Case Law Update
November 28, 2022
Prepared by
Richard L. Polin

Eleventh Circuit Court of Appeals

United States v. B.G.G., 21-10165 (Nov. 22, 2022)

The Eleventh Circuit held that the "district court abused its limited discretion when it granted 'leave' to dismiss the information against B.G.G. with prejudice." In reaching this conclusion, the Court provided extensive analysis regarding the scope of a judge's discretion under Fed.R.Crim.P. 48(a).

Controlling principles are that the court "must presume that the government moved to dismiss the information in good faith"; that the court "must find, to overcome the good-faith presumption, that the government acted in bad faith in moving to dismiss the information"; that the court "must still dismiss the information, if the good-faith presumption has been overcome, where the government's reasons for dismissal do not go to the merits and do not demonstrate a purpose to harass"; and the court's "dismissal (before trial) must be without prejudice and cannot bar a future prosecution."

Relevant to this case, the district court had suspended all grand jury sessions in response to the pandemic on March 26, 2020, and that suspension was extended until January 4, 2021. While that suspension was in effect, the government filed a sealed information against B.G.G. alleging conspiracy to accept kickbacks for prescribing opioids and a related solicitation charge. The offenses were subject to a five-year limitations period which would expire on August 31, 2020. The sealed information was filed on August 28, 2020 and provided to defense counsel on August 31st. B.G.G. refused to waive prosecution by indictment.

In the motion to dismiss the information, the government explained that it filed an information in this case because of its concerns about the impending expiration of the statute of limitations and that the intent was to dismiss the information and indict B.G.G. once the grand jury reconvened, consistent with the tolling provision of 18 U.S.C. s. 3288. B.G.G. did not oppose the government's motion to dismiss, as he had not consented to prosecution by information. The parties, however, disputed whether the dismissal should be with or without prejudice.

The district court questioned the government's "tactical" use of Fed.R.Crim.P. 48(a) for the dismissal. The court was concerned about prosecutorial harassment. The court did not question the subjective good faith of the prosecutor, but indicated that it would "reject a dismissal without prejudice if the government's use of rule 48(a) harassed B.G.G. or was contrary to the public interest." After further briefing of the issue in the district court, that court dismissed with prejudice. The court concluded that good faith was not relevant to the analysis in this case because the government identified its reasons for dismissal. Thus, the court did not apply the presumption of good faith to the rule 48(a) motion. The district court emphasized the government's strategic motives for filing and then dismissing the information. That court continued to find that the government's use of the statutory tolling provision to enable it to later file a superseding indictment "'at least arguably' amounted to prosecutorial harassment." The court perceived the government's tactics as an end-run around the statute of limitations. The court further found that the limitations period had actually expired "because the information hadn't 'instituted' the prosecution within the meaning of section 3282(a)."

The Eleventh Circuit emphasized several factors in concluding that the dismissal with prejudice was an abuse of discretion. First, the district court refused to apply the presumption of good faith to the government's motion. Second, "the district court didn't require B.G.G. to overcome the presumption of good faith by showing that the government sought the dismissal in bad faith." Third, "the district court erred in focusing its rule 48(a) analysis on the government's reasons for filing the information and not on its reasons for seeking the dismissal." The correct focus should have been on the reason for dismissing the information – i.e., "B.G.G.'s refusal to waive his right to indictment and consent to the information."

Fourth, "the district court erred in failing to apply the ultimate test in deciding whether to grant 'leave' to dismiss the information: where the defendant has overcome the presumption of good faith, an information 'will be dismissed' 'if the reason for dismissal does not go to the merits or demonstrate a purpose to harass.'" The district court did not make any of these findings, instead, finding that the government's action "arguably" constituted harassment.

Finally, the court erred in dismissing with prejudice. If the court grants leave to dismiss prior to trial, the dismissal must be without prejudice.

One judge dissented with respect to the Court's analysis of several of the foregoing factors. The dissent viewed the government's acts as being in bad faith,

for the purpose of obtaining a tactical advantage or for the purpose of harassment. The dissent concludes that a demonstration of such bad faith compels a dismissal with prejudice. The dissent also took issue with the majority's characterization of some parts of the district court's order.

