of its control."

Second District Court of Appeal

Harris v. State, 2D21-2601 (July 29, 2021)

On rehearing, the Second District withdrew its prior opinion and issued the current opinion.

The Second District affirmed an order holding Harris in indirect civil contempt "for refusing to provide the passcode to access his iPhone in connection with a search warrant." Harris had not yet been charged "with any crime related to his phone," and his "arguments challenging the warrant's issuance and the propriety of the traffic stop and seizure of his iPhone are, therefore, premature at this point." The current ruling "should not be understood as ruling on any of the Fourth Amendment arguments Mr. Harris has raised. To the contrary, if the State ultimately pursues charges against him in connection with any evidence found on his iPhone, Mr. Harris will have – and the court below may be called upon to consider – the full panoply of protections afforded under the state and federal constitutions."

The Court further noted that Harris "has not argued that being held in contempt for refusing to provide his iPhone's passcode constitutes compulsion of potentially testimonial evidence."

Third District Court of Appeal

Gonzalez v. State, 3D2901525 (July 27, 2022)

The Third District addressed multiple claims regarding the trial court's holding a probation revocation hearing and sentencing hearing via Zoom.

Key to the Court's decision in this case was that the defendant participated without objection and "while rule 3.180 was temporarily suspended." The Court therefore reviewed all claims for fundamental error and found that fundamental error was not demonstrated.

The Court relied on its prior decision in Clarington v. State, 314 So. 3d 495 (Fla. 3d DCA 2020), with respect to the probation revocation proceeding, as the basis for rejecting claims based on rule 3.180, due process and the confrontation clause. There, the Court had note that "to the extent that rule 3.180 could be construed to limit or prohibit [a] remote probation violation hearing . . ., AOSC 20-23 suspends application of that rule." Additionally, "a probation violation hearing is a post-adjudicatory proceeding rather than a 'critical stage of trial' or a 'criminal prosecution.'" And, the remote proceedings at issue were viewed as being of a "temporary nature," balancing the interests of the defendant and those related to Covid-19 and public health and safety.

With respect to the sentencing hearing, the Court relied on the Fourth District's decision in Brown v. State, 335 So. 3d 123 (Fla. 4th DCA 2022), where

that Court found the absence of fundamental error. Relevant points were that that rule 3.180 had been suspended temporarily; that the defendant "was not denied private access to his counsel during the hearing," that the defendant "had a meaningful opportunity to be heard through his counsel at the hearing," that the defendant "was able to present all of the evidence and the argument which he sought to introduce at sentencing," and that technical difficulties did not impede the presentation of mitigation argument to the court.

A claim that the remote proceedings interfered with the constitutional right to effective assistance of counsel was rejected because the trial court had used the "breakout room" feature, enabling private communications. The defense did not report any technical issues after an initial problem was resolved at the beginning of the hearing.

While it would probably be "optimal to have counsel sitting next to the defendant at the same table," this was "not a case where either Gonzalez or his attorney notified the trial court that some infirmity of the remote platform hindered Gonzalez's counsel's effectiveness, and, even on appeal, Gonzalez has not identified any such infirmity." The Court refused to adopt Gonzalez's position that "a lawyer who is not sitting next to a defendant at counsel table during a probation violation hearing or a probation sentencing hearing is ineffective as a matter of law," so as to result in fundamental error.

As to the Confrontation Clause claim for the sentencing hearing, the Court noted case law suggesting that the Confrontation Clause is not applicable at a non-capital sentencing hearing, but did not reach the merits of that argument, because at the hearing in this case, "the trial court considered no additional witness testimony or testimonial evidence during Gonzalez's probation violation sentencing hearing."

Sampson v. State, 3D21-2005 (July 27, 2022)

The Third District reversed the denial of a motion to correct an illegal sentence under rule 3.800. The scoresheet that was used was incorrect.

The State conceded that the wrong scoresheet was used, but argued that the error was harmless because the sentence was within the statutory maximum and the trial court could have had a basis for imposing an upward departure sentence. The Third District could not agree with that because the trial court had not made such findings and the record before the appellate court did not establish that the trial court would have made such findings but for its reliance on the improper scoresheet.

The trial court, when it imposed the original sentence, used the Criminal Punishment Code scoresheet. However, the CPC went into effect on October 1, 1998, and the offenses in this case were committed in May, 1997, and the sentence to be imposed was therefore governed by the Sentencing Guidelines scoresheet that was in effect at that time.

Under the guidelines in effect in 1997, prior to the CPC, the fact that sentence fell within the statutory maximum was not the end of the inquiry, because the pre-CPC guidelines created sentencing ranges within the statutory maximum, and the caps on those ranges could be exceeded only through the imposition of valid reasons for upward departures.

