Case Law Update
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Supreme Court of Florida

In Re: Amendments to the Florida Evidence Code, SC22-1040 (Sept. 8, 2022)

The Florida Supreme Court adopted section 90.2034, Florida Statutes, "to the extent it is procedural." This statutory amendment to the Evidence Code addresses the judicial notice of information taken from web mapping services, global satellite imaging sites, or Internet mapping tools. Although adopting it to the extent it was procedural, the Supreme Court was still entertaining comments from interested persons until December 1, 2022.

Davis v. State, SC20-1282 (Sept. 8, 2022)

The Supreme Court addressed a certified question of great public importance: in a direct appeal in a criminal case, when the denial of a legally sufficient motion to disqualify the judge for alleged bias or prejudice is challenged, does harmless error analysis apply, and if so, what harmless error test should be applied?

In a first-degree murder prosecution, Judge Jacobsen was the presiding judge, but was expected to leave the capital felony division, to be replaced by Judge Harb. The defense moved for Judge Jacobsen to remain as the judge due to his familiarity with the prior litigation, in addition to the fact that Judge Harb had previously been a homicide prosecutor in the State Attorney's Office, while Davis's case was pending. Judge Jacobsen denied the motion, without prejudice to the filing of a motion to disqualify Judge Harb. The defense proceeded with such a motion, which Judge Harb denied, finding it to be legally insufficient.

On appeal from the ensuing conviction, the Second District found that the motion was legally sufficient and should have been granted, but found that the erroneous denial of the motion was harmless error. The Second District concluded that there "was no reasonable possibility that Davis was denied his right to a fair trial by a neutral judge." That Court emphasized three facts: 1) Davis failed to pursue a pretrial prohibition petition, thus suggesting "that he did not think he would fail to receive a fair trial"; 2) Judge Harb's rulings during the trial suggested that the trial

was fair; and 3) the circumstances alleged in the disqualification motion "did not in reality pose a substantial risk that Davis would be denied a fair trial."

The Florida Supreme Court agreed that the motion to disqualify was legally sufficient. The Court further agreed that the erroneous denial of the motion is not per se reversible error. The correct test for harmless error review on direct appeal is the longstanding test from State v. DiGuilio, under which the State has the burden of proving beyond a reasonable doubt "that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."

Applying that test, the Supreme Court concluded that the erroneous denial of the disqualification motion was not harmless. "Judge Harb made several consequential decisions that could have altered the outcome of the trial. Most notably, Davis's alternative theory of defense at trial was that he suffered a preexisting mental disease or infirmity. As argued by Davis, this preexisting condition triggered the psychotic episode that led to the shootings – not, as argued by the State, his alleged use of marijuana." Judge Harb overrode the prior judge's ruling with respect to the scope of voir dire questioning and permitted the State to ask questions regarding mental health. Judge Harb rescinded the previously ordered sequestered voir dire on the insanity defense. It was therefore a reasonable possibility that Judge Harb's "influence on voir dire and the jury selection process, contributed to Davis's conviction."

Two justices dissented and would have concluded that the erroneous denial of the disqualification motion constitutes per se reversible error.

The majority opinion includes a lengthy discussion of the nature of per se reversible error, and the limited circumstances in which that doctrine applies.

Eleventh Circuit Court of Appeals

United States v. Doak, 19-15106 (Sept. 7, 2022)

The Eleventh Circuit affirmed convictions and sentences for the two defendants, husband and wife, related to the transporting of his three adopted daughters across state lines so that he could sexually abuse them. The wife was convicted for aiding and abetting.

Mack Doak was charged with three counts of aggravated sexual abuse under 18 U.S.C. s. 2241(c), and six counts of transporting children with the intent that they "engage in sexual activity for which any person can be charged with a criminal offense." On appeal, Mack Doak argued that the transporting charges, under 18 U.S.C. s. 2423(a), should be dismissed "because the government forgot to include in the indictment the statutes criminalizing the sexual abuse that Mack intended to commit." The indictment tracked the statutory elements. The issue on appeal was "whether the statutes criminalizing the intended sexual activity are themselves additional elements or only means of proving the element of intent." The Court concluded that the element of the offense was criminal sexual activity as a general category and other specific statutes regarding the commission of sexual offenses were only "means by which the jury could identify that the sexual activity was criminal."

