

Case Law Update
October 3, 2022
Prepared by
Richard L. Polin

Supreme Court of Florida

[Truehill v. State](#), SC20-1589, SC21-828 (Sept. 29, 2022)

The Supreme Court affirmed the denial of a Rule 3.851 motion for postconviction relief, and denied a habeas corpus petition alleging ineffective assistance of appellate counsel.

Trial counsel was not ineffective in questioning the venire panel. At an evidentiary hearing, counsel testified as to his strategic reasons for not asking questions about race. Counsel's strategy was to avoid questions about race, as questions about racial bias could prove to be damaging, unless the facts of the case indicated a racially motivated crime. The facts of this case were perceived as being based on opportunity, not race.

Two jurors were not specifically questioned about their views on the death penalty. Defense counsel's questioning was not deficient, because the record reflected that both the prosecution and defense counsel presented extensive general questions to the venire regarding views on the death penalty.

Defense counsel was not ineffective for failing to object to comments by the prosecutor during opening and closing arguments. A reference to Truehill as the "hatchet man" in the attack on victim Brown was "a reasonable conclusion drawn from the evidence that Truehill was consistently the one seen wielding a knife."

Counsel was not ineffective in handling questioning of witnesses. The failure to question one witness, Leann Williams, about her original identification in which she stated that her attacker was Hispanic, and in which she initially identified only one of the other two perpetrators, was not deficient where there was other evidence tying Truehill to the attack on Williams and any questioning of the witness on this "would have had limited impeachment value."

Questioning of another witness, Brenda Brown, would, according to counsel's testimony, "only have the effect of bolstering her in-court identification of Truehill." Counsel feared giving the opportunity for the witness, on the stand, to state that

Truehill was the perpetrator. As to yet another witness, who identified Truehill in court, defense counsel feared that questioning the witness on her prior lack of identification would set up "a dramatic reidentification of the defendant in front of the jury."

Counsel did not question the defendant's stepmother about the abuse the family suffered at the hands of Truehill's father. Her testimony at the postconviction evidentiary hearing, where she said that she was responsible for disciplining Truehill contradicted her penalty phase testimony, in which she said that the father was the disciplinarian. The failure to present testimony from several other witnesses was not ineffective where the testimony that they would have provided was deemed cumulative of substantially similar to testimony that had been presented in the penalty phase. A claim based on the failure to present a mitigation expert at the penalty phase and the failure to provide that witness with necessary resources for further interviews of potential mitigation witnesses was refuted by counsel's testimony that no constraints were placed on the mitigation specialist's work and that the witness never asked to question additional witnesses or to pursue a different line of investigation. Counsel's limited questioning of the State's expert witness was not ineffective, as counsel testified at the postconviction evidentiary hearing that counsel feared such questioning would open the door for the State to elicit more damaging information.

Several claims based on defense counsel's handling of DNA evidence were rejected. The Supreme Court did not address the alleged deficiency on the part of counsel, concluding only that based on the overwhelming evidence of guilt, even if counsel's performance "fell below objective standards of reasonableness with respect to the DNA evidence, we conclude there is no reasonable probability that the jury would have acquitted him in light of the overwhelming evidence of guilt."

A Giglio claim pertaining to the testimony of the State's DNA expert was rejected. Truehill asserted that the expert "failed to disclose that FDLE's new procedures could have potentially changed her interpretation of certain DNA results and (2) failed to provide a statistical weight for some results that implicated him." As to the first part of the claim, Truehill "does not cite to any specific portion of Livingston's testimony that was false." The absence of testimony regarding the change in guidelines cannot satisfy Giglio's requirement that false testimony was presented at trial. And, based on the overwhelming evidence, the Court again concluded that there was no reasonable likelihood of a different verdict.

The second part of the claim was rejected for similar reasons. No specific portions of testimony of the expert were cited by Truehill as being false. And, no case law was cited for the proposition that a lack of testimony constitutes a Giglio violation. “And Truehill does not explain how the absence of statistical weight would have caused the jury to overvalue Livingston’s testimony that Truehill *possibly* left DNA on the wallet, washcloth, and a pair of jeans.”

A claim of newly discovered evidence was based on “the MIX 13 studies, a series of scientific studies conducted on DNA labs across the country,” because it allegedly brought to light “inconsistencies in DNA interpretation.” Evidence in this case indicated that defense counsel was “aware of the discrepancies with DNA interpretation among labs.” As such, this did not qualify as newly discovered evidence. Even if the information had not been available at the time of trial, at best, it would “slightly undermine the mixed, low-level DNA evidence.” Based on the testimony in this case, the MIX 13 studies would not have had the effect of probably affecting the outcome of the case.

