Case Law Update
August 15, 2022
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. Witt, 21-10557 (August 9, 2022)

The Eleventh Circuit affirmed the convictions and sentence for conspiracy to commit wire fraud, theft of government funds and aggravated identity theft. The offenses related to a "scheme to defraud the federal government out of relief funds intended for farmers affected by drought and fire."

The district court did not err in denying a motion for new trial based upon the weight of the evidence. The first part of this claim was based on a challenge to the credibility of the government's main witness, who was facing 180 years in prison for 38 charges and who had offered contradictory sworn statements. The Eleventh Circuit, in rejecting the claim, noted corroborative testimony from another witness; the fact that Witt had offered the contradictory evidence for the jury to consider as impeachment; and "it simply can't be that any time the government uses a cooperating witness, that witness's testimony itself constitutes a ground for new trial." The Court also rejected Witt's argument that the evidence adduced was "thin." The Court went through the key evidence to show how Witt's factual challenges were explained by witnesses.

The 28-month prison sentence was held to be substantively reasonable. The statutory minimum for one of the offenses, aggravated identity theft, was two years in prison. The guidelines range, after a downward adjustment of four months, was 28 to 34 months, and the district court imposed the bottom-of-the-Guidelines sentence. The primary argument on appeal was that the court should have imposed home detention for a portion of the prison sentence. Witt's argument was based on the premise that her sentence fell in the guideline range of Zone C of the sentencing Table, the minimum of which included supervised release with home detention for up to one-half of the total sentence. The Eleventh Circuit found that Witt's argument failed because her applicable guideline range fell within Zone D, not Zone C, and that negated the entire argument.

United States v. Pate, 20-10545 (Aug. 10, 2022)

The Eleventh Circuit affirmed convictions for offenses arising out of 18 U.S.C. s. 1521, which prohibits the filing of a false lien or encumbrance against the property of any officer or employee of the United States "on account of the performance of official duties." The liens involved were filed against the former commissioner of IRS and a former Secretary of Treasury and were without dispute retaliation for acts performed as part of their official duties. The issue of first impression in the Eleventh Circuit was that the liens were filed after the victims "had left their positions with the federal government."

The Court addressed that issue and held that section 1521 applied "to false liens filed against former federal officers and employees for official actions they performed while in service with the federal government." The Court's analysis focused on interrelated provisions of sections 1521 and 1114. Section 1521 prohibited the filing of the false lien against the property of any individual described in 18 U.S.C. s. 1114, "on account of the performance of official duties by that individual. . . ." Section 1114 referred to officers or employees of the United States government "while such officer or employee is engaged in or on account of the performance of official duties. . . ."

The key phrase for statutory construction as "on account of the performance of official duties" in s. 1521, as it interacted with the words "any officer or employee" in s. 1114. "Thus, s. 1521 makes it illegal to file a false lien against the property of a federal officer or employee because of something he *did* as part of his official duties. And an individual who files a false lien against the property of a federal officer or employee for reasons unrelated to the performance of official duties does not fall within the scope of s. 1521." "Because s. 1521's prohibition depends upon what an individual did while acting as a federal officer or employee, and not simply his employment status at the time of the action at issue, the natural reading of the statute's language leads us to conclude that the terms 'officer' and 'employee' encompass both current and former officers and employees."

One judge dissented, arguing that the majority's construction of the statute "contravenes the text, structure, and statutory context" of the two statutory provisions.

First District Court of Appeal

Florida Department of Corrections v. Gould, 1D19-1149 (Aug. 12, 2022)

A majority of the en banc court denied a motion for certified question of great public importance or a certified conflict. The motion was filed by the Department of Corrections. The issue that had been decided in the prior decision of the Court was whether inmates convicted of attempted sexual battery are eligible for incentive for gain-time under section 944.275(4)(e), Florida Statutes. Two judges dissented and would have certified conflict.

Reynolds v. State, 1D20-2968 (Aug. 10, 2022)

The First District affirmed a conviction and sentence for second-degree murder.

