Case Law Update
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First District Court of Appeal

Jack v. State, 1D21-1494 (Oct. 12, 2022)

The First District affirmed a conviction for second-degree murder, but reversed the sentencing order as to costs and fines.

A claim asserting the inadmissibility of Williams rule evidence was not preserved for appellate review and was not fundamental error. The objection raised at trial was different from the claim asserted on appeal. At trial, when a witness was asked if the Appellant had ever said "anything to you about a certain number," counsel objected that there was "no evidence that any of this talk has ever taken place" and that it was prejudicial.

Jack also argued that he was entitled to a 12-person jury, but this was not preserved in the trial court and did not qualify as fundamental error because a six-person jury did not deprive him of a fair trial. Regardless, decisional law on the constitutionality of a six-person jury for noncapital cases remains binding law.

Some of the fines imposed had been imposed without notice and opportunity to be heard; they were stricken with leave to reconsider them on remand after an appropriate hearing with notice.

State v. Green, 1D21-1808 (Oct. 12, 2022)

The trial court erred in suppressing evidence. During a warrantless search of the residence Green shared with probationers, probation officers discovered drugs and paraphernalia in plain view; they then obtained a search warrant and, after the ensuing search pursuant to the warrant, they discovered additional contraband.

Probation officers responded to an anonymous tip that a probationer, Stripling, possessed controlled substances at the residence. The probation officers went to conduct a warrantless search and were accompanied by two investigators from the sheriff's office, as a safety precaution. Those investigators remained outside the residence with the three residents while the probation officers conducted

the initial search. Green shared a bedroom with the probationer, Stripling, and the initial items of contraband were observed there, in plain view. The search was then stopped, until the warrant was obtained. The subsequent search resulted in the discovery of additional items in the home, some of which were in the same bedroom.

The trial court suppressed the evidence based on the conclusion that although there was probable cause for the search, the evidence would be admissible only in a probation revocation proceeding had Green been on probation. For admissibility in a new criminal proceeding, "law enforcement had to have at least a reasonable suspicion of criminal activity without the information obtained from the warrantless search by probation officers."

The starting point for the appellate court was that Green, although a non-probationer, could not reasonably expect privacy in areas of a residence that he shared with a probationer. As the probation officer had authority to conduct a warrantless search, without any showing of reasonable suspicion as to the probationer, Stripling, the initial search and discovery of contraband by the probation officers was lawful. However, "the same evidence may not be used to support new criminal charges unless the search otherwise satisfies the requirements of the fourth Amendment."

Once the initial contraband was observed during the lawful search as to the probationer, the officers obtained a search warrant for which probable cause had been established. The exclusionary rule that the trial court had applied, on the basis of the initial search, was not applicable "when there was no illegal conduct on the part of law enforcement."

Green further argued that the initial evidence seized during the warrantless search "indicated only personal use of drugs and did not create reasonable suspicion to believe that additional contraband would be discovered in the home." The First District disagreed. The officers collected a "smoking device and a used syringe containing liquid. They also told investigators that they saw a crystal-like substance in a plastic container on the dresser in the master bedroom. Although that was not tested at the time, "it could reasonably be inferred that the crystal-like substance was also methamphetamine."

Key v. State, 1D21-1876 (Oct. 12, 2022)

The First District affirmed convictions for burglary, grand theft auto and trespass.

A sworn motion to dismiss with respect to burglary was properly denied. Key argued that he did not take the stolen truck from a towing service. Key had previously stolen a Lexus, and when that got stuck in mud, he proceeded to steal a tow truck from a nearby towing service to extricate the Lexus. It was undisputed "that the entire property of Allen's Towing Service is enclosed in a fence and that the stolen truck was taken from within that enclosure." The First District found that factors that apply to determine the meaning of curtilage for Fourth Amendment purposes were not applicable to the issue of whether curtilage existed as an element of a burglary offense.