Supreme Court of Florida

Sievers v. State, SC20-225 (Nov. 17, 2022)

The Florida Supreme Court affirmed convictions for first-degree murder and conspiracy to commit murder, and the sentence of death imposed for the murder.

A prosecution witness, Wright, entered into a plea agreement which gave the State the option of administering a polygraph examination, but the State did not provide one. At trial, defense counsel, in closing argument, asked the jurors if they trusted Wright, and further asked if they would "feel different if a polygraph had been administered." The State then obtained a jury instruction, which stated that if Wright had taken and passed such a test, its results "would not have been admissible during this trial." Sievers argued on appeal that this misstated the law and constituted a "comment to the jury on the evidentiary weight of the State's decision not to give Wright a polygraph exam, and that it indirectly commented on Wright's credibility."

The challenge to the instruction was forfeited by the defense. During discussions about the instruction, counsel did not object to it, and argued only that the State, "rather than the court itself, should raise the admissibility issue with the jury in the form of an argument." Nor was the instruction erroneous, as the jury "could reasonably have taken defense counsel's closing argument to imply that the jury would have known the results of any polygraph exam administered to Wright."

Witness Wright, when acknowledging that he had lied during a pretrial proffer to the State "when he said that he had stayed outside the Sieverses' home while Rodgers alone carried out the killing," explained his subsequent decision to tell the truth, and that explanation included his comment that "I prayed." Defense counsel objected that this violated section 90.611, Florida Statutes, and on appeal argued that this appealed to "religious bias" and improperly bolstered Wright's credibility. Section 90.611 bars "evidence of the beliefs or opinions of a witness on matters of religion . . . to show that the witness's credibility is impaired or enhanced thereby." This did not violate that statute, as it was a "fleeting reference to prayer," which the witness "explicitly equated [] with talking to his attorney and taking a break."

During direct examination of witness Wright, the prosecution referenced his pretrial discussions with the prosecution, including one in which the focus was on Wright's wife. The prosecutor, at that time, referenced the wife as a "blip on [his] radar screen" that he wanted "to go away." The prosecutor further explained that Wright's plea agreement would not protect the wife from potential prosecution. Defense counsel sought to introduce the video of this portion of the pretrial discussion with Wright during the defense case-in-chief. The prosecutor objected, asserting that such evidence should have been introduced on redirect examination, not in the defense's case-in-chief, and the trial court excluded the evidence. The Supreme Court did not reach the issue of the validity of the State's objection, or of the merits of the issue, concluding, instead, that the evidence "was cumulative and therefore properly excluded."

The defense objected to testimony from a neighbor regarding a prior encounter, which "tended to corroborate Wright's account that Sievers had actively scoped out his home as a possible murder location and investigated jumping over the backyard fence as the best way to access the home." Torres also testified about an argument she overheard in which the victim, the defendant's wife, stated that she was "tired of this" and was leaving," and the defendant, responded, "fine but we'll see about that." The defense raised hearsay objections. The Supreme Court did not address the merits, finding only that any error was harmless in light of the totality of the circumstances of the case.

The evidence as to first-degree premeditated murder was sufficient. The jury was instructed on the principal theory of liability. The jury could conclude "from Wright's testimony that Sievers had promised to pay Wright to murder Dr. Sievers, that Sievers and Wright carefully planned the murder weeks in advance, and that Wright and Rodgers murdered Dr. Sievers according to Sievers' plan." The State "corroborated Wright's testimony with cell phone evidence showing their communications leading up to the murder," as well as other corroborative testimony.

Sievers challenged the conspiracy conviction, arguing that it was undisputed that he "never communicated with Rodgers about the murder and told Wright that he did not want to know the identity of any accomplice." "To sustain a conspiracy conviction, the government does not need to prove that the defendant knew the identity of every other person alleged to have been a part of the conspiracy. It is enough that the State provided that the alleged co-conspirators shared a common purpose to commit the crime."

