

Case Law Update
August 29, 2022
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Supreme Court of Florida

[State v. Garcia](#), SC19-1870 (Aug. 25, 2022)

When imposing sentence after a conviction for arson, the trial court gave consideration to Garcia’s behavior while he was out on bond, “including his threats to witnesses” and acts that endangered first responders and neighbors. The trial court denied the defense motion for a downward departure. The Fourth District reversed the sentence based on the consideration of incidents of misconduct occurring after the charged offense. There was no objection at the time of sentencing.

The Florida Supreme Court’s analysis focused on the nature of fundamental error, emphasizing that the Court very rarely has found fundamental error to exist in the context of sentencing. Although the sentencing court referenced these matters at the time of sentencing, the “judge gave no indication of having given weight to any arrest or charge supported merely by probable cause.” The sentencing judge had also heard the extensive evidence of the defendant’s offense and imposed a sentence of 84 months, based on a permitted range of 34.8 months up to the statutory maximum of 360 months. The Florida Supreme Court could not say that the 84-month sentence, based on the totality of the circumstances, rose to the level of fundamental error.

In reaching this conclusion, the Court emphasized the recent decision of the Supreme Court of the United States in [Concepcion v. United States](#), 142 S.Ct. 2389 (2022), in which the Court referenced the long tradition that sentencing judges “enjo[y] in the sort of information they may consider at an initial sentencing proceeding.”

[Conage v. United States](#), SC20-1441 (Aug. 25, 2022)

The Florida Supreme Court addressed a question certified by the Eleventh Circuit Court of Appeals: “whether a completed purchase of illegal drugs necessarily entails the defendant purchaser’s possession of those drugs, as federal law does.” This question was relevant to the sentence that a federal district court could impose under the Armed Career Criminals Act. The defendant, in federal court, had been

convicted of a gun possession crime and an enhanced sentence could be imposed on him on the basis of three qualifying predicate offenses for “serious drug offenses,” as defined in the ACCA. Conage had a drug trafficking offense from a Florida state court. Trafficking, under Florida law, may be committed in several alternative manners, one of which includes trafficking by purchase. A “serious drug offense” under the ACCA includes, inter alia, possessing with the intent to distribute a controlled substance – thus, the question of whether purchase includes possession.

In response to the Eleventh Circuit’s question, the Florida Supreme Court held that purchase, under Florida state law, does include possession, and rejected the “argument that a purchase is necessarily complete as soon as the would-be purchaser pays for the drugs.”

Of great significance, en route to reaching this conclusion, the Florida Supreme Court addressed the rules of statutory construction. Prior case law from the Florida Supreme Court concluded that when statutory language is unambiguous, and conveys “a clear and definite meaning,” “there is no occasion for resorting to the rules of statutory interpretation and construction.” The Supreme Court receded from that, deeming it “misleading and outdated.” “Viewed properly as rules of thumb or guides to interpretation, rather than as inflexible rules, the traditional canons of statutory interpretation can aid the interpretive process from beginning to end. . . .”

The Court then engaged in its analysis of the term purchase, and found that the term, as used in Florida’s trafficking statute, “requires proof that the defendant both (1) gave consideration for and (2) obtained control of a trafficking quantity of illegal drugs.” Noting the potential redundancy or overlap between different forms of trafficking – i.e., purchase and possession, possession and delivery, possession and bringing drugs into the State – the Court said that it would leave it to the Legislature “explicitly to adopt a specialized definition saying that a purchase is complete upon payment, if the Legislature wishes to do so.”

[Covington v. State](#), SC21-295, SC21-1077 (Aug. 25, 2022)

The Supreme Court, in a capital postconviction proceeding, affirmed the denial of Covington’s Rule 3.851 motion and denied his habeas corpus petition.

The Court addressed multiple claims of ineffective assistance of counsel at the penalty phase of the capital trial. After the penalty phase, the trial court found the existence of two statutory mental health mitigators. Covington argued that

counsel was ineffective for failing to present one expert, who testified at the 3.851 hearing, and who stated that Covington was insane at the time of the offense. Counsel from the penalty phase proceeding testified that 17 mental health experts had been consulted and Covington was the only one who expressed such an opinion. Had Covington been called for that purpose, at least four other experts would have been called to repudiate it. Defense counsel had presented expert testimony at the penalty phase regarding Covington's bipolar disorder.