The evidence was sufficient as to the depraved mind element of second-degree murder. The killing arose out of a dispute regarding the title to a vehicle which the defendant had recently sold to the victim's girlfriend, but apparently had not been paid for the vehicle. A confrontation ensued at a gas station, where an argument escalated and the defendant ended up slashing the victim's throat with a knife, killing him. The Appellant argued that the ill will for second-degree murder was not directed towards the victim. The First District stated: "In fact, [the defendant] stepped around the Victim's girlfriend to attack the Victim, directed curses and 'bowed up' at the Victim (who had made no threatening gestures), and then fatally slashed the defenseless man's throat. Nothing about these facts establishes that the Appellant's actions were free of ill will towards the Victim or amounted only to some momentary misjudgment. Indeed, the deep slash completely through the largest muscle in the Victim's neck and through the internal jugular vein to the point of putting a notch in the bone of his cervical vertebrae near his spine showed a concerted determination and deliberateness that is probative of Appellant's evil intent towards the Victim and indifference to human life."

Graphic photos of the slash wound of the victim were relevant and properly admitted. They went to "the nature of Appellant's action and severity of the wound as described by the medical examiner. They are probative of Appellant's disposition towards the Victim and human life." Nor were they "so shocking as to preclude their use." The jury had been made aware during jury selection that there would be bloody photos and they were asked whether that would "keep them from deliberating

fairly." They were also "instructed appropriately to avoid acting out of prejudice, bias, or sympathy, or because they felt sorry for or were angry at anyone."

One comment by the prosecutor, in closing argument, "that he was personally shocked by certain evidence was improper," but the isolated comment "did not impact the fundamental fairness of the proceeding, preclude the jury from making a reasoned assessment based on the evidence, or deny due process."

Woodward v. State, 1D21-1465, 1D21-1467 (Aug. 10, 2022)

Several grounds for revocation of probation required a monetary component, but the judge failed to determine Woodward's ability to pay. Those grounds for revocation were therefore stricken, but the probation revocation was otherwise affirmed.

One judge dissented as to the striking of the monetary violations, concluding that the Court should not even have reached those conditions where the revocation was otherwise validly based on other grounds.

Rivers v. State, 1D22-1190 (Aug. 10, 2022)

The First District reiterated its prior holding that the Supreme Court's decision in Alleyne v. United States, 570 U.S. 99 (2013), does not require a jury finding as to the date of a defendant's prison release for the purpose of determining whether the defendant qualifies for sentencing as a prison releasee reoffender.

Second District Court of Appeal

DeCola v. State, 2D22-817 (Aug. 12, 2022)

On appeal from the denial of a Rule 3.850 motion, where the motion was correctly deemed successive as to four claims, the Second District reversed and remanded with respect to the fifth claim, which the trial court lacked jurisdiction to deny.

The lower court summarily denied the motion asserting the first four claims on February 7, 2022. The amended motion, reasserting those four claims, added a fifth claim of cumulative error. DeCola then filed a notice of appeal as to the order denying the original motion, and one week later, the trial court denied the amended motion. "Here, because it had previously denied the first four grounds for relief on

the merits in its February 7, 2022, order, the postconviction court correctly concluded that 'any further supplements on those particular claims [were] successive,' and correctly denied the first four claims as such."

The lower court then concluded that the cumulative error claim lacked merit. However, that claim related to the first four claims. And, because the appeal was already pending as to the order denying the first four claims, the trial court lacked jurisdiction to rule on the amended motion. During the pendency of a postconviction appeal, the trial court retains jurisdiction to rule on motions that raise only issues that are unrelated to those which are being reviewed by the appellate court.

Third District Court of Appeal

Alvarez v. State, 3D22-928 (Aug. 10, 2022)

During the pendency of a direct appeal, the trial court designated Alvarez a sexual predator under section 775.21, Florida Statutes. Alvarez subsequently filed a motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a), arguing that the trial court lacked jurisdiction during the direct appeal to amend his sentence, by adding the sexual predator designation, absent a proper motion under Florida Rule of Criminal Procedure 3.800(b)(2).

