Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Harrison, 21-14514 (Jan. 10, 2023)

The Eleventh Circuit addressed the issue of whether robbery by intimidation under Georgia law was a crime of violence for purposes of Section 4B1.2 of the United States Sentencing Guidelines.

In answering that question, the Court first concluded that the Georgia robbery statute was "divisible" under Mathis v. United States, 579 U.S. 500 (2016). "Divisible" statues are those which list "multiple, alternative elements, and so effectively create 'several different crimes.'" The Georgia statute, as a divisible statute, set forth separate offenses, "including robbery by force, robbery by intimidation, and robbery by sudden snatching."

Harrison's predicate conviction in this case was for robbery by intimidation. "Intimidation" was defined in Georgia caselaw as requiring "that terror likely to create an apprehension of danger, and induce a person to part with his or her property for the safety of his person." Based on that definition, it qualified as a crime of violence under Section 4B1.2.

United States v. Pate, 20-10545 (Jan. 11, 2023)

The Court granted a motion for rehearing en banc, vacated the prior opinion of the Court, and agreed to hear the case en banc.

The issue that will be determined en banc is the following:

> Title 18 U.S.C. criminalizes the filing "in any public record or in any private record which is generally available to the public, any false lien or encumbrance against the real or personal property of an individual described in [18 U.S.C. s] 1114, on account of the performance of official duties by that individual, knowing or having reason to know that such lien or encumbrance is false or contains

> any materially false, fictitious, or fraudulent statement or representation."
>
> Does 18 U.S.C. s. 1521 apply to false liens filed against former federal offices or employees for official duties they performed while in service with the federal government?

United States v. Moran, 21-12573 (Jan. 13, 2023)

Moran "commented on several 'mom blog' posts asking mothers to display sexually explicit images of their young daughters." The Court addressed the question of whether those "requests constitute criminal attempts to produce child pornography under 18 U.S.C. s. 2251(a) and (e)." The Court concluded that they did, and affirmed his convictions for attempted production of child pornography.

Moran's first argument was that the government could not prove that the requisite specific intent or mens rea for the crimes. Contrary to Moran's argument, a "defendant's desire alone – wholly without respect to his likelihood of success – can establish his intent." As part of this argument, he asserted that it was obvious that he was just "internet trolling," "harassing bloggers for his own entertainment."

For purposes of appellate review of a claim of sufficiency of evidence, it is not "enough for a defendant to put forth a reasonable hypothesis of innocence." "[E]vidence of one purpose doesn't exclude another," and the government need not prove that the defendant "was single-minded in his purpose." "[E]vidence that Moran asked for child pornography *is* evidence that he desired to obtain – and thus to produce – child pornography." The evidence, however, went beyond that. The "sorts of pornographic images that [the blog posts] requested matched Moran's particular preferences." And, he "used what might be viewed as persuasive tactics in his messages to increase their likelihood of success." This included his own bragging about his own niece loving to have her picture taken in a particular way, "implying that the blogger's children would as well." He also "suggested that a blogger buy her child a sex toy and sent her a link to it."

Additionally his own established "sexual interest in children speaks to his desire to obtain child pornography." He possessed more than 1,000 images of child pornography "and 24 pairs of children's underwear – despite having no children living with him." This enabled the jury to conclude that he "meant what he said when he asked the bloggers to post or send him pictures." He also dishonestly denied posting under a pseudonym, and this was evidence of his guilt.

There was also sufficient evidence to prove the offense's interstate-nexus element. The elements of the statute, for a completed offense, required proof that the defendant, inter alia, persuaded, induced or enticed a minor to engage in sexually explicit conduct; that the defendant have a "purpose of producing [a] visual depiction of such conduct," and that the defendant "know[] or ha[ve] reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce." The Court rejected Moran's reading of the statute: "that a defendant must know in advance that his scheme will result in the production of child pornography." The Court held "that in a prosecution for producing child pornography under s. 2251(a), the government must prove that the defendant knew that, *if produced*, the pornography he sought would travel in interstate commerce." That standard applies to attempt prosecutions, as well as prosecutions for completed offenses.