Covington argued that penalty phase counsel was ineffective for failing to obtain a PET scan and another test. The Court's opinion details the extensive mental health information and testing that counsel did and obtained through multiple experts and extensive testing. Several experts told counsel that the PET scan was not likely to yield favorable results. And counsel was successfully able to establish the bipolar disorder without the PET scan.

Counsel tried to get the lower court during the penalty phase to consider a qEEG. It was argued in the 3.851 motion that counsel should have asked the trial court to reconsider its original rejection of that request. The Supreme Court disagreed. Even in the absence of the jury, this test would not have satisfied Frye, which was in effect at the time of the penalty phase proceedings. This test, if admitted, would have provided additional corroboration of the bipolar disorder. This scan was a novel procedure in the trial court jurisdiction at the time and a Frye hearing had been held.

Covington argued that counsel was ineffective for failing to seek a redaction of his videotaped interrogation to remove prejudicial portions. Defense counsel had sought, without success, to suppress the entire statement. In addition to incriminating statements regarding the murders, the interrogation addressed prior cat mutilations, child abuse, domestic violence, and collateral offenses. Defense counsel planned to use most of those facts as mitigation in support of the seriousness of Covington's mental health issues. The trial court and Supreme Court concluded that the evidence at the Rule 3.851 hearing supported that counsel made a reasonable strategic decision.

Penalty-phase counsel was not ineffective for failing to rebut the State's expert testimony that the defendant suffered from an antisocial personality disorder and that the defendant was a psychopath. Counsel had retained experts for that purpose. Counsel relied on those experts to determine what tests to perform and did not ask her experts to administer the Hare Psychopathy Checklist. Three defense experts did testify at the penalty phase and asserted that the defendant had a bipolar

disorder, and they explained how they ruled out ASPD. Counsel had also filed a pretrial motion to exclude evidence regarding future dangerousness, including psychopathy, which motion was granted as to future dangerousness.

Counsel was not ineffective for failing to “fully develop and present substance abuse as a mitigating factor.” Three defense experts testified that the defendant “has alcohol, cocaine, and/or polysubstance abuse disorder.” The trial court’s sentencing order accorded this factor great weight. Covington was arguing, in part, that counsel should have asserted drug use as a mitigating factor “separately from his mental illness.” In addition to finding that counsel’s conduct was not deficient based on the highly deferential standards applicable when assessing counsel’s performance, the Supreme Court noted that even if asserting such a distinction was an error, it was not sufficiently serious to entitle Covington to relief.

Counsel was not ineffective for failing to present mitigation based on child abuse. At the penalty phase, counsel presented testimony from friends and co-workers of the defendant to the effect that he was a good person, well-liked by all. Although one expert from the State had notes about child abuse, defense counsel relied on her experts, whose communications with family members led to the conclusion that the defendant was not physically abused. Covington had not conveyed any history of abuse to defense counsel. Spankings that had been referenced were not of a nature to have been beyond the “usual or normal” corporal punishment that some families use.

[In Re: Amendments to Florida Rule of Criminal Procedure, 3.220](#), SC22-312 (Aug. 25, 2022)

Rule 3.220, as well as Rule 4.310 (sexually violent predators), and Juvenile Rule 8.060, all of which pertain to discovery, were modified and “preclude the visual recording of adult deponents unless ordered by a court or agreed to by the parties and the deponent, require the audiovisual recording of depositions of minors unless otherwise ordered by a court, and prohibit the photographing of deponents during discovery depositions.”

Eleventh Circuit Court of Appeals

[United States v. Utsick](#), 16-16505 (Aug. 22, 2022)

Utsick pled guilty to one count of mail fraud, which resulted from a prosecution for soliciting large sums of money “from investors under false

pretenses.” He was ordered to pay over \$169 million in restitution. On appeal, he challenged the sentence and order of restitution, asserting that there was a violation of the extradition treaty between the United States and Brazil. He further argued that his guilty plea was not voluntary.