The defendants further argued that this did not provide them with adequate notice of the "nature of the intent accusation against Mack." The Eleventh Circuit saw no ambiguity. The indictment, in addition to setting forth the statutory elements of the offenses, listed "six trips between Alabama, Florida, Cambodia, and Rhode Island; the dates of each trip; and the victims Mack transported." The indictment alleged "the intent to engage in a sexual act with the two younger girls." It "divulged the key detail about the criminal sexual activity at issue – that Mack intended to sexually abuse the girls himself." While the "best practice" is "to include the statutes criminalizing the sexual activity that the defendant planned to inflict on the transported child," the indictment in this case was "detailed enough to notify the Doaks of the charges against them."

The Court, responding to the argument that Mack had an innocent intent while the family was crossing state lines with the victims, found that the evidence was sufficient to establish intent. The evidence established that the moving between states was for the purpose of keeping the abuse concealed. After living in one place for many years, frequent uprooting of the family began when the sexual abuse started. This further enabled the jury to find that the daughters were kept isolated to avoid detection and to keep them silent.

The evidence was also sufficient as to aiding and abetting. Jaycee did not dispute that she helped her husband transport the girls, but said that she "disapproved of his rampant sexual abuse." "But it does not matter whether Jaycee participated in the trips 'with a happy heart' or with 'a sense of foreboding.'" Additionally, she began abusing the girls as well, albeit not sexually. "She hit the girls, and called them derogatory, sexualized names. She silenced them to conceal the sexual abuse."

The district court did not err in admitting the government's expert testimony about how "children disclose incidents of abuse." The witness "explained the forensic-interview process and described how children pulled out of suspected sexual-abuse situations disclosed that information. Her testimony about the process was reliable because she had handled six thousand such interviews herself. "Her firsthand experience equipped her to identify trends in how children process abuse and disclose it. Because her testimony described her experience interviewing children suspected to be sex abuse victims, it offered a reliable framework to provide to the jury."

A video of Mack slapping the girls' brother was not improper character evidence based on an unrelated act. The combined threats to the adopted children at the hands of both Doaks were necessary to present a complete story of the crime for the jury; it was not character evidence. It explained why the children felt threatened and why they may have silently endured sexual abuse for years.

In a cross-appeal, the government challenged Jaycee's sentence, the statutory minimum, as being substantively unreasonable. The Court disagreed. The district court did not overlook Jaycee's lack of remorse. It was a "close call" as to whether the district court "prioritized the wrong factors." The district court had expressed doubts about sufficiency of the evidence, notwithstanding the denial of the defense's prior motions regarding sufficiency; and the court considered her role as aiding in transport and concealing the abuse, in comparison to Mack's raping or groping of the victims. Given the scope of sentencing discretion possessed by the district court, there was no abuse of discretion.

One aspect of the order for restitution to the victims was reversed where the district court ordered an amount for expenses for caring for the victim children for the 18 months leading up to sentencing. The court-ordered amount exceeded the testimony as to that portion of the restitution.

First District Court of Appeal

Bailey v. State, 1D21-2023 (Sept. 7, 2022)

The trial court erred in denying a motion to dismiss an affidavit of violation of probation because the "probationary period had ended prior to the probation officer filing the affidavit of violation of probation."

Bailey was placed on probation for 12 months on April 1, 2020. The affidavit of violation was filed in May, 2021. During the prior year, there had been another affidavit of violation, and the court accepted a plea of no contest and adjudicated Bailey guilty, gave a suspended jail sentence, resentenced Bailey to probation and reimposed the conditions of probation.

After the May, 2021 affidavit, the trial court concluded that it had extended the period of probation in conjunction with the no contest plea on the prior affidavit. The defense argued that the judge never announced any extension of probation and further argued that probation could be extended beyond the original term only if the trial court modified or revoked probation, which it had not done in the prior proceedings. The First District agreed with the Appellant's arguments. The statutes addressing probation do not provide for any automatic extensions of the probationary period.

When the judge announced in the first revocation proceedings that the court was "reinstating" the terms of probation, the court "did not indicate any intent to modify Appellant's probationary period beyond the original probationary period." The 12-month period therefore expired prior to the filing of the affidavit in May, 2021.

