Case Law Update
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Supreme Court of Florida

In Re: Amendments to Florid Rule of Criminal Procedure 3.790, SC22-1033 (Sept. 22, 2022)

The Supreme Court approved, subject to comments within 75 days, an amendment to Rule 3.790(a), which now references supervision of probationers under the authority of entities other than the Department of Corrections, "as provided by law." This is a reflection of statutory amendments providing for supervision for misdemeanor offenders by private entities.

Eleventh Circuit Court of Appeals

United States v. Grushko, 20-10438 (Sept. 23, 2022)

The convictions and sentences of the two codefendants for multiple offenses based on the use of stolen credit-card information to fraudulently obtain high-value electronic goods from Target were affirmed.

The district court did not err in denying a suppression motion. Secret Service agents entered the residence of the codefendants, two brothers, to arrest them pursuant to an arrest warrant. Upon entering the residence, the agents saw in plain sight the evidence that was the subject of the suppression motion. Prior to entering, the agents observed two unknown men outside the residence. After entering, they learned that the two men were the Grushkos. The agent who had observed them at first had not seen them before and did not recognize them, and they refused to identify themselves. The Grushkos argued that officers entered the residence illegally after arresting the brothers outside. The district court found the agent's explanation credible, with the result that the entry into the residence preceded the arrest, coupled with the plain view observation of the evidence within the residence.

Additionally, there was testimony that agents heard noises from within the residence. They entered the house and cleared it and left, without seizing any evidence, and returned later with a search warrant.

During voir dire, the district judge addressed the venire and spoke about the lack of realism in television crime shows with respect to the discovery of forensic evidence, making the point that "you can't expect the government to come in here with all types of things, as well, fingerprints. We have to have that. That's not required to prove someone guilty." The judge also advised the jury that there was no magical number of witnesses, minimum or maximum, that the government needed to present for its case. The Grushkos argued that these comments "impermissibly lowered the government's burden of proof during voir dire by suggesting to the jury that the absence of fingerprint evidence would not create a reasonable doubt, and, thus, that the court should have granted their motion to strike the entire panel."

Although the Eleventh Circuit concluded that the district court did not abuse its discretion when commenting on presentations of forensic evidence on television shows, that discussion "was unnecessary, unwise and should have been avoided." But, the "court never suggested that the government did not have to prove each of the elements of the charged crimes, or that the government was relieved of its burden of establishing each element beyond a reasonable doubt." The district court had further emphasized the government's burden of proof on several occasions prior to opening arguments.

A sentencing enhancement that may be imposed for offenders who are organizers was found to have been properly imposed as to both brothers. The scheme involved a third participant, and "the Gushkos instructed [him] how to install skimmer devices on ATM machines, and they provided him with access devices to purchase items." They also paid him with a portion of their proceeds from the scheme, suggesting "that they claimed a larger share." This evidenced their "control or influence over" the third participant.

While there was potential merit to an argument as to the district court's calculations of amounts of loss attributable to each defendant, as well as in the application of the obstruction-of-justice enhancements, "the district court explicitly stated that it would have imposed the same total sentences even if it had decided the disputed enhancement issues in favor of the defendants." Based on that assertion, in accordance with prior decisions of the Court, it was not necessary for the appellate court to review the sentencing issue, where the sentence was otherwise substantively reasonable.

The 145-month total sentence on each brother was not substantively unreasonable. The district court "gave a sufficient explanation for the sentences it

imposed," addressing both brothers' arguments and the sentencing factors under 18 U.S.C. s. 3553(a). The appellate court emphasized the "incredibly widespread and sophisticated scheme" against Target, the fact that it was not a one-time incident; the absence of remorse; the need for deterrence; the sophisticated means of concealment; and other factors.

First District Court of Appeal

Bicking v. State, 1D21-2981 (Sept. 22, 2022)

The First District affirmed, without written opinion, the denial of a Rule 3.850 motion. One judge authored an extensive concurring opinion for the purpose of addressing "the barbarity and cruelty of Appellant's aggravated armed rape (sexual battery) and kidnapping," as well as the judge's disagreement with the decision of the United States Supreme Court "barring capital punishment for the rape of an adult." The concurring opinion details the judge's reasons for finding that the Supreme Court's decision "was not based on the text of the Constitution or the historical underpinnings of the Eighth Amendment." The judge further urged the United States Supreme Court, if presented with the opportunity, to "reconsider its erroneous non-unanimous plurality decision in *Coker v. Georgia*, 433 U.S. 584 (1977), and the five-to-four decision in *Kennedy v. Louisiana*, 544 U.S. 407 (2008), and hold that such sentences under certain circumstances are valid and legitimate exercises of the states' police power to punish the violent rapes that plague society, as consistent with the historical understanding of the Eighth Amendment and consistent with legitimate state retribution and moral proportionality for these heinous, atrocious, and cruel crimes that violate the human dignity of rape victims and inflict a lifetime of permanent pain and suffering, as evidenced in this case."