A doctrine of international law, the “rule of specialty,” “stands for the proposition that, in extradition cases, the requesting state, which secures the surrender of a person, can prosecute that person ‘only for the offense for which he or she was surrendered by the requested state or else must allow that person an opportunity to leave the prosecuting state to which he or she had been surrendered.’” Utsick argued that this doctrine barred the district court “from relying on his conduct prior to November 30, 2005 to determine his sentence.”

The offense to which he pled guilty was committed on or about December 19, 2005, although the scheme which led to that conviction had occurred over the preceding 10-year period, and nine other counts had been charged prior to the guilty plea as to the one offense.

Reviewing relevant treaty provisions, the Eleventh Circuit concluded that the long-term securities fraud scheme was conduct “which gave rise to the request” for extradition, and the imposition of punishment was therefore not barred. The Court similarly looked to proceedings that had occurred in the Brazilian Supreme Court, and that Court had excluded from possible imposition of sentence only offenses narrated in the indictment between the limited dates of 4/13/05 and 4/14/05. That restriction did not extend to what the district court was considering.

[United States v. Ifediba](#), 20-13218 (Aug. 25, 2022)

Two codefendants appealed convictions for health care fraud and related offenses and the Eleventh Circuit affirmed the district court.

Ifediba was a physician at a clinic, and wrote many prescriptions for controlled substances, including opioids, although he did not specialize in pain-management medicine. Codefendant Ozuligbo, his sister, was the clinic’s office manager.

The district court did not err in excluding Ifediba’s proffered evidence of good care, “showing that he provided legitimate medical treatment to some patients,” which the court deemed to be “an attempt to portray Ifediba as a person of good character by pointing to his prior good acts.” Ifediba argued that this prevented him

from presenting a complete defense to the charge of unlawful distribution of controlled substances,” but “the government never alleged that Ifediba unlawfully treated every patient who walked through [the clinic’s] doors. . . .”

Ozuligbo challenged the exclusion of evidence that she participated in the conspiracy “based on the Nigerian cultural norms requiring her to be ‘subservient’ to her older brother,” the codefendant Ifediba. Without discussion of this issue, the Eleventh Circuit noted that it had rejected a similar argument in a prior case.

The Court addressed a claim of juror misconduct. The district court “received a credible tip that the alternate juror had ‘googled the case’ and discussed it with her coworkers.” The court inquired, and the alternate denied being aware of “any jurors independently researching the case or discussing it.” The district court dismissed the alternate and Ifediba then moved for a mistrial based on the possibility that the alternate might have discussed her research with other jurors. The Eleventh Circuit viewed this incident as falling “at the less serious end of the spectrum of juror misconduct.” The district court dealt with the incident appropriately by dismissing the alternate and “preventing her from playing any role in the verdict.” Defense counsel “agreed to the court’s proposed method of questioning the alternate and declined the opportunity to request a sidebar during her questioning or ask further questions.” The claim of “further misconduct” was “purely speculative.” The Eleventh Circuit added that “individual questioning of the jury is not to be undertaken lightly,” as it “has the potential to ‘aggravate the situation’ by drawing attention to misconduct.”

Challenges to the sufficiency of evidence as to Ifediba were rejected largely on the basis of evidence of patient files and billing records showing that he or another coconspirator “ordered treatment knowing that it was medically unnecessary,” and that he then billed insurers while knowing that the treatment was medically unnecessary. Ozuligbo’s challenge to the sufficiency of the evidence on the conspiracy charge was based on her assertion that she was “merely an employee.” Here, too, the case against her was built on patient medical records, such as those showing her knowledge of “the conspiracy to provide immunotherapy treatment to patients who had tested negative for allergies. She gave patients allergy tests, signing her name to the test records. She recorded the negative results but also recorded that she administered immunotherapy to them.” The fact that she was hired under unusual circumstances – her brother pressured someone to hire her as a technician even though technicians were not needed – created an inference enabling the jury to conclude that she “understood her special treatment to be part of a larger scheme that gave her brother the leverage to insist on her employment and benefits.”

