Case Law Update
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Supreme Court of Florida

State v. Garcia, SC20-1419 (Oct. 27, 2022)

The Fifth District Court of Appeal issued an opinion holding, on a certiorari petition, that the trial court erred in compelling a defendant to disclose the "passcode to an encrypted smartphone," finding that the order to disclose violated the defendant's Fifth Amendment right not to "be compelled in any criminal case to be a witness against himself." The Florida Supreme Court granted discretionary review and concluded that the Fifth District erred in granting certiorari.

One of the requirements for certiorari relief is that the petitioner suffer "irreparable harm – that is, a material injury that could not be corrected on postjudgment appeal." The order reviewed by the Fifth District did not cause such irreparable harm. Furthermore, a petition for a writ of certiorari may be granted only if the lower court "violated a clearly established principle of law." As the trial court's order did not do that, the Fifth District erred in granting certiorari for this reason as well.

The Florida Supreme Court recognized that the trial court's order "may very well materially injure [the] defense at trial. If Garcia knows and discloses the smartphone's passcode, leaving aside the smartphone's contents, he would be providing evidence to support the conclusion that he owns the smartphone." This would be corroborative of other evidence possessed by the State. However, "Garcia could adequately remedy these potential, admittedly material, injuries on postjudgment appeal of a final order." The record before the Supreme Court did not make clear "what use of the smartphone evidence the State will ultimately propose to make, whether such evidence will be admitted by the trial court, or how, any such use would be rebutted by Garcia."

Furthermore, the certiorari petition before the Fifth District did not demonstrate the existence of a "departure from the essential requirements of law," which can exist "only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." Here, the Florida Supreme Court had not yet ruled on the Fifth Amendment issues which were at issue. As a

result, "there was no clearly established law binding on the trial court." "The district courts of appeal have reasoned to differing conclusions about whether disclosure of a smartphone passcode is testimonial. The courts of last resort in several states have disagreed about whether the compulsion of such disclosure in circumstances like these would violate a defendant's constitutional right against self-incrimination."

Eleventh Circuit Court of Appeals

United States v. Malone, 20-12744 (Oct. 26, 2022)

The Eleventh Circuit held that the defendant's claim that "the government breached his plea agreement by arguing at sentencing against recommendations it allegedly promised to make to support a lower sentence than Malone received," was not preserved for appellate review by any objection during sentencing "that the government failed to live up to its bargain." As a result, the claim was reviewed on appeal under the plain-error standard of review. Although the Court's majority viewed this as being a point of well-established law, one judge dissented, concluding that the claim was not cognizable in this direct appeal and had to be brought in a collateral attack. The majority's conclusion on this issue was based on Puckett v. United States, 556 U.S. 129 (2009).

In a pre-sentencing memorandum, "Malone noted that he had pled guilty under a plea agreement and the government had agreed to recommend a three-point reduction for acceptance of responsibility and a sentence within the guidelines range." He did not object to the government's alleged breaches during the sentencing hearing. The Eleventh Circuit reviewed the terms of the agreement and found that "the government implicitly agreed not to object to the two-level reduction for acceptance of responsibility under U.S.S.G. s. 3E1.1(a) unless it received information that Malone acted inconsistently with acceptance of responsibility 'between the date of the plea hearing and the date of the sentencing hearing.'" At the time of the agreement, the government already "knew of Malone's post-arrest, pre-plea conduct on which it later based its opposition to the acceptance-of-responsibility reduction at sentencing." At sentencing, the government referenced only the post-arrest, pre-plea conduct. The government, on appeal, referenced alleged continued criminal conduct; it did not refer to this in the district court.

After finding a breach of the agreement, the Eleventh Circuit found that it affected Malone's substantial rights. The government argued on appeal that probation had already recommended denying the reduction and that the district court could have reached the same conclusion regardless of the government's

recommendation. While that was true, the district court noted that it relied on counsel's argument when it denied the reduction.

The government further breached its promise to "recommend a sentence within the guidelines range by advocating for an above-guidelines sentence." At sentencing, the government first recommended a 66-month sentence, but it then proceeded to argue that that was not enough, as Malone deserved a sentence two or three times higher. Malone could not prove prejudice as to this part of his argument, however, as the district court "still sentenced Malone within the guidelines range as the court calculated it during the sentencing hearing."

The foregoing breach of plea agreement was then found to have "seriously affected the integrity, fairness, or public reputation of the proceedings." The Court therefore vacated the sentence and remanded for resentencing before a different judge.