Mizell v. State, 1D20-3627 (Sept. 21, 2022)

The First District affirmed a conviction for DUI manslaughter. The trial court did not err in excluding evidence of the victim driver's intoxication. Under the DUI statute, an accused is guilty if the accused causes or contributes to the causing of the death of the victim. "The excluded evidence did not show that the deceased was solely responsible for the fatal accident." As such, the excluded evidence was not relevant. "Appellant violated the statute, even if he only contributed to the accident, so the proffered evidence had to show that the victim was 100% at fault for the collision." Additionally, "the potential danger of this evidence to mislead the jury renders it inadmissible. . . ."

Rhoden v. State, 1D21-2714 (Sept. 21, 2022)

The trial court granted the State's mandamus petition, directing the Baker County Sheriff to return a convicted offender to the county jail. The First District affirmed that order. The Sheriff had released the inmate from the jail under electronic monitored supervision after serving just four days of a 66-day jail sentence. There was no court authorization for the release of the inmate. The opinion does not set forth what the Sheriff's legal argument was. The Sheriff had "a ministerial duty to implement the sentence imposed by the court."

Brown v. State, 1D21-2947 (Sept. 21, 2022)

The First District struck the Anders brief that had been filed, noting numerous sentencing errors regarding the imposition of costs and fines. As a result of the striking of the brief, counsel for the Appellant would then be able to file a Rule 3.800(b) motion in the trial court, seeking correction of the errors. A Rule 3.800(b) motion challenging a sentence must be filed prior to the filing of the initial brief of appellant.

Gross v. State, 1D21-3193 (Sept. 21, 2022)

The State's evidence as to one ground of an alleged violation of probation was found to be insufficient. The State's evidence was "that Appellant was not home on two occasions when the officer visited, along with the hearsay testimony of the mother of Appellant's child that she had not seen him in a month-and-a-half." This was insufficient to prove that gross changed his residence. The opinion cites several prior decisions for the point that a violation of probation may not be based entirely on hearsay.

Watson v. State, 1D22-189 (Sept. 21, 2022)

The First District affirmed the denial of a Rule 3.850 motion alleging newly discovered evidence.

The claim was based on a public records request for emails about plea offers. Although he received the information in 2021, he had previously made the same request in 2001, but never received a response. The current motion was untimely, as Watson did not exercise due diligence to discover the information in a timely manner. Watson asserted that he assumed that there were no emails when he did not

receive a response in 2001. "Watson offers no compelling reason for why he waited nearly twenty years to make another inquiry."

Barber v. State, 1D22-253 (Sept. 21, 2022)

Under section 921.0024(2), Florida Statutes, "If the lowest permissible sentence under the [Criminal Punishment Code] exceeds the statutory maximum sentence as provided in s. 775.082, the sentence required by the code must be imposed."

Second District Court of Appeal

State v. Waiters, 2D21-1477(Sept. 23, 2022)

The State appeals the trial court's order finding that 'but for' causation immunized Anthony Levern Waiters from prosecution for drug-related offenses under the 911 Good Samaritan Act, s. 893.21(2), Fla. Stat. (2020). . . . Because the contraband was not obtained as a proximate, or direct, result of Mr. Waiter's seeking medical assistance, we reverse."

Waiters had been using crack cocaine and began acting erratically. His sister called 911. Emergency personnel arrived in response to a possible drug overdose. Law enforcement officers also arrived and evaluated Waiters under the Marchman Act "to determine whether he needed to be taken into protective custody." EMS cleared Waiters for release and waiters signed a release declining further medical attention.

Law enforcement ran Waiters' name and discovered an outstanding felony arrest warrant. After Waiters was cleared by medical personnel, the law enforcement officers arrested him. Prior to patting him down, the officers asked "if there was anything on his person that posed a danger of sticking/poking the officers," and Waiters admitted having a broken crack pipe stem and a piece of crack rock in his pocked. This resulted in charges for possession of the crack and possession of drug paraphernalia.

Waiters moved to dismiss based on a claim of immunity because the contraband was obtained as a result of him seeking medical assistance. The trial court dismissed the charges.

Section 893.12(2) provides that a person "who experiences, or has a good faith belief that he or she is experiencing, . . . a drug-related overdose and is in need of medical assistance may not be arrested, charged, prosecuted or penalized for a violation of [section] 893.147(1) or [section] 893.13(6), excluding paragraph (c), if the evidence for such offense was obtained as a result of the person's seeking medical assistance.

