Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Ruan, 17-12653 (Jan. 5, 2023)

On remand from the Supreme Court of the United States, the Eleventh Circuit concluded that a jury instruction on mens rea, as used in this case, was inconsistent with "the Supreme Court's guidance and did not convey an adequate mens rea to the jury for the substantive drug convictions under 21 U.S.C. s. 841." As the error was not harmless beyond a reasonable doubt, the convictions for the substantive drug charges of both Ruan and his codefendant, Couch, were reversed for a new trial.

The drugs involved in this case were only authorized for prescriptions and a prescription must be made for a "legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." The statute prohibited, inter alia, the knowing or intentional dispensing of a controlled substance "except as authorized." The defendants sought a jury instruction on good faith, as "a defense to an allegation that they acted outside the 'usual course of professional practice.'" In a prior decision, the Eleventh Circuit, based on prior precedent, rejected the argument that the defendants were entitled to such a good-faith instruction. The Supreme Court reversed and held that "s. 841(a)'s scienter provision (requiring the defendant to act 'knowingly or intentionally') applied not only to the statute's actus reus – here dispensing – but also to the 'except as authorized' exception."

Here, the defendants requested a "good faith instruction reflecting their subjective intent." The district court gave an alternative instruction: "A controlled substance is prescribed by a physician in the usual course of a professional practice and, therefore, lawfully, if the substance is prescribed by him in good faith as part of his medical treatment of a patient in accordance with the standard of medical practice generally recognized and accepted in the United States."

Section 841 uses the words "knowingly or intentionally." It does not use the phrase "good faith." The defendant's subjective intent matters here. The instruction as given in this case was problematic because "[w]ithout further qualification, the phrase 'good faith' encompasses both subjective and objective good faith," but under

s. 841, "only the subjective version is appropriate." Nor did the given instruction "help convey that a subjective analysis was required for the 'except as authorized' exception." The instruction also failed "to convey the required mens rea."

Based on the testimony in the case, the jury could have "concluded that Dr. Ruan and Dr. Couch subjectively believed their conduct was in accord with the appropriate standard of care." Under the erroneous instruction, "the jury could convict the defendants if they found that a reasonable doctor would not have believed the conduct was in accord with the appropriate standard." Thus, the errors could not be deemed harmless.

Offenses such as substantive money laundering and conspiracy to commit money laundering were not affected by the erroneous instruction; only the substantive drug charges were reversed for a new trial.

United States v. Downs, 21-10809 (Jan. 6, 2023)

The Eleventh Circuit affirmed convictions for producing and possessing child pornography. This opinion has subsequently been withdrawn and a revised opinion was issued on March 13, 2023 and will be discussed in a future issue of the Case Law Update.

Downs challenged the sufficiency of evidence to satisfy the production statute's interstate-commerce element based on the absence of "evidence that the Samsung phone with which he took the photos of L.H. ever traveled in interstate commerce. But, of course, the government *did* produce evidence that the hard drives to which Downs transferred the photos were manufactured overseas. The question thus turns on whether the act of transferring the photos from the cell phone to hard drive can itself constitute the 'produc[tion] prohibited by s. 2251(a)." Based on one of the Court's prior decisions, Maxwell v. United States, the Court concluded that the word "producing" covered "the act of transferring a photograph from a phone to an external drive."

The Court rejected Downs' related argument that "the production statute's mens rea element requires that there be an interstate-commerce connection at the moment of initial creation." Based on Maxwell's holding regarding the transfer of the photos to a hard drive constituting production, if the "hard drives were manufactured overseas, then the necessary nexus exists between the actionable 'produc[tion]' and interstate commerce."

The district court discharged an "impaneled-but-as-yet-unsworn jury" in Downs' absence. Attorneys for both parties had agreed to discharge the unsworn jury due to an impending storm. Jeopardy had therefore not attached as the jury was not sworn, and "absent jeopardy, Downs had no right to have his case decided by the particular jury that the judge had initially impaneled." Nor did the court err in excluding Downs "from the conference at which the judge decided to discharge the jury." This issue had been decided at a teleconference, and Downs' lawyer did not object. Downs did not demonstrate any error, whether under the Fifth Amendment of Sixth Amendment's Confrontation Clause. There were no witnesses at this conference. And, under the Fifth Amendment's Due Process Clause, that "protects a defendant's right to be on hand," because "at those junctures, a defendant's right to defend against the charges before him is at an apex." The decision to discharge an unsworn jury in Downs' absence "doesn't trigger the same concerns."