The Third District disagreed and affirmed the denial of Alvarez's 3.800(a) motion. The designation of Alvarez as a sexual predator under section 775.21 is "neither a sentence nor a punishment but simply a status resulting from the conviction of certain crimes." As a result, the limitations of Rule 3.800(b)(2), regarding amendments of sentences pending a direct appeal, were inapplicable.

Fourth District Court of Appeal

Walk v. State, 4D21-557 (Aug. 10, 2022)

The trial court failed to award proper credit for time served. Walk was sentenced for three third-degree felonies. The sentence was modified to 18 months in prison followed by 10 years of probation. "The court did not announce that the sentences would be served consecutively. Accordingly, the written sentence provided that both the prison portion and the probation portion would be served concurrently."

While on probation after the prison portion, Walk moved to correct the sentence, arguing that the 10-year probationary sentence to be served concurrently was an illegal sentence, exceeding the statutory maximum of five years for the third-degree felonies. He was resentenced to 18 months in prison on count I, with credit for time served on count II to five years of probation, and on Count III to five years of probation, "all to be served consecutively." He sought 30 months of credit on the probationary sentences of counts II and III for time already served. The court granted it as to Count II, but not Count III.

Walk was entitled to the credit against each count "for the time he served on probation concurrently on each offense."

Copeland v. State, 4D21-1651 (Aug. 10, 2022)

An assessment of $50 in investigative costs was reversed because the State did not request reimbursement for such costs. An assessment of $200 in prosecution cost was reversed because costs in excess of $100 are permitted only upon sufficient proof.

Francois v. State, 4D21-2112 (Aug. 10, 2022)

The Fifth District granted a motion for rehearing and issued a new opinion in this case. The condition of probation prohibiting the defendant from "visiting places where intoxicants, drugs, or other dangerous substances are unlawfully sold, dispensed, or used," was modified to reflect that the defendant may not "knowingly visit" such prohibited places.

The requirement, in the written order, that the defendant "pay the costs of her substance abuse and mental health evaluation and treatment" was stricken. The court did not orally pronounce the requirement of payment at the sentencing hearing and this was a special condition of probation that could be imposed only if orally imposed prior to the written sentence.

The special condition of probation requiring completion and payment for a batterers' intervention program was stricken because the defendant's "convictions for battery on a law enforcement officer and resisting an officer with violence did not qualify her" for the program. The program is available only for those found guilty of crimes of domestic violence as defined in section 741.28, Florida Statutes.

Fifth District Court of Appeal

Batta v. State, 5D21-1655 (Aug. 12, 2022)

The defendant's sentence, as a violent career criminal, was reversed. One of the qualifying predicates for VCC sentencing is any forcible felony, as described in section 776.08, Florida Statutes. Batta had a prior conviction for battery on a person over the age of 65. That, however, did not qualify as a forcible felony. In State v. Hearns, 961 So. 2d 211 (Fla.2007), the Supreme Court held that battery on a law enforcement officer was not a forcible felony for VCC sentencing. That offense consisted of simple battery and an enhancement based on the status of the victim/law enforcement officer. Likewise, the crime of battery on a person over 65 does not qualify as a forcible felony.

Payet v. State, 5D22-547 (Aug. 12, 2022)

One of the violations of probation was stricken on appeal. Revocation may not be based solely on proof of an arrest during the probationary period. It was clear from the record that the lower court would have revoked probation based on the remaining violations.

The trial court was without jurisdiction to rule on pro se motions to withdraw plea which were filed after the notice of appeal of the final judgments and sentences.

Wright v. State, 5D22-727 (Aug. 12, 2022)

In a rule 3.850 motion, Wright alleged that if he had been "properly advised that his motions to suppress were weak, he would have accepted the State's plea offer; the State would not have withdrawn the offer; the trial court would have accepted the offer; and the sentence under the offer would have been less than the sentence imposed." He also alleged that he had not wanted to go to trial and did not know that his sentences would be consecutive. Although the State conceded that an evidentiary hearing was necessary, the trial court denied the claim on the basis of a pretrial colloquy of Wright. The Fifth District reversed because the plea colloquy did not conclusively refute the claim.