Truehill argued that appellate counsel was ineffective for “defaulting on his opportunity for federal habeas review because he did not explicitly raise federal issues in three separate claims on direct appeal.” [Note: In federal habeas corpus proceedings challenging state court convictions or sentences, a federal court may review only federal constitutional claims, and, as a general rule, those federal constitutional claims must first be exhausted in the state trial and appellate courts; presentation of a similar claim under state law typically does not constitute adequate exhaustion of the federal constitutional claim.] This argument failed in the Florida Supreme Court, because Truehill did not demonstrate how the federal constitutional standards differed from those that were applied under state law in the direct appeal. And, he did not demonstrate how the additional references to federal constitutional standards would have had an impact on the Supreme Court’s ruling on direct appeal. The Florida Supreme Court further found that for federal litigation purposes, appellate counsel “presented the substance of the federal claims” and therefore did not “waive” them.

Eleventh Circuit Court of Appeals

[Conage v. United States](#), 17-1395 (Sept. 30, 2022)

The Eleventh Circuit previously certified a question to the Florida Supreme Court. After the Florida Supreme Court addressed the question in an opinion, the Eleventh Circuit, in turn, published that opinion as an appendage to it own.

In response to a question certified by the Eleventh Circuit Court of Appeals, the Florida Supreme Court addressed the meaning of the word “purchase” in Florida’s drug trafficking law. The Supreme Court concluded that a “completed purchase of illegal drugs necessarily entails the defendant purchaser’s possession of those drugs, as federal law defines possession.” The Court therefore rejected the argument “that a purchase is necessarily complete as soon as the would-be purchaser pays for the drugs.” The definition of purchase under Florida law pertained to the question of whether the prior Florida conviction qualified as a serious drug offense under the Armed Career Criminal Act.

En route to this conclusion, the Supreme Court receded from prior decisional law regarding statutory construction. Prior Supreme Court decisions held that “[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction.” That holding was deemed “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 (recognizing that some canons, like the rule of lenity, by their own terms comet into play only after other interpretive tools have been exhausted). It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether a term has a ‘plain’ or ‘clear’ meaning in isolation, without the aid of whatever canons might shed light on the interpretive issues in dispute.”

[Lukehart v. Secretary, Florida Department of Corrections](#), 21-10099 (Sept. 26, 2022)

In an appeal from the denial of a federal habeas corpus petition, the Eleventh circuit addressed an alleged violation of Lukehart’s right against self-incrimination when his confessions and other statements made to the police were admitted into evidence.

The Eleventh Circuit expressed concern about the Florida Supreme Court’s custody analysis. The Supreme Court concluded that “Lukehart was not in police custody for the first several hours after he turned himself in to Trooper Davis – despite being handcuffed and escorted everywhere by police officers – because the officers handcuffed him for his own protection after he reported that he had tried to kill himself.” The Eleventh Circuit, however, did not make its own conclusion regarding the existence of custody, focusing, instead, on the issue of whether there was an interrogation.

Some of Lukehart's statements were not made in response to direct questioning by the police; two were. In one of those, a trooper inquired where the baby was, and "Lukehart said that he did not know what the hell Davis was talking about and demanded that Davis read him his rights." In the second, a deputy asked "what's going on," and "Lukehart said that he had just tried to kill himself." "The introduction of these statements at trial, even if their admission was error under *Miranda* does not warrant habeas corpus relief." The Eleventh Circuit's harmless error analysis focused on the numerous prior, spontaneous statements made by Lukehart, in which incriminating statements had been made.

The Eleventh Circuit also addressed the claim that counsel was ineffective in the penalty phase of the death penalty case for "failing to thoroughly investigate [the] prior felony child-abuse offense and failing to call an available witness to mitigate the effect of the State's evidence about that offense." The State, at the penalty phase, relied on this conviction as an aggravating factor in the penalty phase. Defense counsel was aware that the State was going to rely on it. Counsel was also aware that Lukehart claimed he was innocent of the prior crime and that another person caused the child's injuries. Lukehart had pled guilty to that offense "because he wanted to get out of jail."

Counsel was aware of a witness who would have provided potentially mitigating evidence with respect to this, including Lukehart's love of the child and his caring for the child. Counsel was also aware that the same witness would have provided testimony that was not positive – Lukehart yelled at the bay when she cried, in a voice that sent "shivers down the spine." The witness had stated in her deposition that she thought Lukehart engaged in mental abuse; that Lukehart slapped the baby; that one of the baby's arms went limp once, and another individual said that Lukehart had done that. Additionally, counsel chose to focus on Lukehart's serious psychological problems at the time of the prior offense, which still existed at the time of the instant murder. While Lukehart argued that the different strategy would have been better, that did not satisfy his burden for a claim of ineffective assistance, as "counsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken might be considered sound trial strategy."

First District Court of Appeal

[Herring v. State](#), 120-0861 (Sept. 28, 2022)

After admitting multiple violations of probation, Herring appealed the revocation and sentence. The appellate court noted that after such an admission, a defendant could still appeal the sentence. The primary argument on appeal was that the judge erred by characterizing the violations as “blatant.” This was not a legal finding, as it was required for neither the revocation nor sentence; it was “a passing comment explaining the court’s general evaluation and perception of the case,” and it came after an admission “to intentionally violating . . . probation by using illegal drugs and failing to contact his probation officer for an extended period. This was far from error.”