Brown v. State, 3D22-367 (July 27, 2022)

The Third District affirmed the summary denial of a Rule 3.850 motion. In addition to reciting the bars against successive motions and relitigation of claims that have previously been litigated, the Court also noted that "'the law is clear that even if Brown's arrest was illegal, this does not void his convictions or sentence.'"

Fourth District Court of Appeal

Gibson v. State, 4D21-660 (July 27, 2022)

The Fourth District rejected the defendant's argument that the trial court considered conduct for which the defendant was acquitted when it imposed sentence.

At the hearing regarding designation as a dangerous violent felony offender of special concern, the prosecutor mentioned a prior sexual battery charge for which the defendant was acquitted. At the time of referencing that, the prosecutor noted that the only thing that could be considered was "something he did while he was on probation . . . otherwise it gets reversed on appeal." And the Sate was not "asking the court to consider charges for which the defendant was ultimately acquitted in making [its] determination at sentencing down the line." The judge did not make any reference to the charge, either orally or in writing.

A public defender's fee of $500 exceeded the statutory maximum and was ordered reduced to $400. The breakdown of the $400 is detailed in the court's opinion, and lesser amounts were allocated to each of several distinct proceedings –

three different probation violation proceedings and an additional "VOP application fee."

Kohler v. State, 4D21-1680 (July 27, 2022)

The Fourth District affirmed a conviction and sentence for driving under the influence, causing or contributing to injury to a person or property.

The trial court erred in admitting hearsay testimony, but it was found to be harmless error. Over objection from the defense, a deputy was permitted to testify "that the victim had identified the defendant as the driver of the vehicle which had caused the crash." Although section 90.801(2)(c), Florida Statutes, exempts certain identification testimony from the definition of hearsay, in order for testimony to satisfy that statutory provision, the declarant – in this case the victim – must have been "subject to cross-examination concerning the statement." Critically for this case, when the State presented the testimony of the victim, the State "did not ask the victim whether she had informed the responding deputy that the defendant had been the driver of the vehicle which had caused the crash." As a result, "the victim was not subject to cross-examination regarding such a statement before the responding deputy later testified to the victim having made that statement."

In explaining why the victim had not been subject to cross-examination regarding the identification statement, the Court noted that cross-examination is limited to the subject matter of the direct examination. And, as the identification statement was not the subject of direct examination, defense counsel could not engage in cross-examination of the victim regarding that statement.

The error was found to be harmless because of circumstantial evidence showing "that the defendant was the driver of the vehicle which had caused the crash," and patrol vehicle video evidence showing spontaneous incriminating statements by the defendant.

Elliot v. State, 4D21-2541 (July 27, 2022)

The Fourth District reversed the imposition of certain costs at sentencing. The assessment of the $50 investigative cost was improper because the State had not requested reimbursement. The assessment of a $200 prosecution cost exceeded the statutory maximum of $100 absent demonstration by the state of the greater amount. And, the State did not request an assessment in excess of $100.

In Re: Final Report of the 20th Statewide Grand Jury, 4D21-3640, et al. (July 27, 2022)

The Court denied motions for rehearing, rehearing en banc and for certification. The Court's prior decision, discussed in the Case Law Update of June 20, 2022, addressed issues regarding grand jury secrecy and the scope of investigative authority of a statewide grand jury. One judge issued a dissenting opinion as to the denial of certification. The dissenting judge would have certified the following question as one of great public importance to the Florida Supreme Court:

> WHETHER A STATEWIDE GRAND JURY EXCEEDS ITS AUTHORITY AND JURISDICTION WHERE IT INVESTIGATES MATTERS SOLELY INVOLVING A SINGLE CIRCUIT OR COUNTY, AND WHERE ITS REPORT DOES NOT CONCERN ANY MATTERS INVOVLING MORE THAN ONE CIRCUIT, AS ITS JURISDICTION IS DEFINED IN SECTION 905.34, FLORIDA STATUTES?

Fifth District Court of Appeal

Spear v. State, 5D19-1747 (July 29, 2022)

In a recent decision, the Florida Supreme Court held that the trial court, in this case, erred by sua sponte reducing an erroneously excessive amount of jail credit and prison credit that had been awarded at sentencing. The Fifth District now withdrew its prior mandate and ordered that the credits be restored.

One judge authored a special concurrence to urge trial courts "to be especially diligent regarding their jail credit calculations and their sentencing paperwork," "in light of the relatively limited time frame" in which some errors may be corrected. In this case, as a result of the erroneous calculation by the trial court, Spear was now receiving "an additional 300 days of prison credit in one of his cases for time that he clearly did not serve prior to resentencing."