[Freeman v. Commissioner, Alabama Department of Corrections](#), 18-13995 (Aug. 24, 2022)

The Eleventh Circuit affirmed the denial of a federal habeas corpus petition and concluded that trial counsel was not ineffective for failing to conduct a reasonable mitigation investigation or present mitigation evidence at a penalty phase proceeding.

Some of the claims addressed in the district court, and subjected to de novo review, were claims that that court viewed as “new” and “more factually specific than the conclusory claims he fairly presented to the state circuit court.” After carefully reviewing the facts of those claims, the Eleventh Circuit concluded that they were adequately presented in state court and were therefore properly exhausted prior to the federal habeas petition. The arguments presented in state court remained “unchanged in substance.” It is required only that the habeas petitioners “present their claims to the state courts such that the reasonable reader would understand each claim’s particular legal basis and specific factual foundation.” Although Freeman developed and presented extensive additional factual allegations in the federal petition, the substance of the claim was the same “despite the ‘variations in the . . . factual allegations urged in its support.’”

The state appellate court had concluded that the claims asserted by Freeman had not been pled with sufficient specificity under relevant state rules of procedure. That raised an issue of the standard of review in federal court. Adjudications on the merits in state court are entitled to deferential review in federal habeas proceedings – the state court’s adjudication on the merits must be contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court – and a state court’s rejection of the claim under the applicable state rule of procedure for lack of specificity was a “ruling on the merits.” As the state court pleadings failed to establish a specific factual basis for the claim, the Eleventh Circuit concluded that the state court’s disposition of the claim was not contrary to or an unreasonable application of clearly established federal law.

The Court then addressed the claims insofar as they were based on the detailed and new factual allegations. The district court had erred in subjecting these arguments to de novo review, as opposed to the deferential standards noted above, as the district court had erred in concluding that the claim was a new claim. For purposes of this claim, “the relevant state court decision on the merits of Freeman’s

claim concluded that Freeman was not entitled to an evidentiary hearing in the postconviction court” because his claim failed to plead sufficient specific facts.

The Eleventh Circuit, in this posture, first had to resolve the question of whether the state court petition pled sufficient facts which, if proven, facially demonstrated a claim of ineffective assistance of counsel. And, if Freeman satisfied that test, the Eleventh Circuit then had to determine whether the state court decision was unreasonable. Viewing the reasonableness of the state court’s resolution of the claim, the federal court does not consider the supplemental allegations presented in federal court. Under these standards, Freeman did not demonstrate that the state court disposition was “an unreasonable determination of the facts in light of the evidence presented.”

A concurring judge would have simplified the majority’s analysis and held just that Freeman “could not rely on new evidence (let alone mere allegations) not in the state court record to argue that federal courts should grant relief.” The concurring judge emphasized that “the system failed Mr. Freeman all along the way,” as the extensive factual allegations asserted for the first time in the federal proceeding have not received review due to the failure to present them prior to the federal proceedings.

First District Court of Appeal

[State v. Hardley](#), 1D19-1515 (Aug. 24, 2022)

The defendant’s sentence was reversed for resentencing because the trial court erred in denying the State’s request to add sexual penetration points to the sentencing guidelines scoresheet.

The jury found the defendant guilty of one count of incest for having sexual intercourse with the victim, but not guilty of sexual battery with the victim. The trial court concluded that the jury found that the evidence was insufficient to demonstrate that the sexual intercourse was involuntary and that applying the victim injury penetration points would constitute a violation of the Equal Protection Clause because the assessment of points “would apply only in cases of heterosexual incest.” No party had raised any constitutional claim.

The First District held that the statutory language regarding penetration points being mandatory “could not be clearer.” The Court admonished the lower court for raising a claim that no party had raised, further noting that Hardley did not present

any such argument in the appellate court either. Hardley’s argument on appeal was that for the victim injury statute to apply, there must be ‘a victim,’ and that there is no victim under the incest statute because the sexual intercourse between adults was consensual.

