Case Law Update
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First District Court of Appeal

Reed v. State, 1D21-2473 (Nov. 16, 2022)

The First District affirmed a conviction for manslaughter.

Reed sought to suppress a video recording made while he was in police custody in a hospital emergency room, arguing that it was illegal to intercept oral information. Reed waived his right to appeal when counsel stated that there was no objection during the trial. Alternatively, no error was demonstrated. The statutory protection regarding intercepted communications applies "only insofar as the speaker has a reasonable expectation of privacy in his statements." The admission about committing a murder while in police custody at the hospital was one for which there was no reasonable expectation of privacy: "What particularly dooms Appellant's argument here is that he loudly communicated his incriminating statement to the hospital nurse (after being warned against spitting on the nurse). Appellant's proclamation could be easily heard outside the open glass door of Appellant's hospital room, including by a police officer."

A motion for judgment of acquittal was properly denied. The State presented "eyewitness testimony indicating that Appellant was situated beside the victim as the only reasonable person who could have shot the victim. Additionally, Appellant placed himself at the crime scene when the shooting occurred and admitting to running down the path where the murder weapon was recovered by the police. Finally, Appellant could be heard yelling at the hospital about committing a murder."

Second District Court of Appeal

Bowers v. State, 2D21-2597 (Nov. 18, 2022)

The Second District affirmed a conviction for offering prostitution, lewdness or assignation, contrary to section 796.07(2)(e), Florida Statutes, but reversed a $5,000 civil penalty assessed under section 796.07(6).

This sentencing claim was raised under Rule 3.800(b), but the trial court, although granting the motion, did so more than 60 days after the filing of the motion to correct sentence, thus meaning that the motion was deemed denied prior to the court's ruling and leaving the court without jurisdiction to grant the motion. The Second District, after noting the State's confession of error on appeal, observed that Bowers was charged with a second-degree misdemeanor and the statutory provisions in section 766.07 for first-time violations of second-degree misdemeanors did not provide for punishment by a civil penalty of any amount. The civil penalty applied solely to conviction for offenses under section 796.07(2)(f).

State v. Lopez-Garcia, 2D21-1492 (Nov. 16, 2022)

The Second District reversed a pretrial order granting a motion to dismiss charges of traveling to seduce/solicit/entice a child to commit a sex act and attempted lewd or lascivious battery on a victim aged twelve to sixteen, and use of a computer for the purpose of effecting the prior charges. The dismissal was based on the defense of subjective entrapment and the Second District concluded that the defense of entrapment should have been "presented to the jury rather than decided by the trial court as a matter of law."

The defense of subjective entrapment was based "on a series of text communication between [the defendant] and an undercover police officer posing online as 'Ashlie.' The factual issue of what each party typed in these text communications was not in dispute. However, because reasonable persons could draw different conclusions as to what each person meant by what they typed, Lopez-Garcia did not establish inducement as a matter of law and a factual issue remained as to whether he lacked predisposition to commit the crime."

After providing extensive details and quotes from the numerous communications, the Court summarizes them by stating that "three texts were sent in rapid succession, which is a pattern on the part of Lopez-Garcia throughout the text communications. Multiple times, he sent several texts right in a row asking 'Ashlie' to respond to him. At one point later in the conversation, he asked her why she was taking so long to respond although only three minutes had passed. In this way, he could be viewed as being responsible for – or at the very least participating in – keeping the conversation going."

After detailing other communications, the Court drew the following conclusions: "Although this is an outright request by the officer to have Lopez-Garcia transmit a photo to a minor, because the officer did not explicitly ask for a

nude photo and made the request in conjunction with providing Lopez-Garcia a photo of 'Ashlie' fully clothed, a factual issue existed as to Lopez-Garcia's intent that should have been resolved by the jury."

The defendant argued that the undercover officer's statements "were attempts to chide, embarrass, and humiliate Lopez-Garcia into acting criminally. But this was a supposed fourteen year old who Lopez-Garcia had never met in person and had only been communicating with for a little over a day. Whether such comments from a virtual stranger amounted to inducement in this context is a factual issue for the jury to resolve."

Many statements were subject to more than one interpretation. While the undercover office attempted on at least four occasions "to get Lopez-Garcia to agree to travel to see 'Ashlie' the question of whether she used 'persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas [,] based on need, sympathy[,] or friendship,' . . . or in the alternative merely prompted him to act or created an opportunity for him to act."

In addition for the need for the issue of inducement to go to the jury, the issue of predisposition had to be determined by the jury, as well. The question of predisposition must be submitted to a jury "when factual issues are in dispute or when reasonable persons could draw different conclusions from the facts." The State's case showed that Ashlie was 14, the defendant "asked her several times to send nude photos of herself, repeatedly steered the conversation in a sexual direction – often using vulgar, explicit language – and sent her what were arguably unsolicited penis photos." After learning that the girl was 14, the defendant said they could not meet and could only chat, and further said that he would not take her virginity, there were subsequent contradictory statements, including his requests for nude photos of Ashlie, and sexual inquiries on his part.

State v. Bin Islam, 2D21-1797 (Nov. 16, 2022)

In a one-paragraph opinion, with a 13-page dissent, the Court transferred the case to the Thirteenth Judicial Circuit, concluding that under section 318.16(1), Florida Statutes, "if a person is found to have committed an infraction by the hearing official, he or she may appeal that finding to the circuit court." The Court's opinion of November 16th was subsequently withdrawn and replaced with a new opinion on December 30th, which opinion will be addressed in a subsequent issue of the Case Law Update.

Bustos v. State, 2D21-2485 (Nov. 16, 2022)

A $3 discrepancy is a cost assessment was reversed because the written order did not conform to the oral pronouncement.