The dissent rejected the majority's reliance on the Supreme Court's decision in Puckett. The dissent found that in Puckett, the district court had been "alerted" to the government's breach of promise in the plea agreement. The dissent also concluded that "[n]either of the alleged breaches was clear enough to warrant the District Court's sua sponte intervention, so we cannot find that plain error occurred."

The dissent took issue with the manner in which the majority opinion characterized the dissent. The dissent, in footnote 2, recognizes that the principles of Puckett are controlling, and adds: "My view is simply that when reviewing government breaches of a plea agreement under the plain error standard, as we must do in Malone's case, we may only say that plain error exists as an initial matter when the government breach was plain to the district court. That's what happened in *Puckett*. . . . Only when the breach should have been clear to the district court, that is an indication that the record is sufficiently developed for appellate review, and we are only dealing with a question of law that makes our review manageable."

First District Court of Appeal

Burney v. State, 1D21-1082 (Oct. 26, 2022)

The First District affirmed convictions for first-degree murder and other offenses and concluded that the trial court did not abuse its discretion "by allowing the State to present evidence of pending charges against a witness." Burney had impeached two state witnesses and then presented two others who went on to testify

in Burney's defense and presented contradictory testimony to [the State's two cooperating witnesses] that was favorable to Burney." "For the same reason it was permissible for Burney to impeach Rayford and Zeiler based on their motive to testify, it was also permissible to impeach Coleman. The pending charges help explain why two of the three co-defendants are turning on the other, and so are relevant to show bias."

Eastburn v. State, 1D22-1205 (Oct. 26, 2022)

After discussions about the possible need for a new competency evaluation, the trial court agreed to order one, but nothing was done in the aftermath. Eastburn eventually filed a mandamus petition to force the trial court to decide the issue without a new evaluation, by relying solely on one done in a separate case about 1 ½ years earlier. The First District encouraged the trial court to address the issue, "order an evaluation if necessary, and address Petitioner's competency." The mandamus petition itself was denied based on the unusual circumstances in the case.

Maddox v. State, 1D22-2834 (Oct. 26, 2022)

Based on statutory amendments from 2022, the circuit court lacked jurisdiction to entertain a prohibition petition regarding disqualification of a county court judge. After that petition was denied, Maddox filed a certiorari petition in the district court of appeal. The First District treated that as a prohibition petition and denied it.

Second District Court of Appeal

State v. Erway, 2D21-1265 (Oct. 28, 2022)

The county court dismissed a citation for driving without a license. The citation described the vehicle, in part, as "MK," which referenced a minibike. The county court found that under the statute, a minibike did not require a driver to have a license to operate.

The Second District first found that the State had the right to appeal the dismissal of a criminal traffic citation, referencing section 924.07(a), Florida Statutes, which permits appeals from orders dismissing indictments or informations. The Supreme Court previously held, in Whidden v. State, 32 So. 2d 577 (Fla. 1947), that the State's right to appeal was not limited to those two types of documents, thus

permitting the State to appeal the dismissal of "an affidavit purporting to charge a criminal offense."

As to the merits of the appeal, section 322.01(27) defined a motor vehicle as including "any self-propelled vehicle, . . . excluding . . . motorized wheelchairs, and motorized bicycles. . . ." The vehicle in this case was self-propelled and it was not a motorized wheelchair." Motorized bicycles are further defined in section 316.003, under the definition of bicycle, and this definition "refers only to a 'bicycle propelled by a combination of human power and an electric helper motor,'" and it therefore "does not include a bicycle powered by a gasoline engine, such as Erway's Huffy."

One judge dissented with respect to the State's right to appeal.

Jackson v. State, 2D21-3827 (Oct. 28, 2022)

The Second District reversed the summary denial of one claim of a 3.850 motion for further proceedings. Jackson alleged that counsel was ineffective for failing to object to the imposition of costs of prosecution and investigative costs, where neither the State nor investigative agencies requested such costs. He alleged that if counsel objected, the costs would not have been imposed. The trial court found the claim facially insufficient because Jackson did not allege that but for counsel's alleged deficiency, he would not have pled guilty and would have gone to trial.

The appellate court concluded that the allegations of prejudice were sufficient. The trial court's analysis was erroneous because the alleged deficiency "occurred *after* and was unrelated to Jackson's entry of his guilty plea."

Roman v. State, 2D22-766 (Oct. 28, 2022)

The summary denial of one claim of a 3.850 motion was reversed for further proceedings because the attachments to the lower court's order did not conclusively refute the claim.

Roman alleged that "he accepted trial counsel's advice to reject a plea offer without trial counsel informing him that he faced life in prison on two separate counts." The lower court relied on two reports from competency experts who opined that "Roman understood that he could possibly be imprisoned for life if found guilty of his offenses" and that Roman "stated that he could go to prison for at least [five] years with these charges."