Downs did have a right to be present under Fed.R.Crim.P. 43(a)(2), as jury discharge was a "trial stage." And, although this was an error, and likely plain error, Downs was unable to show "that the error affected his substantial rights." His attorney as present and represented his interests. His attorney suggested an alternative, which the judge rejected. The record reflected that whatever Downs' lawyer was going to argue, "the judge intended to discharge the entire jury if even a single member wouldn't be available at the later date."

United States v. Esformes, 19-13838 (Jan. 6, 2023)

The Eleventh Circuit affirmed convictions for healthcare fraud, illegal kickbacks and money laundering.

The defendant owned and operated several medical facilities, including" skilled nursing facilities," for which Medicare or Medicaid would "pay for a stay . . . only if the patient receives medical certification that the admission is necessary and if the patient spent at least three days in an acute-care hospital immediately before admission." Esformes was found guilty on 20 charges and the jury did not reach a verdict on six. After Esformes was sentenced to 20 years in prison, plus three years of supervised release, and was ordered to pay restitution in the amount of $5.5 million, his sentence was commuted by the President to time served; the commutation did not affect supervised release or the balance of the restitution that remained due.

The Eleventh Circuit did not reach the claim that the commutation barred retrial of the remaining counts because the hung counts were not the basis of a final judgment and only the final judgment was the subject of the appeal.

The district court did not err in declining to dismiss the indictment or disqualify the prosecution team based on misconduct. During the criminal investigation, the FBI executed a search warrant and a team of agents started reviewing materials "before prosecutors confirmed that the materials were not privileged and before Esformes received copies of the seized documents." The government used a "'taint protocol to identify privileged documents found in the search and to keep the prosecution team from seeing them." The procedure used resulted in prosecutors reviewing privileged documents and also trying to use them against the defendant prior to trial. The district court suppressed the improperly obtained evidence. Esformes was not entitled to the greater sanction of dismissal or disqualification of the prosecution team because he failed to "prove 'demonstrable prejudice' from the intrusion on his privilege when the suppression orders are considered. . . ." The Eleventh Circuit declined to presume prejudice. Esformes did not attempt to prove prejudice.

Prosecutor Young was not an "interested prosecutor" for the purpose of the defense's effort to have her disqualified. The defense argument focuses on her "professional interest in avoiding sanctions" based on the team's review of the privileged materials. Nor did she violate the "rule that advocates may not testify in a case when she participated in the hearing on the motion to disqualify her." Any error in her testifying at that hearing was invited, when Esformes "called her to the stand, and he cannot complain about it now." Furthermore, she was not a qualifying "advocate witness." She was "not testifying to the jury about the charges in the case but was instead testifying to a magistrate judge about her own investigatory work."

The district court did not err in deferring ruling on the government's Daubert motion until after the relevant expert testified. The court has broad discretion with respect to procedures for determining admissibility of evidence and need not conduct a separate Daubert hearing. And, any error was harmless in light of the conclusion that the testimony was admissible under Daubert. As part of the ultimate Daubert analysis, the Court accepted the trial court's conclusions about the ways in which the doctor's testimony was helpful to the jury. It helped "in understanding the relationship between how [skilled nursing facilities work, how patients come in and out of [skilled nursing facilities], what types of treatment are generally required in a [skilled nursing facility], and . . . the relationship between the Medicare rules and

regulations and guidelines as they pertain to [skilled nursing facilities] and other rehabilitation centers."

As a claim that the defendant was entitled to a judgment of acquittal hinged on the alleged inadmissibility of the expert's testimony under Daubert, that claim failed.

In accordance with Rule 32.2, the district court permitted the jury to determine whether certain properties were forfeitable, and the court then calculated a money judgment afterward. Pursuant to a prior Supreme Court decision, Libretti v. United States, the Sixth Amendment right to a jury trial does not apply to a verdict on forfeitability.

Supreme Court of Florida

In Re: Amendments to Florida Rules of Juvenile Procedure, SC22-1674 (Jan. 5, 2023)

Rule 8.013(b) added requirements for supervised release detention: "For a child who is placed on supervised release detention care prior to an adjudicatory hearing the court must conduct a hearing within 15 days after the 60th day. Upon written findings as provided by law, the court may order the child to continue on supervised release detention until the adjudicatory hearing is completed."

Requirements were also added for secure detention: 1) "motions to extend detention as provided by law must be in writing and filed with the court"; 2) a "written motion to extend secure detention must be heard before the expiration of the current period to determine the need for continued secure detention care'; and 3) adjudicatory hearing must then commence "as soon as reasonably possible."