At the arraignment, in May 2016, two months after section 782.04(1)(b) went into effect, the State filed a notice of intent to seek the death penalty, but omitted the newly-required list of aggravating factors that intended to prove. After Sievers filed a motion to strike, four days prior to the expiration of the 45-day deadline, the State, on that same day, filed an amended notice, "substantially compliant," listing two aggravating factors. In upholding the denial of a motion to strike the amended notice, the Supreme Court concluded that any procedural defect was harmless. Within four days of the statutory deadline, a compliant notice was filed; discovery had not yet commenced, and no hearings were scheduled. The trial did not being until 3 ½ years later.

Although the State, in its closing argument, conceded that Sievers established the statutory mitigator of no significant history of prior criminal activity, the jury, on the verdict form, checked "no" with respect to the statement that "one or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence." Defense counsel did not object, and on appeal, Sievers argued that the jury's decision was a reaction to a misstatement by the State in closing argument. The Supreme Court reviewed the claim for fundamental error, and found that any error was not fundamental. Almost immediately after the allegedly erroneous comment in closing argument, "the State again told the jury that Sievers had no prior criminal history," and, the subsequent instructions from the court accurately instructed the jury on the law of mitigating circumstances and the verdict form.

There was no error in admitting a postcard into evidence with a redaction. Sievers sought to use the postcard, which his daughter had sent him while he was in custody, to address his loving relationship with his family, including his daughters. At a penalty phase proceeding, both parties must be afforded "the opportunity to rebut hearsay evidence sought to be admitted by the other side." As the daughters did not testify, the State would not have that opportunity.

Live testimony from the victim's mother and a "brief video clip of Dr. Sievers herself," discussing her "commitment to practicing holistic and preventative medicine," was properly admitted as victim impact evidence, "relevant to show the loss suffered by Dr. Sievers' family and community."

A challenge to the sufficiency of the pre-sentencing Spencer hearing was rejected, with the Supreme Court noting that "Spencer does not categorically preclude the trial court from holding a Spencer hearing and imposing sentence on the same day. Nor does Florida's death penalty statute say that a Spencer hearing

and the imposition of sentence must occur on different days." The Court found no error, let alone fundamental error.

First District Court of Appeal

Edwards v. State, 1D21-2838 (Nov. 21, 2022)

The First District denied a prohibition petition, in which Edwards sought dismissal of a charge of manslaughter after the trial court conducted an evidentiary hearing as to Stand Your Ground immunity.

As a preliminary matter, Edwards challenged the lower court's denial of his motion to dismiss on both substantive and procedural grounds. While the substantive challenge, based on the sufficiency of the evidence, was properly reviewed through a prohibition petition, the procedural challenge, regarding the lower court's application of the burden of proof, was reviewable by certiorari, which has different standards of review.

With respect to the burden of proof, the judge accurately stated the controlling burden – that the State had to prove by clear and convincing evidence "that the petitioner did not reasonably believe that his use of force was necessary to defend himself from the alleged victim, specifically." The judge also made a statement expressing interest in hearing Edwards' version of events. That, however, did not constitute a misunderstanding on the part of the judge as to the proper burden. There was nothing improper in the interest in hearing the defendant's version: "A trial court may inquire whether a criminal defendant wishes to present evidence or present testimony at a pretrial immunity hearing." The judge was ensuring that Edwards "understood it was his decision whether to testify," and "explained how Edwards' testimony could help resolve conflicts in the evidence."

With respect to the substantive claim, Edwards argued that the State did not meet its burden because there was no evidence "regarding how Mr. Edwards was acting at the time of the shooting." As a preliminary matter, the Court noted, but did not make any legal findings on the issue, that Edwards had the burden of presenting a prima facie case of the elements of self-defense; that the unsworn allegation in the motion to dismiss "lack evidentiary value;" and that it was therefore "questionable whether Edwards 'raised' a prima facie claim of self-defense immunity sufficient to shift the burden to the State under section 776.032." The State did not challenge the existence of a prima facie case, and, as a result, the Court proceeded to determine

whether the lower court's findings at the conclusion of the evidentiary hearing were supported by competent, substantial evidence.