Examining the statutory language, and referencing a senate staff analysis report, the Court observed: "Apparently, the legislature did not intend to immunize individuals seeking medical assistance for a drug overdose from an arrest pursuant to an outstanding arrest warrant. It would certainly be incongruous, then, for an individual to evade criminal liability under section 893.21(2) for any contraband discovered pursuant to an arrest on an outstanding warrant."

The appellate court engaged in an extensive discussion of the different concepts of causation – "but for," proximate or direct. "According to Mr. Waiters, an arresting officer must turn a blind eye to any contraband discovered pursuant to a search incident to arrest or an outstanding warrant because the series of events leading to the discovery began with Mr. Waiters' need for medical assistance for a suspected drug overdose. This is, indeed, a strained reading of the statute; it ignores the legislative intent reflected in section 893.21(2)'s staff analysis." The First District bolstered this legal conclusion by reading section 893.21 in pari materia with other statutes addressing drug abuse. This included section 782.04(1)(a)3,, which defined first-degree murder to conclude murder which was the proximate cause of the enumerated controlled substances.

Hay v. State, 2D21-2167 (Sept. 21, 2022)

The Second District granted a petition for writ of certiorari and quashed an order denying the public defender's request to withdraw based on an alleged conflict.

The "conflict in this case was articulated as related to the representation of Jon Hay and another defendant represented by the same office or with an attorney in that office, and it apparently arose from a conversation between Mr. Hay and his appointed assistant public defender when Mr. Hay was in the State Hospital." The assistant public defender advised the trial court "that she was ethically precluded from providing more specific information regarding the conflict that than provided in the amended certification of conflict."

The trial court denied the request to withdraw because the alleged facts rendered the court 'unable to determine if the asserted conflict is prejudicial to the indigent client." The Second District stated: "Although we recognize and appreciate that trial courts are hamstrung by a statute which allows trial courts to conduct a hearing but precludes trial courts from asking much about the nature of the conflict in cases of alleged conflict like this, it was a departure from the essential requirements of law for the trial court here to deny the public defender's request to withdraw under the facts set forth in the requests and outlined in the transcripts of the hearings in this case."

Third District Court of Appeal

McGregor v. State, 3D22-0971 (Sept. 21, 2022)

The summary denial of a Rule 3.850 motion was reversed for further proceedings because the claim was not conclusively refuted by record attachments. The motion alleged that counsel failed to apprise the defendant "of a possible defense and that had she been aware of the defense she would not have entered a plea of guilty."

Fifth District Court of Appeal

Goonewardena v. State, 5D21-1073 (Sept. 23, 2022)

This case was remanded for further proceedings because the trial court failed to make an independent determination that the defendant was competent to proceed to trial.

Two experts were appointed to determine competency. The first evaluation was "inconclusive"; the second found the defendant competent, but this report was not brought to the court's attention, as there was no further competency hearing. Over a year later, at a trial scheduling conference, defense counsel raised the issue, and the judge noted that the parties stipulated to the second report, "[s]o the Court will make a finding of competency to proceed." There was also a mistaken belief that the first evaluation concluded the defendant was competent. No written order was entered. "The trial court's duty to make an independent determination is not absolved when the parties stipulate to a defendant's competence and the psychological evaluations conclude that he is."

State v. Williamson, 5D21-2624 (Sept. 23, 2022)

The trial court erred in granting a sworn motion to dismiss the charge of aggravated assault with a deadly weapon, as there were disputed issues of material fact.

Officers responded to a call that the defendant was trespassing at his sister's apartment. Bodycam footage depicted the events after the arrival of the officers. The footage showed the officers and defendant leaving the apartment, and, one minute later, the defendant walks back toward the apartment and one of the officers. When the officer asks if the defendant has a gun on him, "Williamson pulls what appears to be a gun from his pocket." Williamson is instructed to put his hands up, but does not do so; he continues "walking towards the officer while repeatedly raising and lowering his gun from a resting position by his leg, to a position parallel to the ground, to a position over his head." He continues to move forward, until one of the officers knocks the gun out of his hand and tasers him in the back. The suspected gun was later identified as an airsoft gun.

The trial court concluded that the intentional act required for aggravated assault was lacking, as "what placed [the officer] in fear was the fact Williamson had a gun and was not listening, 'as opposed to an over act intended to place him specifically in fear.'" According to the trial court, merely brandishing and waving an airsoft gun while within shooting range was not a sufficient overt act.

The appellate court, resolving all inference against Williamson, concluded that a prima facie case of an overt act existed. "[B]randishing of an apparent firearm, while moving toward Officer Glidden and ignoring commands, coupled with . . . proximity to Officer Glidden, creates a material issue of fact as to Williamson's intent."

A special concurrence found that the prosecutor did not make the arguments asserted by the Court's majority, and that the trial court erroneously "conducted a mini-trial and resolved the material factual issue of whether Williamson's actions were an intentional act. . . . That is not the purpose of a motion to dismiss under rule 3.190(c)(4)."