First District Court of Appeal

Schluck v. State, 1D22-1380 (Jan. 4, 2023)

The First District, as part of its order on a Public Defender's motion to withdraw, which failed "to adequately specify the nature and basis of the asserted conflict," appended Uniform Standards for Use in Conflict of Interest Cases. The motion alleged an "irreconcilable conflict" but did not provide the "reasons for withdrawal." The appellate court's order also set forth, verbatim, Florida Bar Rule 4-1.16, which enumerates the situations in which a lawyer must withdraw, and Rule

4-1.16(a), which enumerates the situations when withdrawal is allowed. The Uniform Standards further set forth scenarios which are not "automatic grounds for conflict," including the filing of a Bar grievance against the attorney; a conflict in a closed case involving the client; a victim or state witness having a friend or relative in the attorney's office; a personal conflict; or a defense witness being a current or former client of counsel.

For similar reasons, in two other cases, the First District authored written opinions denying motions to withdraw as counsel. In Richardson v. State, 1D22-1743 (Jan. 4, 2023), the motion alleged that the Office of the Public Defender withdrew at the trial level "'due to conflict based on an ethical duty to a current client' and that [t]his conflict remans on appeal.'" The motion failed "to adequately specify the nature and basis of the asserted conflict." In Whitfield v. State, 1D22-2129 (Jan. 4, 2023), a motion to withdraw plea and appoint conflict free counsel was filed in the trial court, along with a notice of appeal. The motion to withdraw alleged that counsel misled the defendant in several respects. The trial court granted the motion for appointment of separate counsel, but the motion to withdraw plea was not ruled on. The Public Defender was then appointed for the appeal as to which the notice of appeal had already been filed, and appellate counsel filed a motion to withdraw based on a "conflict." This motion referenced the trial court motion to withdraw plea which alleged ineffective assistance of counsel.

The sole basis for the appellate court motion to withdraw was section 27.5303, Florida Statutes, which references the Public Defender's "representation of two or more defendants" who have adverse interests. That statute was inapplicable to the request to withdraw being made in the appellate court.

Second District Court of Appeal

Washington v. State, 2D21-1984 (Jan. 6, 2023)

In an appeal from an order withholding adjudication for two violations of a county noise ordinance, the Second District relinquished jurisdiction to the trial court because it was unclear whether counsel was present at the competency hearing or whether the trial court made an independent determination of competency.

The opinion includes detailed facts as to what the appellate court observed from the county court record, and those details indicate multiple levels of a lack of clarity: hearing transcripts which refer to "unidentified males," references to something confidential, presumably an expert's report, but an inability of the clerk

of the court to later provide the appellate court with a copy of whatever was presumably filed with the trial court.

Third District Court of Appeal

State v. Rojas, 3D21-1018, 3D21-1019 (Jan. 4, 2023)

The Third District reversed the trial court's mitigation of sentences previously imposed pursuant to a negotiated plea agreement. The sentences imposed as a result of that mitigation further constituted a downward departure sentence. "[O]nce the trial court formally accepts and ratifies a negotiated plea agreement and imposes sentence pursuant to the terms of that agreement, the trial court is obligated to abide by those terms and, if necessary, to enforce the terms agreed to by the parties." The trial court retains authority to alter a plea arrangement only up until the time the sentence is imposed, and, even at that time, the judge is constrained, as the court must provide a defendant with an opportunity to withdraw any plea entered in reliance on the promised sentence.

A concurring opinion relied on language from Rule 3.800(c), for the point that the rule authorizing sentence reductions "does not apply to those cases in which the trial judge has no sentencing discretion."

V.M.A. v. State, 3D21-2422 (Jan. 4, 2023)

The Third District reversed an order withholding adjudication of delinquency. The adjudicatory hearing was conducted via Zoom, over defense counsel's objection to the remote hearing. The trial court relied on an administrative order that required remote hearings "unless the parties agreed to appear in person." The trial court "did not make any case-specific findings of why it was necessary to conduct the adjudicatory hearing remotely." The hearing was held in October 2021.

Stroud v. State, 3D22-1908 (Jan. 4, 2023)

The trial court erred in denying a motion for jail credit. The lower court noted that the motion did not allege any illegalities in the sentence and that the motion did not allege that the sentence exceeded the statutory maximum. While those were accurate statements based on the motion and law, they did not address the actual claim – that the defendant was entitled to additional jail credit.

Fourth District Court of Appeal

State v. Bender, 4D21-2539 (Jan. 4, 2023)

The trial court erred in suppressing statements made by the defendant and evidence of the arrest itself.

One statement was made before the defendant was placed in a patrol car and one while she was in the patrol car. The officer was investigating a crash. The defense argued that the officer "had an affirmative legal duty to read Bender her *Miranda* rights as soon as the crash investigation ended and the criminal investigation began." The Fourth District rejected the existence of such a bright line rule. Miranda warnings are required only when an individual is in custody and subject to interrogation.