[Kunselman v. State, et al.](#), 1D20-1003 (Sept. 28, 2022)

The appellate court had jurisdiction to hear an appeal transferring a postconviction motion to the proper jurisdiction. The order was a nonfinal order concerning venue and was appealable under Fla.R.App.P. 9.130(a)(3)(A).

[Perry v. Florida Department of Corrections](#), 1D20-2187 (Sept. 28, 2022)

A habeas corpus petition filed in the trial court, when used as a postconviction challenge to a conviction, is unauthorized and may be dismissed by the trial court, rather than transferred to the jurisdiction in which a Rule 3.850 motion could be entertained.

[Parrish v. State](#), 1D21-1435 (Sept. 28, 2022)

Parrish appealed his sentence and the First District affirmed with respect to the issue of eligibility for sentence review, and dismissed as to the issue of the court’s “refusal to impose a departure sentence.”

Parrish was sentenced to concurrent prison terms of 30 years for sexual battery and five years for false imprisonment, for offenses committed while he was 16 years old. The sentence imposed by the court did not reference entitlement to a sentence review, either orally or in writing. The First District saw not statutory “requirement that the court, when sentencing an offender,” “pronounce the offender’s entitlement to a sentence review pursuant to section 921.1402(2)(d). Nor is the sentencing court required to indicate these facts on the sentencing order.” Section 921.1402(3)

“places the requirement to notify Parrish of his eligibility for a sentence review on the Department of Corrections.” Section 921.1402(4) “places the burden of seeking judicial review on the offender once notified.” And the “sentencing court’s responsibility . . . is triggered upon receiving an application for judicial review.”

[McPheeters v. State](#), 1D22-1869 (Sept. 28, 2022)

McPheeters mailed a written motion to file an enlarged brief, referencing a yet-to-be-filed petition for writ of prohibition. The First District dismissed, observing that this motion did not suffice to invoke the court’s jurisdiction

[Jordan v. State](#), 1D22-2960 (Sept. 27, 2022)

The First District dismissed a certiorari petition which challenged the denial of the public defender’s motion to withdraw. That motion alleged a conflict between representation of Jordan and prior representation of a potential state witness. The petition failed to discuss irreparable harm, a required element of certiorari review in an appellate court.

Third District Court of Appeal

[T.T.W. v. State](#), 3D21-1045 (Sept. 30, 2022)

In a short opinion referencing several of the Third District’s own prior decisions, the Court reversed an adjudication of delinquency based on a violation of the constitutional right to confrontation “by permitting, over objection, a prosecution witness – a police officer – to testify at [the] juvenile delinquency hearing via Zoom without any case-specific finding of necessity.” “On remand, as it appears that we are now in the later stages of the COVID-19 pandemic, the trial court may conduct the adjudicatory hearing via Zoom if it first holds a hearing on T.T.W.’s objection and ‘makes a case-specific finding of necessity before limiting [the juvenile’s] confrontation rights.’”

[Quinn v. State](#), 3D22-0922 (Sept. 30, 2022)

In affirming the summary denial of a motion to clarify a sentence, the Third District upheld the lower court’s finding that the motion was successive, quoting the previously established principle that the law of the case “‘doctrine requires that “questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings.’””

Fourth District Court of Appeal

[Johnstone v. State](#), 4D21-1411 (Sept. 30, 2022)

The Fourth District affirmed a conviction for misdemeanor stalking. A prior appeal in the case had resulted in the conclusion that evidence of stalking was sufficient to support a revocation of probation. This appeal involved the sufficiency of evidence as to the actual substantive criminal charge for stalking. The Fourth District first concluded that the prior appellate opinion was not binding because the two proceedings involved different judges, different evidentiary records, different standards of proof (reasonable doubt v. greater weight of the evidence), and different standards of appellate review (de novo for criminal conviction, which was deemed less deferential than the standard for probation violations – prohibiting reversal unless the record shows that there is no evidence to support it).

The majority opinion then concluded that the evidence was sufficient, but did not set forth any of the testimony adduced at the trial. A substantial dissent argued that the Fourth District’s prior and current decisions in this case “prohibit and criminalize legal acts on a resident’s property under the auspices of the harassment prong of the stalking statute simply because a neighbor finds the acts annoying.” The dissent asserted that the stalking statute had been misinterpreted and urged consideration of the case en banc so that the Court could recede from its first decision in the probation revocation proceeding. The dissent includes a lengthy discussion of the facts of the case, noting many of the acts committed by the defendant – emptying bags and trash by the fence between the two properties; displaying signs on the fence containing profanity; burning garbage at the corner of the property; funning a lawnmower at 7:00 a.m. on Christmas day; standing on the defendant’s own property while holding a machete and staring at one of the neighbors; and several other acts committed by the defendant.

[Mendez v. State](#), 4D22-1169 (Sept. 30, 2022)

The Fourth District quoted prior decision for the point that sexual battery of a child may be charged by information because the offense is no longer punishable by death and therefore no longer qualifies as a capital crime.