Finally, Moran argued that there was insufficient evidence that he took a "'substantial step toward the commission of [the] crime.'" This argument was not preserved in the district court and was reviewed for plain error. Moran did not satisfy that standard of review. In "the absence of 'explicit language of a statute or rule,' an error 'cannot be plain unless the issue' in question has been 'specifically and directly resolved by . . . on point precedent from the Supreme Court of the United States or this Court.'" Moran relied on Eleventh Circuit precedent which addressed completed offenses, not attempts, with respect to the statutory language "arrange for a minor to engage in sexually explicit conduct." That could not serve as the basis for a plain error argument regarding an attempted offense.

First District Court of Appeal

Washington v. State, 1D22-2358 (Jan. 11, 2023)

In an appeal from a case arising from Escambia County, the public defender from the First Judicial Circuit, PD1, filed a designation, which the Firs District struck and the public defender for the Second Judicial Circuit, PD2, filed a "motion to refuse designation." The First District wrote an opinion to address a "frequently occurring problem arising in our court." PD2 had been "filing refusal motions, seeking reappointment of the local public defender to coordinate preparation of a record on appeal where PD2 considers the previous preparation inadequate."

PD2 is the public defender statutorily designated to handle all appeals in the First District. Under the statutory scheme, PD1 bears the responsibility for

completing tasks listed in appellate rule 9.140(d)(1), which includes the filing of the notice of appeal, the statement of judicial acts to be reviewed, the directions to the clerk for preparation of the record on appeal, and designations to the court reporter. The problem in the First District was arising because trial courts were prematurely granting motions of trial counsel to withdraw prior to completion of these tasks.

In this case, private trial counsel had withdrawn from the case and PD1 had been appointed, but private trial counsel withdrew prior to completing the above-noted tasks. When PD1 was then appointed, PD1 "sought to pass representation of the appellant to PD2 pursuant to section 27.51(4), Florida Statutes, without taking any steps to have appellant's trial transcribed or otherwise to address trial counsel's non-compliance with rule 9.140(d)(1)."

In an effort to resolve the problem in this case, the First District ordered PD1 to consult with private trial counsel and to then file the statement of judicial acts to be reviewed and a designation to the court reporter.

Second District Court of Appeal

Gibson-Capo v. State, 2D21-2776 (Jan. 13, 2023)

The Second District partially reversed a sentencing order regarding restitution in the sum of $438. "The trial court told [the defendant] to make arrangements through the probation department," and never set a payment schedule. "Setting a restitution payment schedule is a nondelegable judicial task."

Mercado v. State, 2D21-3444 (Jan. 13, 2023)

The Second District affirmed the defendant's convictions and sentences and rejected the claim that "the trial court considered impermissible factors in imposing the sentences." Mercado argued that the judge erred in considering "postplea misconduct."

The defendant was charged with multiple misdemeanors based on his continued efforts to visit and contact his ex-partner. After he pled guilty, at sentencing he "blamed his former partner for his misdeeds and misfortunes." The State responded that postplea, and presentencing, the defendant's "behavior had become more dangerous and threatening." When imposing sentence, the judge did not reference this and "succinctly pronounced its sentences." The mere existence of

information of postplea conduct that the judge has been made aware of does not constitute improper reliance on that information by the judge.

The claim in this case was not preserved in the trial court and was reviewed for fundamental error. The appellate court further noted that the defendant requested and received a probationary sentence, and, "[h]ad the trial court relied upon impermissible factors, we would expect mor onerous punishments."

Evans v. State, 2D21-3450 (Jan. 13, 2023)

Absent an oral or written waiver of the defendant's right to a jury trial, the case was reversed for further proceedings. Additionally, the trial court "failed to hold a competency hearing and make a competency determination despite having entered an order appointing psychological experts."

Fifth District Court of Appeal

Robinson v. State, 5D22-2023 (Jan. 10, 2023)

In a one-paragraph opinion, the Fifth District affirmed the denial of a Rule 3.853 motion and quoted a prior decision of the Florida Supreme Court for the point that a " 'trial court does not err in denying a motion for DNA testing where the defendant cannot show that there is a reasonable probability that the absence or presence of DNA at a crime scene would exonerate him or lessen his sentence.'"