"Bender was not subject to the restraints of a formal arrest when she made the statements the county court suppressed. And most of the statements were spontaneous without any prompting from the officer." The investigating officer spoke to Bender, who was in the vehicle involved in the single-vehicle crash. The officer helped her out while conducting the crash investigation because she could not stand. The officer then noticed that her eyes were red and glossy and that she spoke slowly and was slow to recall. He then had her stand in front of the vehicle, and she was not restrained, but she was not free to leave, although the officer did not tell her that. After the crash investigation was complete, the officer advised her that he was conducting a DUI investigation, and Bender volunteered that she had been drinking, but denied drinking a lot. After the officer advised her of factors causing the DUI investigation, such as the smell of alcohol on her breath, she agreed to participate in field sobriety exercises and added that she was not going to lie, she "had a couple."

The officer then moved her to a nearby parking lot for the sobriety exercises. The officer's vehicle was in that lot and Bender entered it on her own, and made statements that she was "so stupid."

The Fourth District further found that the trial court erred in suppressing the "arrest," because that exceeded the scope of the defendant's motion.

Etienne v. State, 4D21-2599 (Jan. 4, 2023)

The Fourth District affirmed a conviction and sentence for battery. While finding the failure to hold a Richardson hearing harmless error, the Court wrote this opinion "to reiterate the need to hold a *Richardson* hearing when a potential discovery violation occurs. Further, whether the discovery violation is 'intentional' or harmful' to appellant is one of the purposes of conducting a *Richardson* hearing, and a trial court's belief that a discovery violation is unintentional or harmless cannot act as a substitute for holding a *Richardson* hearing when required."

"The victim testified that he gave allegedly threatening messages he had received from appellant to a prior prosecutor, but those messages were not provided to appellant in discovery." During the ensuing bench conference, after ascertaining that the messages had not been provided to defense counsel, the prosecutor "argued that this was not a '*Richardson* hearing situation' because it was not intentional conduct by the state. The trial court asked defense counsel how the omitted discovery was favorable to appellant. The court suggested that defense counsel question the victim about the messages and stated, 'If they came from [appellant,] [appellant] has them and she's lying.'"

In addressing the failure to conduct the required hearing, the Fourth District noted that "the evidence does not have to be favorable to a defendant to necessitate a *Richardson* hearing, as suggested by the trial court. Evidence which is harmful to a defendant can serve as the basis of a discovery violation when it affects the way a defendant would have prepared for trial."

Ultimately, the error was harmless in this case based on the evidence "which included a video of the incident, which corroborated the victim's version of events, and showed appellant hitting the victim. Appellant also admitted to battering the victim. The state's evidence without the alleged messages was sufficient to convict appellant of battery. Additionally, appellant's trial preparation was not procedurally prejudiced without the alleged messages. Appellant's sole theory at trial was that she had acted in self-defense. Appellant does not argue on appeal that she would have pursued a different defense or trial strategy if she had possession of the alleged messages."

State v. Acevedo, 4D21-3218 (Jan. 4, 2023)

An appeal by the State was reinstated after having previously been dismissed as untimely. In this case, the State, in the trial court, filed a motion for rehearing

from the order being appealed. That motion for rehearing was timely and tolled rendition of the order being appealed.

Johnson v. State, 4D21-3557 (Jan. 4, 2023)

In an appeal from a revocation of probation, the Fourth District addressed two sentencing issues. The Court rejected an argument that the trial court imposed vindictive sentences. The Court did not "read the judge's words as indicating that he gave sentences proportional to the time, effort, and expense which defendants caused the state to incur. Rather, the court pointed out the reality of the plea bargaining process, where defendants are incentivized by the possibility of receiving lower sentences. This is not a case where a defendant was penalized for maintaining his innocence. . . ."

Second, prior grand theft convictions were properly scored as third-degree felonies on the scoresheet. The determination of the degree was based on the statute in effect at the time of the convictions, not at the time of the sentencing.

Ramsaran v. State, 4D22-111 (Jan. 4, 2023)

An assessment of $100 for prosecution costs was reversed because the State did not seek costs in excess of the statutory maximum of $50, and the State did not prove the existence of the higher amount. A $223 assessment for "MM cost" was upheld where $220 of it was statutorily mandated, and the additional $3 was mandated for Teen Court costs.

T.T. V. State, 4D22-909 (Jan. 4, 2023)

The assessment of the Teen Court costs was stricken. A "juvenile must have been adjudicated delinquent for teen court costs to be assessed."