[Hudson v. State](#), 1D21-99 (Aug. 24, 2022)

The First District reversed the denial of a suppression motion, concluding that the defendant was in custody and that Miranda warnings were required.

An officer conducted a traffic stop based on concern that the driver was intoxicated. These concerns were then corroborated by observations of slurred speech and the detection of the odor of alcohol. The defendant was then handcuffed and detained in the back of a patrol vehicle with the door open, after she failed to provide the officers with her license and registration upon request. Prior to Miranda warnings, officers told her that an informant reported that she might be intoxicated, and during further questioning, the defendant stated that she had had one beer earlier in the day.

Hudson was in custody because she “was never told that she was free to leave, and in fact, was not free to leave. Appellant was handcuffed in the patrol car for thirty-six minutes. When Appellant conveyed to the officers that she had asthma and needed her inhaler, the officers did not allow Appellant to leave the patrol car with an officer to find the inhaler. One officer told Appellant that she would find the inhaler, but Appellant had to stay in the car with the door shut. Appellant told the officer that she did not want to be in custody and she did not want to be left in the car by herself.”

[Kirkpatrick v. State](#), 1D21-683 (Aug. 24, 2022)

The First District affirmed the summary denial of a Rule 3.850 motion which set forth nine claims of ineffective assistance of counsel.

In one of the claims, Kirkpatrick argued that counsel failed to advise him that if “he testified about not needing to steal from the victim, then the State could introduce evidence showing that Kirkpatrick had stolen a gun from the victim’s home about a month before the murder.” This claim failed because the defendant did not establish prejudice. The Court detailed the trial evidence to support the conclusion that even if Kirkpatrick had been advised not to mention stealing during his testimony, there was no “reasonable probability that the outcome of the trial

would have been different. . . .” Kirkpatrick had been convicted of first-degree murder, burglary and sexual battery. Although he admitted killing the victim, he disputed that the killing was premeditated. Evidence included his confession that he killed the victim, DNA on zip ties that bound the victim’s wrists; blood stain evidence that most of the injuries were inflicted while the victim was on her back.

Counsel was not ineffective for failing to obtain a crime scene reconstruction expert or a psychological expert. His motion “did not allege with specificity what information the experts would have been able to offer and how their testimony would have impacted his case.” He was granted leave to amend his motion but his amended motion failed to cure the deficiencies.

Counsel was no ineffective for failing to move for a judgment of acquittal as to the element of premeditation. The evidence of premeditation was sufficient. This included the binding of the victim’s wrists and ankles with zip ties; evidence that the victim was on her back on the floor for most of the attack; Kirkpatrick’s admission to his roommate that “he shattered a pool cue on the victim and stabbed her in the neck.”

As to a similar claim of ineffective assistance regarding a motion for judgment of acquittal for the burglary charge, there was evidence that Kirkpatrick lacked consent to enter the victim’s home. A statue next to the front door, under which a spare key was kept, was overturned. There was also evidence of a drug debt and that that was why the defendant entered the residence.

As to a similar claim on the sexual battery charge, there was evidence that the sexual contact was nonconsensual. This again included the zip ties and abrasions, as well as the presence of the defendant’s blood and DNA under the victim’s fingernails. Physical evidence included a pair or ripped women’s underwear near a bloody pillow.

Counsel was not ineffective for failing to object to the prosecutor’s closing argument: “Just about everything the defendant told you from the stand was imaginary and unreasonable.” The prosecutor “may argue credibility of witnesses or any other relevant issue if the argument is based on the evidence.” The prosecutor did make an erroneous assertion that the defendant’s testimony about the victim pulling his hair not being credible because he had very short hair at the time of the murder. The defendant never testified about the victim pulling his hair, but the misstatement by the prosecutor was not prejudicial, as this was a brief comment and “referenced a very minor aspect of the case.”

