Case Law Update
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Eleventh Circuit Court of Appeals

Pye v. Warden, Georgia Diagnostic Prison, 18-12147 (Oct. 4, 2022)

The Eleventh Circuit issued an en banc rehearing opinion, and addressed the issue of whether the "state court's decision that Pye is not entitled to relief on his ineffective-assistance claim warrants deference under the Antiterrorism and Effective Death Penalty Act." The en banc court affirmed the denial of a habeas corpus petition because the state court "reasonably concluded that Pye was not prejudiced by any of his counsel's alleged deficiencies in connection with his sentencing proceeding." The prior three-judge panel had engaged in de novo review of the claims and concluded that the district court erroneously rejected the claims "because the state court's conclusions as to both deficient performance and prejudice were based on unreasonable factual determinations and involved unreasonable applications of *Strickland* and therefore weren't entitled to AEDPA deference." The claims related to the sufficiency of the investigation into potential mitigating circumstances of Pye's background; the failure to obtain a mental-health evaluation; and the attempt to rebut the State's argument about future dangerousness. The State's petition for en banc rehearing focused solely on whether Pye failed to establish prejudice. The en banc court therefore did not address the first prong of Strickland – whether counsel was deficient, and the three-judge panel's decision finding deficient performance therefore remained.

The en banc opinion addresses the relevant standards of federal habeas review of a state court's adjudication on the merits. Prior to the enactment of AEDPA in 1996, a state court's factual findings were presumed correct unless the federal court, "'on consideration of the record as a whole concludes that such factual determination is not fairly supported by the record." Post-AEDPA, the state court's factual determinations are "presumed to be correct," and the petitioner has the burden of proving otherwise by "clear and convincing evidence." And, even if the federal petitioner demonstrates that a factual determination was wrong, the state court's determination of facts may still be reasonable "so long as the decision, taken as a whole, doesn't constitute an 'unreasonable determination of the facts' and isn't 'based on' any such determination."

Additionally, under the Supreme Court's decision in Wilson v. Sellers, the federal court must review "the specific reasons given by the state court and defer[] to those reasons if they are reasonable." The federal habeas court, however, is not strictly limited to a review of "the particular justifications that the state court provided. Rather, in order to 'give appropriate deference to [the state court's] decision,' id., having determined the reasons for the state court's decision, we may consider any potential justification for those reasons." The federal court may thus consider "additional rationales that support the state court's prejudice determination."

The en banc majority disagreed with both Pye and dissenting judge's in this case who found that Wilson "prohibits us from considering justifications that support the reasons underlying the state court's decision but that, for whatever reason, the state court didn't explicitly memorialize in its written opinion." The en banc majority engages in an extensive written explanation of its foregoing conclusion on this issue.

After setting forth the controlling principles, the majority returned to the fact-specific component of this case and concluded that "[w]hile the state court might have made some debatable calls as to the weight that is ascribed to different pieces of evidence – and made at least one dubious factual statement – its ultimate decision to deny relief was no 'so obviously wrong that its error lies beyond any possibility for fair-minded disagreement.'"

With respect to the issue of prejudice for failing to investigate and present mitigating evidence regarding Pye's childhood, the en banc majority emphasized that the state court's decision "was based on (1) its decision to discount the affidavit evidence presented at the state post-conviction proceedings due to concerns about their credibility; (2) evidence of Pye's family's unwillingness to cooperate in his defense at the time of trial; (3) the minimal connection between Pye's background and the crimes he committed; (4) Pye's age at the time of those crimes; and (5) the extensive aggravating evidence presented by the State at sentencing." "Neither the court's weighing of these factors nor its ultimate prejudice determination was contrary to or based on an unreasonable application of federal law, or based on an unreasonable determination of the facts."

With respect to the failure to present mental-health evidence, "it was not clearly and convincingly erroneous (or unreasonable more generally) for the state court to view the evidence of Pye's alleged brain damage as conflicting and to question the severity of the condition it reflected." Here, the Court observed that

presenting mental-health evidence often runs the risk of backfiring, by painting a picture of Frankenstein for the jury.

As to the future dangerousness claim, even assuming the truth of the proffered testimony of two corrections officers who supervised Pye as a youthful offender, that Pye was less dangerous than most inmates, "it was reasonable for the state court to conclude that this sort of evidence wouldn't have been substantially likely to change the outcome of sentencing for three reasons: (1) prison records show evidence of Pye's insubordination and aggressiveness; (2) Pye became increasingly violent after his first incarceration; and (3) further evidence that Pye wasn't a violent person would have been cumulative."

All of the foregoing fact-specific portions of the analysis are addressed in extensive detail, prior to the majority's ultimate determination of whether the state court's conclusion "as to cumulative prejudice constituted an unreasonable application of *Strickland*." This cumulative-prejudice analysis focused heavily on the extensive aggravating circumstances heard by the jury.