Second District Court of Appeal

Daniels v. State, 2D21-702 (Sept. 9, 2022)

The Second District affirmed convictions and sentences for misdemeanor DUI and misdemeanor refusal to submit to testing under section 316.1939(a). The "officers who initially interacted with Daniels had reasonable suspicion to conduct a DUI investigation," and a motion to suppress was therefore properly denied.

Officers were conducting a welfare check in response to a report that Daniels was sleeping in his truck with lights on, at 8:30 p.m. His truck was in a business parking lot, but "within the entrance/exit and facing outwards as if Daniels was preparing to pull out onto the adjacent road." An ambulance was called and EMS technicians arrived within minutes and found that Daniels "was not having any medical issues, and left the scene."

The CI who called 911 spoke to a deputy and "suggested that Daniels might be intoxicated." The CI stated that Daniels had been "slumped over in his seat with his seatbelt on." There was surveillance video of this. After the EMS technicians

left, the deputy contacted Daniels and told him that he worked in the DUI unit and was there "to make sure that there is not an instance of DUI occurring." Daniels appeared "lethargic and had bloodshot, watery eyes," and explained that he was very tired after working all day in the sun, thus resulting in his act of pulling into the parking lot to sleep. Daniels further related that he was diabetic, and the deputy called for EMS to return to do a blood sugar test, which was done and was normal. After obtaining the blood sugar test result, the deputy suspected that Daniels was intoxicated and obtained consent for field sobriety tests, which Daniels failed, and for which he was then arrested.

Daniels argued that he should have been released when the first EMS technicians medically cleared him, as nothing as of that time provided reasonable suspicion for an investigative stop.

Once an officer's "concern for the welfare of the person has been satisfied, a continued detention is not permissible unless the police officer has reasonable suspicion that the person has committed or is committing a crime." The critical fact for the appellate court in this case was that Daniels was not in a regular parking spot when observed sleeping with headlights on. The Court was swayed by the location of the truck at the entrance/exit of the business parking lot, while the headlights were still on. "This is not a typical location that a driver would park his or her vehicle if he or she wanted to sleep."

Fourth District Court of Appeal

Neeley v. State, 4D21-3335 (Sept. 7, 2022)

The trial court denied a Rule 3.850 motion alleging newly discovered evidence because the supporting affidavit "was not sworn by the affiant before an individual authorized to administer oaths." The Fourth District reversed, agreeing with the defendant that the affidavit was sufficient because it "contained a signed written declaration complying with section 92.525(2), Florida Statutes."

The affidavit concluded with the following verification: "I declare under the penalty of perjury pursuant to s. 92.525(2), F.S. (2020) that I have read the foregoing affidavit and the statements 1 thru 5 are true and correct." Section 92.525(2) specifically authorizes such a signed, written declaration.

The State's reliance on Placide v. State, 189 So. 3d 810 (Fla. 4th DCA 2015), was rejected because in that case, the verification was qualified by the phrase "to the

best of my information, knowledge, and belief." That qualification renders the verification insufficient and in the instant case, that qualification was not included in the written declaration.

Fifth District Court of Appeal

State v. Torres, 5D22-21 (Sept. 9, 2022)

The Fifth District reversed an order suppressing the results of a breathalyzer test. The trial court suppressed the results because "the municipal law enforcement officer was outside of his geographic jurisdiction when he requested that the defendant submit to this testing."

Torres was stopped after an officer observed a hazardous driving pattern. He admitted that he consumed alcoholic beverages and agreed to submit to field sobriety tests. All of this occurred in Winter Park. Torres was then arrested and transported to the Breath Test Center in Orlando, and the breathalyzer test was then administered by an employee of the Orange County Sheriff's Office.

Torres argued that once the Winter Park officer went to Orlando and requested the breath test, at that point in time, he was outside his city limits and was only a "private citizen," who lacked the authority under the implied consent statute to obtain or gather breath test evidence.

"The color of office doctrine precludes a law enforcement officer who is outside of their territorial jurisdiction from using the power or color of the office to observe unlawful activity or to gain access to evidence that would not be available to a similarly-situated private citizen." The doctrine has exceptions, however, and one exception "allows a municipal officer to continue to act or investigate outside of his or her geographic jurisdiction if the subject matter of the officer's investigation originates inside their city limits." Based on this exception, the color of office doctrine "did not preclude [the officer], as part of his ongoing investigation that originated inside the municipal city limits, from then taking the defendant to the Beath Test Center in Orlando and requesting that he submit to a breath test."