The Court's opinion includes extensive language regarding the meanings of key phrases: substantial evidence; competent evidence; clear and convincing evidence. Clear and convincing "does not mean that there are no inconsistencies in the evidence." Also, before addressing the sufficiency of the evidence based on the relevant standards, the Court wrote, at length, to address the shortcomings of the appendices that were provided along with the petition. The appellate court noted the absence of "several critical pieces of evidence" that the trial court considered: photos of the scene where the shooting occurred; photos of a nightstand in the defendant's bedroom, the gun, and gun safe, which were relevant to the judge's findings; photos of injuries to the defendant after the shooting and subsequently at the hospital; photos that were relevant to the placement and position of the victim's body when discovered; an audio recording by the defendant to 911 right after the shooting, in which he claimed that he was attacked and that he shot his stepson in the chest, in which he also stated that he "fucked up'" Another audio recording to the first deputy to arrive on the scene, which included Edwards' statement that he shot his stepson.

The Court's opinion then has a detailed recitation of the other evidence from the hearing that supported the lower court's conclusions. Key points noted by the appellate court included: Edwards not appearing to be afraid of the victim; the fact that the two had been drinking before the shooting; Edwards was irate because the day of the shooting, he was furious at his stepson because the stepson had wrecked Edwards' car; Edwards was engaged in "mutual combat" with the stepson; after the start of the altercation, Edwards entered his trailer and the stepson followed; Edwards kept his gun locked in a case by the nightstand in his bedroom in the trailer; when the stepson struck Edwards with his hands during a physical altercation, Edwards responded by shooting his stepson at point blank range; other facts regarding the timing and location of the shooting; Edwards' demeanor at various times during the 911 call and when officers arrived as being inconsistent with one who acted in self-defense; Edwards' failure to administer first-aid while knowing that his stepson was dying; the physical discrepancy between the two: Edwards was over 300 pounds; the stepson about 160. There were also logistical problems that were noted with Edwards' claim that he shot his stepson after being smothered on the bed.

One judge wrote a concurring opinion, noting similar facts as those emphasized by the majority opinion and noted additional problems seen with the defendant's version of event.

A third judge wrote a lengthy dissent, taking issue with the significance the majority attributed to the "stepfather-like relationship" the defendant and decedent had. The dissent perceived this as suggesting that a heightened standard was being applied to the defendant because his "stepson" was his attacker. The dissent emphasized the "decedent's repeated blows to Petitioner's head," which resulted in visible injuries. The dissent perceived the majority's view of the law as being that "a person must apparently wait until great bodily harm or death is actually inflicted before a person is allowed to use deadly force to defend herself."

The dissent further credited the State for not attempting to make a meritless argument," i.e., that the defendant's motion did not set forth a prima facie case. The majority further characterized the majority opinion as placing the burden on the defendant to prove self-defense. The dissent emphasized that even the trial court found that "the decedent punched Petitioner more than once before Petitioner shot him in response. The *unrefuted evidence*, supported by the testimony of the State's own witnesses, showed that decedent died of a contact gunshot wound," and that Edwards had been punched in the head "multiple times, causing bruising and a 'goose egg' to the right side of his head."

Terry v. State, 1D21-1933 (Nov. 23, 2022)

The First District affirmed a conviction for first-degree murder. Challenges to two peremptory strikes by the prosecution were not properly preserved for appellate review. "While counsel objected to both challenges, counsel later "accepted the jury without renewing the objections."

Tyson v. State, 1D21-2178 (Nov. 23, 2022)

On appeal from a conviction for possession with the intent to distribute methamphetamine, the First District held that the trial court did not err in denying a motion to suppress the contraband.

Officers had a warrant to search a specific address, and the structure at that address outwardly appeared to be a single-family residence. The defense argued that the residence was "really a multi-unit dwelling that required offices to obtain a second warrant before searching the partitioned bedroom and bathroom."