While these reports demonstrated that Roman "understood that he faced life in prison," that did not conclusively refute the allegations that counsel "failed to advise him that he faced life sentences on two separate counts and that, had he known this, he would not have rejected the State's plea offer."

The case was remanded for further proceedings.

Dydek v. State, 2D21-1275 (Oct. 26, 2022)

In an appeal from a conviction for drug possession charges, the appellate court reversed and found that a motion to suppress contraband should have been granted, as the encounter with Dydek was not consensual and the seizure and search were not supported by reasonable suspicion that Dydek committed a crime.

A hotel housekeeper came across a handgun under a pillow in a vacant room. The police were contacted and upon arrival, they learned that the gun had already been removed from the room and that the man and woman who had been in that room had moved to another room in the hotel. There was no evidence as to how long those two had been in the first room, when they left it, how many beds were in the room, or when it was last cleaned.

The officers ran a computer search and learned that the firearm had been stolen in an incident involving other firearms, but no facts regarding that incident were presented at the suppression hearing. The officers also obtained the drivers' licenses of the two occupants of the room and found that the man was a convicted felon. The officers then staked out the second room, looking for someone matching the description from the license, which had nothing distinctive – a white middle-aged man of average build and height. Such a man exited the second room and quickly reentered. The officers knew they lacked probable cause for a search or arrest warrant. They knocked on the door to try to make contact. Five officers were positioned in the vicinity with multiple handguns and a rifle drawn. At that point, the officers either grabbed Dydek and pulled him out of the room, or he "hesitantly stepped from the room when they directed him out of it while brandishing firearms." While "funneling" Dydek through the hallway away from the room, they patted him down for weapons, finding none. During a "protective sweep" of the room, neither guns nor contraband were found. After Dydek was handcuffed, allegedly for officer safety, Dydek pulled one of his hands away and the officer "took him down to the

ground." Dydek was then arrested for resisting or obstructing an investigation and, during a search, illicit drugs were found in a pouch that was belted around the waist.

This was not a consensual encounter, regardless of whether Dydek stepped out of the room or was grabbed and pulled out. Under either scenario, his exit was not voluntary and a reasonable person would not have felt free to leave when confronted by multiple armed officers. Nor was this an investigatory stop, as there was no evidence that a crime had taken place or that Dydek was reasonably suspected of committing one. Finally, the search which located the pouch was not a valid search incident to arrest because the officers had no authority to detain Dydek and his nonviolent effort to oppose the detention was therefore not unlawful.

One judge dissented and found that there was reasonable suspicion of criminal activity based on the occupants of the first room, where the gun was found, having moved to the second room that was being staked out. The dissent emphasized that "there was reason to suspect that the individuals in that room were also the *most recent* occupant of a room in which someone left a stolen firearm under a pillow."

Third District Court of Appeal

P.J.S. v. State, 3D21-1729, 3D21-1730 (Oct. 26, 2022)

On the basis of M.D. v. State, 345 So. 3d 359 (Fla. 3d DCA 2022) and two other Third District decisions, the Third District concluded that a hybrid adjudicatory hearing conducted remotely, with the judge appearing through the Zoom videoconferencing platform, while all other parties were physically present in the courtroom, resulted in a due process violation absent case-specific findings of necessity. One prosecution witness also testified while masked.

Note: Subsequent to this decision, the Florida Supreme Court denied a petition for discretionary review in M.D., in which the State sought discretionary review based upon an alleged conflict between district courts of appeal.

Mintz v. State, 3D21-1925 (Oct. 26, 2022)

The Third District affirmed a conviction for attempted second-degree murder. The prosecutor's comments in closing argument did not constitute impermissible burden shifting, as the comments "were permissible logical inferences from the evidence."

The victim testified that the stabbing attack occurred in the backseat of his mother's car and that no one else was present. Defense counsel argued that Mintz left the car prior to the attack and that the victim then met another man, whose bus ID card was found in the backseat of the same car. On rebuttal, the prosecutor stated that the "identification found in the car could be fake or Mintz could have dropped the ID while he was perpetrating the crime."

Jordan v. State, 3D22-1116 (Oct. 26, 2022)

The Third District rejected a postconviction challenge to a juvenile sentence, relying on prior cases concluding that "a forty-year sentence is not the functional equivalent of a life sentence," and that a juvenile offender is entitled to relief only if "he or she is serving a life sentence or the functional equivalent of a life sentence."