Key also challenged the sufficiency of the evidence as to $1,000 in damage to a fence at the towing service during the burglary. This argument was again based on the contention hat the fence was not part of the curtilage and thus not part of the structure. The argument was again based on inapplicable Fourth Amendment analysis of curtilage. While there was no Florida case law on the question of whether the fence was part of the curtilage, the Court found that "the fence is inextricably tied to the curtilage and therefor the structure itself."

Although the jury instructions were erroneous with respect to three burglary charges, the issue was unpreserved and the error was not fundamental. The jury was instructed that at the time of entering the structure, the defendant had to have "the intent to commit an offense therein." In 2013, the standard instructions were amended, and currently provide that the defendant "had the intent to commit an offense other than burglary or trespass in that structure." The purpose of this addition was to "make clear to jurors that 'the crime intended cannot be burglary or trespass.'" This error, however, was not fundamental "as it did not implicate a disputed element of the crime." At trial, "Key's trial counsel never suggested that the burglaries did not occur or that someone had entered the structure or dwellings without the requisite intent." Counsel's arguments asserted that there was no evidence that Key had been inside the towing service or two homes at issue; that the damage to the fence was not shown to exceed $1,000; and that the fence was not part of the structure. The State presented significant evidence of the intent to commit theft. "Because Key's defense was based on identification and did not dispute the element of intent, the erroneous jury instruction was not fundamental error."

Atwood v. State, 1D21-2605 (Oct. 12, 2022)

Although a deputy sheriff exceeded the scope of consent whom removing a bag of heroin from Atwood's pocket, subsequent events were not the fruits of that illegal search and a suppression motion was properly denied.

During a traffic stop, a consensual pat-down search for weapons was conducted. Atwood agreed to the removal of a cell phone from his pocket. The deputy also removed a bag of heroin from the pocket.

Atwood was stopped for a traffic infraction and consented to a search of his car. One deputy spoke with him while the car was searched. The deputy was concerned for his safety after observing Atwood's nervousness, and sought and obtained consent to a pat-down for weapons. While patting down Atwood, the deputy felt "a tied-off corner baggy of an unknown powder." "While his hand was outside the pocket on top of the bag, the deputy asked Atwood what 'it' was. Atwood, who also had a cell phone in the same pocket, responded that it was his cell phone and that the deputy could remove it. The deputy then went into Atwood's pocket and 'removed the corner baggy with a white powder substance and his cellphone.'" Atwood then attempted to flee, and during the attempted flight, tossed "to other bags to the ground, containing heroin and cannabis."

The seizure of the baggy exceeded the limited consent to remove the cell phone. There was no evidence to suggest that its removal was accidental or inadvertent. Nor was there testimony to support its seizure on the basis of the plain-touch doctrine. The officer did not testify about experience in handling cocaine; he did not testify about the manner in which illegal drugs were carried or packaged.

On the basis of the limited testimony, the appellate court could not find probable cause for the search of the pocket. The seizure of that bag should have been suppressed. However, the seizure of the other bags, which Atwood tossed during his attempted flight, resulted in the abandonment of those bags, and Atwood no longer had any privacy interest in them. And, even if Atwood had not discarded the bags, they would inevitably have been discovered during a search of his person after his arrest for his attempted flight.

Atwood's appeal was after the entry of a guilty or nolo plea, reserving the right to appeal the denial of the suppression motion. As the abandoned bags were lawfully seized and served as "independent evidence sufficient to support each of the drug convictions," the "suppression of the initial bag would not have been

dispositive in the case." The appeal of an issue reserved for appeal after a plea of guilty or no contest can prevail only if the issue is "dispositive," and an issue is dispositive only if, 'regardless of whether the appellate court affirms or reverses the lower court's decision, there will be no trial of the case.'"

Williams v. State, 1D22-123 (Oct. 12, 2022)

The First District affirmed the denial of a Rule 3.800(a) motion. Williams argued that his sentence should be vacated and conviction overturned because the statute of limitations for the offense had expired. Such a claim is not cognizable in a Rule 3.800(a) motion, as the challenge goes to the validity of the underlying conviction, as opposed to the sentence itself.