An equally extensive 70-page dissent of one judge, joined by a second, took issue with both the analytical framework regarding the state court's justifications and rationales, and further provided its contrary evaluation of the factual errors found to exist on the part of the state court.

First District Court of Appeal

Brown v. State, 1D21-0597 (Oct. 6, 2022)

The First District affirmed convictions for armed robbery, kidnapping, conspiracy to commit robbery and possession of a firearm by a convicted felon.

The First District applied the Faison test to conclude that the three kidnapping convictions were supported by sufficient evidence and that Brown did not establish fundamental error. Brown and his codefendant, Wiggins, "forced the three victims back into the restaurant when they were in the process of exiting the building. Forcing the victims back inside was not slight, inconsequential, or merely incidental to the robbery, and it was totally unnecessary to the commission of the crime (especially given Branton's [another coperpetrator] privileges as an employee). . . . Driving the victims back into the restaurant, temporarily taking their cellphones, and sequestering the women in the hallway for five minutes, all while moving the manager into the office at gunpoint, are actions not inherent to the nature of this type

of robbery. Those actions did, however, make committing the robbery substantially easier and substantially lessened the risk of detection." The store manager was forced to open a safe.

The First District also addressed a challenge to the admissibility of testimony by Branton that Wiggins "told her someone named 'Kenneth' wanted to make some money and that they decided in turn to rob the Bojangles." Kenneth was Brown's first name. Although the State conceded that this issue was properly preserved for review by defense counsel's hearsay objection, the First District rejected that concession, concluding that the issue was not preserved, because defense counsel "did not mention the lack of prerequisite conspiracy findings." After defense counsel asserted a hearsay objection, the prosecutor referenced the coconspirator exception to the hearsay rule, and defense counsel did not present any further objection or argument.

Reviewing the claim under the fundamental error standard, the First District found that although "the trial court did not make threshold findings related to the existence of a conspiracy *prior* to admitting the co-conspirator's statement, we have no doubt that the State could have presented evidence to support the threshold finding had Brown's counsel mentioned the need to do so." Subsequent witnesses presented "ample evidence of a conspiracy" leading up to the robbery. Brown "performed a voice search on his phone," looking for a Draco, the type of gun used in the robbery. Branton and Wiggins were shown to have been close friends for many years. Records of multiple calls and the locations of the phones leading up to the robbery corroborated the preexisting plan.

McClendon v. State, 1D21-1565 (Oct. 6, 2022)

The First District affirmed the sentence imposed for a revocation of probation. The judge imposed a sentence of 44.275 months, which was five months below the lowest permissible sentence under the Criminal Punishment Code. McClendon sought a greater downward departure. "Once "a departure sentence is granted, 'the extent of downward departure is not subject to appellate review.'"

Morris v. State, 1D21-1689 (Oct. 6, 2022)

The First District reversed a conviction for first-degree felony murder, concluding that it was based on legally inconsistent verdicts. The jury found the defendant not guilty of the separately charged offense of attempted armed robbery, which served as the underlying felony for felony murder.

"A legally inconsistent verdict occurs when a finding of not guilty on one count negates a necessary element for conviction on another count."

Carruthers v. State, 1D21-3190 (Oct. 6, 2022)

Prison releasee reoffender status "can apply to defendants who commit crimes while incarcerated; there is no 'release' prerequisite."

Swamy v. State, 1D21-3582 (Oct. 6, 2022)

Habeas corpus is not available as a remedy to collaterally challenge the merits of a conviction.

Second District Court of Appeal

Lamberson v. State, 2D21-1557 (Oct. 7, 2022)

The trial court imposed a five-year prison sentence for a third-degree felony conviction, based on a scoresheet total of 18 points. As the point total was 22 or fewer, a nonstate prison sanction was required unless the court made written findings that such a sanction could present a danger to the public. No such findings were made by the lower court.

At the time of Lamberson's prior direct appeal, the law required the imposition of the nonstate prison sanction on remand. Lamberson, however, had been granted a second direct appeal due to prior appellate counsel's failure to raise this issue. Subsequent to the prior direct appeal, and prior to the current appeal, the Florida Supreme Court held that section 775.082(10) was unconstitutional, because it required a judge rather than a jury to make the finding of dangerousness. The Supreme Court's Brown decision, which held the statute unconstitutional, was not retroactive. The sentence was therefore reversed and remanded with directions to impose the nonprison sentence.

White v. State, 2D21-1713 (Oct. 7, 2022)

The Second District reversed a sentence due to the failure of the trial court to apply "the proper test when determining whether to grant a downward departure sentence." Specifically, the trial court "failed to consider whether Mr. White presented sufficient evidence to meet any of the statutory criteria that would have

allowed for a downward departure." The sentence was remanded for resentencing before a different judge.