The First District's analysis was based on what was referred to as "equipped for independent living" factors: "a property is a 'multi-unit dwelling' for search

warrant purposes if it is comprised of more than one residence, each of which bears the hallmarks of being truly distinct and independent from the others." "Such "indicators of independence include separate street numbers, doorbells, mailboxes, utilities, exterior entrances, kitchens, and bathrooms. The greater the number of distinct identifying features, the more likely it is that the two units are equipped for independent living such that officers would need separate warrants to search them."

Here, the defendant's bedroom and bathroom "were walled-off from the remainder of the home's interior." Nevertheless, it was a single-family residence. There was a single address and a single mailbox. There were no signs indicating multiple living units. The defendant's driver's license used the one and only address for the residence. There was one kitchen, and no separate doorbell or utility meter.

Furthermore, even if the address consisted of two distinct units, the motion to suppress was properly denied, as the general rule "does not apply in those cases where the suspects control the entire premises or where the premises extending beyond a single unit are also suspect and are covered by the warrant." The subject of the investigation, Wilson, was observed "freely coming and going out of both doors of the residence, which led [officers] to reasonably conclude that he had dominion over the entire house."

Stevens v. State, 1D21-2691 (Nov. 23, 2022)

The First District affirmed convictions for three counts of capital sexual battery.

As to one of the convictions, Stevens challenged the sufficiency of the evidence because the child victim, at trial, repudiated her prior out-of-court statements. Stevens argued that the conviction could not be predicated solely upon the child's out-of-court statements.

When the child's out-of-court statement is admitted, it may be "'considered as substantive evidence by the trier of fact.'" If subsequently repudiated, that statement, "'standing alone is insufficient to prove guilt beyond a reasonable doubt.'" Here, "the victim did not totally repudiate at trial her prior out-of-court statements that Stevens touched her vagina with his penis. And, even if she did, other evidence at trial sufficiently corroborated the victim's recanted out-of-court statements."

"In her out-of-court statements, the victim confirmed that Stevens touched her vagina with his penis. But while testifying that Stevens bathed with her unclothed, the victim denied ever seeing his penis. She also testified that Stevens touched her vagina only with his tongue." "Despite this inconsistency, a jury could reasonable conclude, based on the limitations of the child victim's ability to recall events that occurred when she was only three years old, that she may not have remembered all of the details of the abuse." "Because of her young age at the time of the abuse, her lack of composure when testifying at trial, and her inability to answer simple questions posed to her at trial, we conclude the trial court did not err when it found that the victim did not totally repudiate her prior out-of-court statements when she testified at trial."

Alternatively, even if the prior statements had been totally repudiated, there was still sufficient corroborating evidence. This included testimony from the mother that the child had previously reported the abuse to her, and developed irritations and itching in the vaginal area. A nurse examined and observed the redness to the area. The mother testified that Stevens was the only male who had been left alone with the victim. The nurse testified that the redness was consistent with the child's statements in the pretrial forensic interview.

Spurling v. State, 1D22-765 (Nov. 23, 2022)

Spurling challenged his HFO sentence, arguing that one of his prior convictions as a predicate offense did not qualify. The First District rejected the argument, noting that "a sentence of probation or community control can serve as a predicate conviction for purposes of habitualization. . . This is true even when the HFO sentence is imposed at the same time as the violation of probation sentence."

One of Spurling's prior convictions had resulted in a sentence of probation. The probation was later revoked and he was then sentenced to prison on the same day as the sentence he received for his other predicate felony convictions, which were the new law violations causing the revocation of probation for the prior felony. The fact that the VOP sentence was imposed on the same day as the sentences for the new law violations was irrelevant and did not implicate the statutory bar precluding the use of convictions for which there were separate sentencing proceedings.

Nilio v. State, 1D22-0940 (Nov. 23, 2022)

The First District addressed "the extent to which an appellate court can review an order denying a motion to disqualify the lower court judge in a case where the postconviction court summarily denies all relief." The Court found that :[f]aced with a limited record and a limited scope of review in summary denial cases, an appellate court cannot rely on the invocation of its appellate jurisdiction to review an order denying a motion to disqualify the trial court judge who presided over the postconviction proceedings. In these types of cases, a petition for writ of prohibition provides the only mechanism for review."