The lower court had also denied the motion because sections 775.15(13)(a) and 775.15(16)(a) permit prosecution to commence at any time if the offense was reported within 72 hours after the commission of the offense. The offense charged was sexual battery and DNA testing, conducted three months after the date of the offense, found a match to the defendant. The defendant was not arrested until nine years after the date of the offense, beyond the general three-year limitations period for a second-degree felony. The above-noted statutory provisions, however, provide an exception for certain offenses, including sexual battery, permitting commencement "at any time after the identity of the accused is established through DNA evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused. There was insufficient evidence to support this exception based on section 775.15(16)(a), however.

But, the exception under 775.15(13) was established. This permitted prosecution to commence at any time where the victim was under 16 and the offense was a violation of section 794.011.

Second District Court of Appeal

Battles v. State, 2D22-765 (Oct. 14, 2022)

The denial of a Rule 3.800(a) motion, which the trial court found to raise a noncognizable issue, was reversed for further proceedings. Battles "asserted that the predicate offenses used to support his adjudication as an HFO were either felonies that fell outside of the applicable five-year time frame under the HFO statute, were nonqualifying drug related offenses, or could not be counted as separate prior

felonies because he was sentenced for them on the same day." The claim was facially sufficient and was cognizable in a 3.800(a) motion and had to be addressed.

Third District Court of Appeal

Martinez v. Jones, 3D22-1073 (Oct. 14, 2022)

The Third District denied a pretrial habeas corpus petition in which Martinez challenged the denial of pretrial bond after a three-day Arthur hearing. Martinez was charged with first-degree premeditated murder, attempted murder and conspiracy to commit murder. As the charged offense was punishable by life, the State had to demonstrate, in the trial court, that the proof was evident and the presumption great.

The Third District accepted the lower court's conclusion that the proof was evident and the presumption great. The lower court found that the murder was "a premeditated hit." There was evidence that Martinez needed to eliminate the alleged murder victim because she had been a witness against one of Martinez's boyfriends in another case.

Although a trial court has discretion to set bail even after finding that the State satisfied its burden of proof, the appellate court deferred to the lower court's conclusion that Martinez was a "danger to the community, to any potential witnesses in the case against her and there are no conditions of release that would assure her presence at trial or protect the safety of the community."

Alcazar v. State, 3D22-1669 (Oct. 14, 2022)

The Third District granted a pretrial habeas corpus petition and concluded that the State's motion for pretrial detention was erroneously granted.

The trial court found that pretrial detention was warranted because "Alcazar was presently charged with a dangerous crime, there was a substantial probability that Alcazar committed the crime, the factual circumstances demonstrated Alcazar's disregard for the safety of the victim and community, that Alcazar was a threat to both and there were no conditions of release that could assure the safety of the victim and community from the risk of physical harm."

As to most of these factors, the Third District found that the trial court did not abuse its discretion. The problem here was that the pretrial detention statute set forth

an enumerated list of offenses that qualify as "dangerous crimes," and the statute further required that the court find that "the defendant is presently charged with a dangerous crime." The offense at issue here, solicitation of first-degree murder, is not included in that enumerated list in the statute. Attempt and conspiracy were enumerated; solicitation was not. Additionally, the appellate court did not accept the State's argument that the State presented sufficient evidence to show that the solicitation went further and became an attempted murder. The trial court did not make such a finding and the information alleged only solicitation, not attempt.

Mendoza v. State, 3D21-1522 (Oct. 12, 2022)

The Third District affirmed the revocation of probation and found that the State presented substantial, competent evidence of a willful violation of the terms of probation.

Mendoza argued that his inability to pay a $92 evaluation fee "prevented him from attending" a required evaluation, and that the trial court's order "did not specify a date by which the MDSO program had to be completed." The distinctive facts in this case were that "Mendoza had roughly 150-days to try and secure the needed $92. Mendoza failed to pursue any alternative avenues of securing money during this period. And, as the trial court noted, Mendoza never attempted to sell any of his belongings to try and raise money."