Morrow v. State, 2D22-686 (Oct. 7, 2022)

The trial court denied a motion for correction of jail credit. Morrow appealed that order, and while the appeal was pending, he filed a rule 3.800(a) motion, alleging that the written sentence did not conform to the oral pronouncement regarding the additional 127 days of jail credit he was seeking, the same credit being litigated in the then-pending appeal. The trial court denied the subsequent 3.800(a) motion. On appeal, the Second District held that the trial court lacked jurisdiction to entertain the 3.800(a) motion because it raised the same issue, or a related issue, to what was then pending on appeal.

Third District Court of Appeal

L.A. v. State, 3D20-1856 (Oct. 6, 2022)

The Third District, citing several of its own prior decisions, reversed for a new adjudicatory hearing because the trial court conducted the adjudicatory hearing by Zoom, in October 2020, after the juvenile filed a written objection to remote trial based on the constitutional right to be present in the courtroom and the right of confrontation of accusers and witnesses. The trial court did not make "a case-specific finding of necessity for a remote trial and the case proceeded to trial." "[D]ue process required the trial court to make a case-specific finding of necessity . . . for L.A.'s remote trial."

Fourth District Court of Appeal

Walk v. State, 4D21-557 (oct. 6, 2022)

When the trial court "resentenced appellant for three felonies to correct an illegal sentence, it failed to give appellant credit against the probation portion of the new sentences based upon the time appellant had already served on each count." The trial court had granted the credit only as to one of the two counts at issue. The two sentences at issue were concurrent and the credit should therefore have been applied as to both.

Babrow v. State, 4D22-1456 (Oct. 6, 2022)

Facts found by the sentencing judge regarding prior convictions under the Prison Releasee Reoffender Act are not elements of the offense and need not be found by a jury under Apprendi v. New Jersey.

Fifth District Court of Appeal

DCF v. Despaigne and State, 5D22-1186 (oct. 7, 2022)

The Fifth District granted DCF"s certiorari petition and quashed an order committing Despaigne to DCF.

During a pending murder prosecution, competency evaluations were conducted, and while the evaluations concluded the defendant was incompetent, neither report stated that the incompetence "resulted from a diagnosed mental illness, and both opined that it was improbable his competence could be restored in the future." The court involuntarily committed the defendant to DCF. Under section 916.13, Florida Statutes, clear and convincing evidence was required to show that there defendant had a mental illness and that there was a "substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future."

Glispy v. State, 5D21-2172, 5d21-2173 (oct. 3, 2022)

One ground of a revocation of probation was reversed based on insufficient evidence. The violation in question was for failing to remain confined at home. "This condition had exceptions for work-related travel, public service work, or special activities. The State did not elicit any competent, substantial evidence to support this violation. The community control officer did not testify; the State presented no evidence that Glispy's absence from home had not been approved."

Saviory v. State, 5D22-104 (Oct. 3, 2022)

The Fifth District reversed the denial of a Rule 3.800 (a) motion which alleged that the sentence imposed for one count exceeded the statutory maximum. The Fifth District refused to correct the sentences itself based on the State's assertion that the trial court merely mixed up the sentences for two counts when reducing the oral pronouncement to writing. A partially dissenting judge would have limited the

remand to an instruction to conform the oral and written pronouncements, as opposed to the majority's "remand for further proceedings."

Smith v. State, 5D22-1663, 5D22-1688 (Oct. 3, 2022)

The Fifth District granted two petitions for writs of prohibition to "prohibit the trial court from proceeding in [] two underlying violation of probation cases for lack of jurisdiction." The Fifth District agreed that "when [Smith's] jail credit for time served awaiting disposition is correctly credited against the overall probationary term in each case, it is clear he was no longer serving probation at the time the affidavits of violation of probation were filed, leaving the t rial court without jurisdiction over the violation of probation proceedings."

Smith had been sentenced in each case to 24-months of supervised probation, with the condition that he complete a term of six months in jail with credit for time served. While the Fifth District questioned the Florida Supreme Court's precedent on the subject, it deemed itself bound by prior case law when concluding that in the absence of express statutory authority, the award of jail time credit applied to the entire probationary period. Thus, the Court found "that based on this precedent, where probation has been imposed with jail time as a condition thereof, any jail time credit for time served is to be applied to the entire term of probation. By properly crediting Smith with his jail time credit against the entire probationary term in each case and comparing that date with the date the affidavit of violation was filed in each case, we must conclude that his probationary terms had terminated prior to the date the affidavits of violation were filed." The Court's opinion includes computations from one of the two cases for the purpose of illustrating the correct computation.