Baeza v. State, 2D2-114 (Nov. 16, 2022)

The summary denial of a claim of ineffective assistance of counsel "for failing to present an entrapment defense" was reversed. Contrary to the lower court's findings, the claim was not conclusively refuted by the record.

The lower court relied on a portion of closing arguments in which defense counsel argued that the defendant's "brother entrapped him by telling him to store something in the apartment and then told police the drugs belonged to [the defendant]." The attached excerpts did not support the court's conclusion. The appellate court found that the argument "seems to suggest the opposite." "Admittedly, trial counsel did argue that Pulido Baeza's brother, a confidential informant, went to the police and told them that he had drugs hidden in an apartment and that he and another guy, Mario, stole the drugs and were planning to start a drug distribution ring. However, trial counsel emphasized that the jury has no evidence as to what, if anything, Pulido Baeza's brother told him because [t]here's no wire; there's no presence of police there to tell us what he said.'"

The Second District further found that the claim as pled was insufficient, and that the defendant was entitled to an opportunity to amend the claim, to try to set forth a sufficiently pled claim, on remand. The allegations in the motion were deemed to have been conclusory. There were no facts to support the allegations that his brother, acting as a confidential informant, "induced him to commit the offense." Likewise, there were no factual allegations that he "was not already predisposed to commit the offense."

Norman v. State, 2D22-1912 (Nov. 16, 2022)

Norman filed a "motion for clarification" as to whether his sentences from two different cases were consecutive or concurrent. The appellate court first noted that a defendant should entitle postconviction motions in accordance with the options available in the rules of procedure – i.e., a motion to correct illegal sentence, or a motion for postconviction relief under Rule 3.850. The Court further found that the claim was subject to litigation under Rule 3.850, and remanded for further proceedings based on the lack of clarity in the trial court's oral pronouncement at

the time of sentencing and the possibility that there was a conflict between oral and written pronouncements, with the oral pronouncement controlling.

Third District Court of Appeal

Dilver v. State, 3D20-1823 (Nov. 16, 2022)

The Third District reversed judgments and sentences in an appeal from convictions for aggravated stalking in violation of an injunction against repeat violence and two counts of violating an injunction for protection against repeat violence. Two were reversed with directions to vacate; one was reversed with directions to reduce the aggravated stalking to the reduced offense of stalking.

The information alleged that the defendant committed the offense of aggravated stalking under section 784.046, Florida Statutes, by engaging in stalking conduct after the entry of an injunction under that statute or an injunction for protection against domestic violence under section 741.30. The evidence at trial reflected that the injunction was issued under section 784.0485, Florida Statutes. The two offenses based on violating provisions of an injunction, were based on allegations regarding the issuance of an injunction under section 784.046.

The injunction that was issued did not establish the crime as charged in the information. And, the State's theory at trial was "that Dilver had committed the crime of aggravated stalking by violating an injunction for protection against repeated violence, as provided by section 784.046." The only injunction issued into evidence as to the two offenses charging violations of injunctions was an injunction issued under section 784.0485.

The Third District's opinion went through the various statutory provisions regarding the types of injunctions that courts may issue and the different statutory violations that may be based on them. Thus, "an injunction for protection against stalking under section 784.0485 is not the same as an injunction for repeat violence or dating violence under section 784.046, or an injunction for domestic violence under section 741.30."

The convictions here were all reversed based on the mismatch between the injunction entered into evidence at trial and the distinctive allegations in the charging document which referred to a different type of injunction. For one of the three offenses, aggravated stalking, the evidence at trial did establish the elements of the lesser offense of simple stalking and that charge was therefore reduced as it was a

necessarily lesser included offense. A new sentencing hearing was required for the one remaining, lesser offense.

Fourth District Court of Appeal

Johnson v. State, 4D21-3042 (Nov. 16, 2022)

The Fourth District reversed the summary denial of one claim in a Rule 3.850 motion for further proceedings. The defendant alleged that trial counsel "failed to present evidence to support Appellant's entrapment defense."

The Appellant alleged that a video showed "promises made to him by the [undercover] detective that induced Appellant to engage in the drug deal, and the video would also impeach the detective's testimonial claim that he didn't know 'Alicia,' an individual whom Appellant claims was an integral person in the alleged entrapment." The State and lower court relied on a Nelson hearing, which was held during sentencing, and addressed the video, for the purpose of refuting the claim of ineffective assistance. The Fourth District rejected this, because "the prior *Nelson* hearing did not sufficiently cover the factual allegations made in the postconviction motion regarding *substantive* use of the evidence."

Fifth District Court of Appeal

Black v. State, 5D21-2726 (Nov. 18, 2022)

The Fifth District ordered the reinstatement of Black's initial sentence because his double jeopardy rights were increased when the court, "on its own initiative, [] enhanced his sentence sixty days after imposing it."

Lynn v. State, 5D22-617 (Nov. 14, 2022)

Sentences of six years were imposed, concurrently, for two third-degree felonies. Those sentences exceeded the five-year statutory maximum for third-degree felonies, and there was nothing in the record to show that the lowest permissible sentence on the Criminal Punishment Code scoresheet exceeded six years, which would constitute a justification for a sentence exceeding the five-year statutory maximum. This error, however, was not preserved through a Rule 3.800(b) motion and could not be raised on direct appeal. The affirmance of the sentence was without prejudice to the filing of an appropriate motion for postconviction relief.

Joseph v. State, 5D22-1656 (Nov. 14, 2022)

The Fifth District previously mandated a nunc pro tunc competency proceeding, which the trial court conducted and entered a written order on competency, retroactively, without reentering the judgment and sentence. Joseph sought a belated appeal of this competency order. The petition for belated appeal was dismissed, however, as competency orders are not independently appealable. They are subject to appellate review only as a part of the appeal from the judgment of conviction and sentence.