[Fryson v. State](#), 1D21-2285 (Aug. 24, 2022)

The First District affirmed the denial of a Rule 3.850 motion which alleged ineffective assistance of trial counsel. The trial court's order, which is quoted verbatim for several pages by the appellate court, detailed the extensive trial evidence in support of the conclusion that the claims of ineffective assistance failed because of the lack of any possible prejudice. The trial court also made a credibility determination, finding that "counsel was more credible than Appellant regarding his unsupported claims of ineffective assistance of counsel." "The trial court established that Appellant knew he was facing life in prison, and that his defense counsel's strategy was sound and the only viable strategy in light of the overwhelming evidence of guilt."

Second District Court of Appeal

[J.B.E.C. v. State](#), 2D21-374 (Aug. 24, 2022)

A restitution order was reversed because the evidence was insufficient to establish the victim's loss of income. The victim was awarded \$3,594, which included the victim's lost wages. The "victim claimed that he lost \$2,880 in wages because he spent eight nonconsecutive hours getting his vehicle repaired," which included multiple trips back and forth to the repair service. The victim was an attorney who worked as a receiver for a federal court. The victim "did not identify how this amounted to a loss in income. The State failed to elicit specific testimony concerning any legal work that was not performed due to time spent on the repairs of his vehicle or any specific case in which he received less in compensation."

Third District Court of Appeal

[Carnright v. State](#), 3D22-1244 (Aug. 24, 2022)

A motion for bail pending appeal was properly denied. The standards for bail pending appeal are set forth in Rule 3.691(a), which incorporates Younghans v. State, 90 So. 2d 308 (Fla. 1956). The threshold requirement is that "the appeal is taken in good faith, on grounds fairly debatable, and not frivolous." The rule also requires the court to consider three additional factors from Younghans: "(1) the habits of the individual as to respect for the law, (2) his local attachments to the community, by way of family ties, business, or investments, (3) the severity of the punishment imposed for the offense, and any other circumstances relevant to the question of

whether the person would be tempted to remove himself from the jurisdiction of the court.”

Carnright argued that the trial court erred by imposing a higher standard than that of the rule by “ basing its decision on the merits of the appeal as opposed to whether the appeal was” taken in good faith. The Third District observed that the trial court recognized that the good-faith requirement was a “relatively low threshold,” and the lower court found that the defendant satisfied this requirement. A footnote in the trial court’s order, however, added that the grounds were not fairly debatable as the testimony at issue had been excluded or allowed pursuant to the rules of evidence. The Third District found that apparently inconsistent statements by the lower court on this threshold question resulted in the misapplication of the factor. That, however, was not dispositive, as the trial court went on to analyze all of the remaining factors and “found they all weighed against release.”

Fourth District Court of Appeal

[State v. Bodrato](#), 4D22-334 (Aug. 24, 2022)

The Fourth District reversed an order granting a motion to suppress. The defendant “argued that he was unlawfully detained prior to a DUI investigation after an officer required that he exit his vehicle.” The trial court found that the detention was unlawful and that the officer “lacked the authority to require the defendant to exit his vehicle.”

An officer responded to a welfare check. The defendant had been “observed to be sleeping behind the wheel of his parked vehicle, which was partially obstructing traffic. Once the officer observed this infraction, the officer was authorized to require the defendant to exit his vehicle.” When the officer approached the vehicle and knocked on the window, the defendant woke up, and when the defendant opened the door, the officer smelled alcohol on his breath and observed slurred speech and bloodshot and glassy eyes.

The defense relied on distinguishable cases, which involved “vehicles which were lawfully parked.” Here, there was an observed traffic infraction, which was followed by observations establishing probable cause for a DUI arrest, thus rendering the ensuing DUI investigation lawful.

Fifth District Court of Appeal

[Best v. State](#), 5D21-3114 (Aug. 26, 2022)

Although the court issued a per curiam affirmance, one of the judges wrote a specially concurring opinion addressing the lack of preservation. The claim on appeal, which was deemed meritorious by the concurring judge, was that the offense of conspiracy to commit sexual battery was not a qualifying enumerated offense for designation as a sexual predator. However, the claim could not be entertained as it was not preserved, although it was noted that it could subsequently be raised in a rule 3.800 motion.