Michel v. State, 3D22-1373 (Oct. 26, 2022)

A postconviction claim that trial counsel was ineffective for failing to file a motion to suppress a phot-lineup identification for having utilized an unduly suggestive procedure was conclusively refuted by the trial court record. It was established that "the officer showed the victim a six-photo lineup after having him read and acknowledge his understanding of a detailed form indicating the perpetrator may not be among the six photos; that he is 'not obligated to choose any of the photos;' that it 'is just as important to clear innocent people from suspect prosecution, as it is to identify guilty parties;' that the victim 'should not feel that [he] ha[s] to make an identification.' The victim testified the lighting conditions were adequate, immediately identified Michel in the photo lineup, insisted he was certain when questioned, and testified that Michel's image while pointing the gun at his face has haunted him." Any motion to suppress based on the foregoing facts would have been meritless.

Fourth District Court of Appeal

Nottage v. State, 4D21-3238 (Oct. 26, 2022)

A Rule 3.850 motion alleging newly discovered evidence on the basis of an affidavit from a codefendant recanting prior trial testimony was properly denied where the codefendant withdrew that affidavit after the Rule 3.850 motion had been filed. As a result, the motion was no longer predicated upon any affidavit, and the motion was thus rendered legally insufficient.

Guzman v. State, 4D22-0148 (Oct. 26, 2022)

The Fourth District affirmed convictions and sentences for three counts of sexual battery on a child under 12 and other offenses. Guzman presented the unpreserved argument, based on Ramos v. Louisiana, 140 S.Ct. 1390 (2020), that convictions by a six-person jury violated the Sixth and Fourteenth Amendments to the Constitution.

The Fourth District noted that the Supreme Court had rejected such a challenge in Williams v. Florida, 399 U.S. 78 (1970), and further noted that the Supreme Court had not revisited that express holding and that the Court "does not normally overturn . . . earlier authority *sub silentio*."

Guzman also challenged his sentence for the three convictions for lewd and lascivious molestation because he was a first-time felony offender who was sentenced above the statutory minimum without the benefit of a presentence investigation. The Fourth District found that there was a valid waiver of entitlement to a PSI. "Because the trial court *specifically mentioned Guzman's entitlement to a PSI* before asking the parties if they wanted to go forward with sentencing, defense counsel waived Guzman's right to a PSI by proceeding to sentencing without objecting to the absence of a PSI." The issue based on the PSI was raised in a Rule 3.800(b) motion in the trial court, while the direct appeal was pending.

Fifth District Court of Appeal

State v. Trinidad, 5D21-3006 (Oct. 28, 2022)

In an appeal from the granting of a suppression motion, the Fifth District reversed because the "trial court erred by concluding that the probative value of the suppressed evidence would be outweighed by the danger of unfair prejudice." The defendant was charged with multiple sex offenses involving an alleged victim between the ages of 11 and 17 when the offenses allegedly occurred.

The alleged victim "used her iPhone to record a conversation between herself and Appellee, which she recorded without notifying or obtaining Appellee's consent." The recording included incriminating statements by the defendant. Portions of the recording were inaudible. Regardless of the partial inaudibility, the audio recording was still relevant evidence. The trial court concluded that there was some prejudice and that the recording would confuse the jury. The trial court "appeared to conclude that because the audio recording contained neither a definitive

confession nor an overt reference to molestation or intercourse it may confuse the jury. But the lack of these explicit references would neither improperly inflame the jury, nor would it distract the jury from the issues in the case merely because the evidence requires inference. To the contrary, the statements are evidence from which guilt as to the charged crimes may be inferred."

The defendant also argued, based upon section 934.03, Florida Statutes, and Florida Supreme Court case law from 2014, that the recording was inadmissible as it was illegally intercepted. That argument failed because section 934.03 was amended in 2015 and now provides that it is lawful for a child under 18 to intercept and record an oral communication if "the child is a party to the communication and has reasonable grounds to believe that recording the communication will capture a statement by another party to the communication that the other party intends to commit, is committing, or has committed an unlawful sexual act or an unlawful act of physical force or violence against the child."

The recording is quoted in the opinion. The defendant, at one point, says: "I could go to jail for the rest of my life." He says that it was the alleged victim's fault "because you're always get naked. . . ." And: "you don't come to my bed too sometimes?"

Cardoso v. State, 5D22-1152 (Oct. 28, 2022)

The Fifth District affirmed unspecified convictions with parenthetical references to holdings of earlier appellate court opinions for the points that 1) "Police officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct, and appearance, and also to give an opinion on the defendant's state of impairment based on those observations."' And 2) an officer's opinion as to impairment of defendant based on observations of acts, conduct, appearance and statements as seen and heard by the officer was properly admitted.