Although the probation order did not specify the completion date for the MDSO program, the probation officer "gave Mendoza four separate chances to attend his evaluation. Mendoza was aware that he was required to appear at these evaluations, yet purposefully chose not to do so."

Fourth District Court of Appeal

Skirdulis v. State, 4D21-2380 (Oct. 12, 2022)

The trial court failed to make factual findings to support an assessment of $100 in prosecution costs and also erred in imposing a $35 investigation cost that the State did not request. The Fourth District concurred with the State's argument that the trial court could "reimpose the prosecution cost on remand if it makes the required factual findings."

Gray v. State, 4D22-1046 (Oct. 12, 2022)

The Fourth District affirmed the denial of a rule 3.850 motion, quoting from an earlier decision for the point that even if "a deficiency existed in the temporary appointment of the county court judge to the circuit court, this provides no basis for postconviction relief. Jurisdiction is determined by the court, not the judge."

Williams v. State, 4D22-1234 (Oct. 12, 2022)

A rule 3.800(a) motion alleged that "the trial court miscounted the predicate offenses used to sentence [the defendant] as a violent career criminal and that he did not actually qualify as a violent career criminal." The motion was facially insufficient, as it did not "demonstrate that the alleged sentencing error is apparent from the face of the record." Williams was granted leave on remand to refile the motion if he "can demonstrate from the court record (i.e., the sentencing transcript and exhibits received by the trial court) that his sentence was illegal and that it still affects his current release date." The motion may not rely on facts beyond the face of the trial court record.

Fifth District Court of Appeal

State v. Woodson, 5D21-2251 (Oct. 14, 2022)

The State appealed an order dismissing two charges of battery by a detainee in a detention facility on another detainee. The charges were dismissed after an evidentiary hearing on immunity under the Stand Your Ground statute. The Fifth District reversed for further proceedings. The motion to dismiss was facially insufficient and the evidentiary hearing should not have been held.

The charging document alleged that the defendant and his cellmate had a disagreement which resulted in the cellmate asking if Woodson "wanted to fight with him," when "the two traded angry looks, and they bumped into or brushed against each other." Woodson then "pushed his cellmate up against the wall, placed his hands on both sides of the cellmate's head, and yelled at him." The opinion in this case focused on whether Woodson was acting in response to the cellmate's "imminent" use of unlawful force. The opinion sets forth dictionary definitions of "imminent," including "ready to take place," thereby implying that an imminent act "requires no further measures to manifest."

The motion alleged that the cellmate: "(1) asked if he wanted to fight him and offered to fight now, (2) made repeated threats to Appellee's life, (3) struck Appellee with his shoulder as he walked by, (4) chest bumped Appellee, and (5) was a member of a gang known for murder and gun violence." These allegations, even if true, did not "amount to an imminent threat by the cellmate to use unlawful force. Nor could the cellmate's alleged invitation to fight reasonably lead to the conclusion that Appellee necessarily had to use force. That is essentially an argument that Appellee had to fight his cellmate in order to avoid fighting with his cellmate. But accepting an invitation to fight is not defending with force out of necessity against an imminent threat."

Roberts v. State, 5D21-2537 (Oct. 14, 2022)

The Fifth District reversed an order denying a motion for new trial and remanded the case for consideration of the weight of the evidence when ruling on the motion. The trial court erroneously applied the standard of the sufficiency of the evidence when ruling on the motion.

The Fifth District also refused to entertain an argument regarding a discovery issue because it had not been presented in the trial court. When addressing the discovery violation, the trial court inquired as to how Roberts had been prejudiced. Defense counsel asserted that an investigating officer's trial testimony was a complete contradiction of his deposition testimony. The trial court responded that defense counsel could elicit inconsistencies on cross-examination. On appeal, Roberts asserted for the first time "that had he known the investigating officer was going to offer expert testimony he would have retained his expert to rebut that testimony.