One judge dissented.

Second District Court of Appeal

State v. Williams, 2D21-3755 (Nov. 23, 2022)

Williams pled no contest to charges of fleeing or attempting to elude a law enforcement officer and the trial court withheld adjudication of guilt. The State appealed, and Williams conceded that it was error, as section 316.1935(6), Florida Statutes, states: "no court may . . . withhold adjudication of guilt or imposition of sentence for any violation of this section."

Third District Court of Appeal

Mays v. State, 3D20-1527, 3D20-1821 (Nov. 23, 2022)

The Third District reversed convictions for attempted premeditated murder as to two codefendants, and remanded for a new trial, based on the trial court's error in overruling objections by defense counsel as to the State's peremptory challenge toa Black juror.

During questioning of the venire, defense counsel asked "if any of the potential jurors really wanted to be on the jury." Ms. Shuler "raised her hand and expressed her desire to serve on the jury." On further questioning, she explained: "The reason why is because I'm looking around, out of 39, I would say, there is only about four Blacks." She added: "So, I would be terrified if I was them if I had 12 people that don't look like me."

The State first moved to strike Ms. Shuler for cause, stating: "It just seem [sic] like she came here with like a motive and agenda to be on the jury. She said the defendants should be terrified." The court denied the cause challenge and the State then exercised a peremptory challenge and the defense objected, asking for a race-neutral reason. The State reiterated the same assertions previously made with respect to the cause challenge. After hearing substantial argument from counsel, the judge overruled the objection to the peremptory challenge.

The Third District's concern in the case went to the genuineness of the State's reasons. "In this case, the trial court erroneously focused on Juror Shuler's comments instead of examining the surrounding circumstances of the State's proffered explanation in support of granting its peremptory strike. The State's proffered reason for the strike was that Juror Shuler came to the jury with a 'motive and agenda to be on the jury,' implying that she would favor the defense. The defense rebutted the State's contention with the fact that all the jurors in the venire are randomly called to jury service, and one cannot design one's own selection as a juror in order to somehow favor one party or another. Further, Juror Shuler's explanation, that if she were on trial she would feel 'terrified' to see a majority white jury rather than a fair representation of the community, was a reasonable response to defense counsel's question." Additionally, other record circumstances included "the State's clear pattern of exclusion of Black jurors, in which the State sought to strike every Black person on the venire. The trial court, in analyzing the genuineness of the State's explanation, failed to consider that the jury composition was skewed. It was apparent that there were not enough Black persons remaining in the venire to be chosen, which is exactly why Juror Shuler raised her hand when asked who really wanted to serve on the jury." "The trial court did not seek to question Juror Shuler further, or give defense counsel the opportunity to advise the court how the State's explanation was a pretext for discrimination. Further, if the State was truly concerned that Juror Shuler's comments demonstrated bias in favor of the co-defendants, it could have and should have delved further into her motivations for her comments, which were perfectly clear on their face; hers was an explicitly race-based concern. We find that Juror Shuler's answers reflected her desire to participate on a jury that incorporated a fair representation of the co-defendants' community."

McClenney v. State, 3D22-198 (Nov. 23, 2022)

The Third District affirmed the summary denial of five claims alleging ineffective assistance of counsel, plus the denial of one other claim after an evidentiary hearing. The Third District addressed only the claim that counsel erred "in advising McClenney against testifying and that, as a result, McClenney's

decision not to testify was not a knowing and voluntary one." Trial counsel testified at the evidentiary hearing as to strategic reasons for counsel's decision, and the trial court found counsel's testimony credible and objectively reasonable. The trial court had also colloquied McClenney about the decision not to testify, and McCleney was deemed bound by the answers he gave under oath in response to the court's questions – including that he was fully informed by counsel and that it was his decision not to testify.

Caso v. State, 3D22-1514 (Nov. 23, 2022)

A trial court's "exercise of discretion in ruling on the merits of a motion to reduce or mitigate sentence pursuant to Florida Rule of Criminal Procedure 3.800(c) is not subject to appellate review," and the appeal was therefore dismissed."

Fourth District Court of Appeal

Goldbach v. State, 4D21-3545 (Nov. 23, 2022)

In an appeal from a conviction for driving under the influence, the Fourth District addressed the claim that golden rule violations required reversal. The Court disagreed and affirmed.

During voir dire, the prosecutor addressed the issue of a person's refusal to submit to a breath test as consciousness of guilt, and asked the venire: "How important is your driver's license to you?" A golden rule objection was initially sustained, but the court then reconsidered and allowed further questioning. The prosecutor continued asking the venire questions about the importance of their drivers' licenses or how they would feel about losing their jobs after having lied about having a fever to get the day off. The prosecutor then referred to those matters as examples of consciousness of guilt, or a guilty-mind.

During closing argument, when anticipating defense counsel's possible arguments about the lack of a breath or blood test, the prosecutor reminded jurors of their responses during voir dire, and how they "all agreed with me because nobody rose or raised their hand and said, 'I would take the test [i.e. for temperature].'" A further golden rule objection was sustained and a motion for mistrial was denied, and the court ordered the prosecutor not to use any further golden rule arguments.

The prosecutor then "tried to compare the defendant's willful failure to submit to a breath or blood test – and its resulting driver's license suspension – to the jurors'

unwillingness to lose their driver's licenses." An objection was overruled. The prosecutor resumed with further argument about losing one's driver's license and how one juror felt that it would be devastating.

The Fourth District could not "conclude a reasonable possibility exists that the state's golden rule violations contributed to the defendant's conviction or were so prejudicial or inflammatory as to deny the defendant a fair trial." The prosecutor's comments were viewed as consisting of a "convoluted hypothetical regarding whether the venire would lie to their boss about having a high fever, but then not to allow their boss to take their temperature to avoid losing their job." These were "unnecessary, if not clumsy, attempts to 'educate' the venire about whether a defendant's refusal to submit to a breath or blood test can reflect consciousness of guilt. Fortunately, these attempts did not become a feature of the trial and, in our opinion, would not have distracted the jury from reasonably determining, based on the witnesses' testimony and video evidence, whether the defendant had committed DUI."

Allen v. State, 4D22-1246 (Nov. 23, 2022)

In an appeal from a revocation of probation, the Fourth District noted that the trial court "fundamentally erred in entering a duplicative judgment for the same underlying offenses after revoking the defendant's probation." The judgment of conviction was entered when the defendant was originally placed on probation. When probation is thereafter revoked, a second judgment of conviction for the offenses that resulted in a defendant being placed on probation is not required.

Fifth District Court of Appeal

State v. Janes, 5D21-1834 (Nov. 21, 2022)

The Fifth District addressed the issue of whether, "[a]s part of a de novo resentencing to correct previously imposed illegal sentences on certain points, may the postconviction court restructure legal sentences on other counts."

Janes was sentenced in 2007 and the sentence was affirmed in 2008. The judge had orally pronounced sentences totaling 60 years. In 2018, through a rule 3.800(a) motion, he challenged the legality of sentences on three counts as exceeding applicable statutory maximums. The motion also alleged that the court had failed to orally pronounce any sentence on one other count. Sentencing on the remaining five counts were not challenged.

Rather than granting relief and correction solely as to the counts that had been challenged, the trial court conducted a de novo review and restructured the sentences, including sentences imposed for counts that had not been challenged.

"While an illegal sentence can be corrected at any time, a court loses jurisdiction to modify a legal sentence after sixty days have passed since its imposition. . . . Moreover, a rule 3.800(a) motion does not provide a court with jurisdiction to modify a legal sentence imposed on a count, even if the sentence for another count was found to be illegal." Thus, the "postconviction court lacked authority to restructure the original, legal sentences imposed" for those counts that had not been challenged in the motion.