Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Garcon, 19-14650 (Dec. 6, 2022)

The Eleventh Circuit addressed an issue regarding the "safety valve" provision of the First Step Act en banc on rehearing and, applying the rule of lenity, construed the provision in favor of the defendant and affirmed the sentence.

Garcon pled guilty to the offense of attempting to possess 500 grams or more of cocaine with intent to distribute, an offense which carried a statutory minimum sentence of five years' imprisonment. Garcon sought the benefit of the safety valve provision, 18 U.S.C. s. 3553(f), which authorizes a sentence below the statutory minimum if the defendant does not have: a) "more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;" b) "a prior 3-point offense, as determined under the sentencing guidelines;" **and** c) "a prior 2-point violent offense, as determined under the sentencing guidelines." Garcon had a prior 3-point offense, thus raising the legal issue of whether he was disqualified from receiving the benefit of the safety-valve relief.

Garcon argued "that the use of the conjunctive 'and' to join the subsections . . . meant that he would be ineligible for relief only if he had more than 4 criminal history points, a 3-point offense, *and* a prior 2-point violent offense." Engaging in an exercise of statutory construction, the 11th Circuit started with the premise that "and means and," and, as a result, concluded that the prior 3-point offense did not disqualify Garcon from safety-valve relief.

Three judges were parties to two concurring opinions and two judges authored dissenting opinions.

First District Court of Appeal

Yeary v. Chief Judge of the Second Judicial Circuit, 1D21-2583 (Dec. 8, 2022)

Adminisrative Order 2021-06 of the Second Judicial Circuit authorized a pre-bond mental health screening assessment. The Office of the Public Defender filed a petition for writ of certiorari to challenge that order and the First District concluded that it lacked jurisdiction and dismissed the petition. The Court, in a two-paragraph opinion, found that the Office of the Public Defender failed to demonstrate one of the required elements of a certiorari petition – i.e., the existence of "irreparable harm to itself." One judge authored a substantial concurring opinion, explaining that the Public Defender had other remedies, including an application to the Supreme Court Local Rules Committee for a determination of the propriety of the local administrative rule, as well as possible petitions, such as mandamus or quo warranto, which would be filed directly in the Florida Supreme Court.

A third judge authored a substantial dissent. The dissent addressed the issue of irreparable harm, observing that the pre-bond mental health screening process was done "without indigent criminal detainees having been appointed legal counsel to advise them on whether to accede to a mental health interview/report/recommendation and, if so, what rights they have in the process. . . ." This is a matter for which "time is of the essence," and on "this basis alone, the public defender's office has shown irreparable harm in its ability to perform its constitutionally compelled obligation to provide legal counsel to indigent defendants. . . ." The dissent further concluded that, on the merits, "the administrative order is inconsistent with Florida statutes and rules as well as precedent governing pretrial release."

Full copies of the administrative order and the Public Defender's letter to the Chief Judge of the Second Judicial Circuit, addressing concerns over the administrative order, are attached to the First District's opinions.

Williams v. State, 1D22-1642 (Dec. 8, 2022)

The First District affirmed the summary denial of a Rule 3.850 motion.

The appellate court addressed one of four claims – that counsel was ineffective for failing to object to an improper comment on the defendant's "decision to exercise his right to remain silent." "Defense counsel objected to the relevancy of testimony by a sheriff's deputy that Appellant walked away from police, went inside his

residence, and refused to allow police entry when they responded to the dispatch call the night of the incident with F.B.R. In response, the State argued, 'it's indicia of guilt when he refuses to talk to the police about what's going on.'"

Defense counsel was found deficient for not objecting, on the basis of the Florida Supreme Court's decision in State v. Horwitz, 191 So. 3d 429, 442 (Fla. 2016), which had been issued six months prior to the trial, and which held that "a defendant's pre-arrest, pre-*Miranda* silence cannot be used against him as substantive evidence of consciousness of guilt." Nevertheless, the claim of ineffective assistance failed because the defendant did not demonstrate prejudice. First, had there been an objection, the Court found it likely that there was no reason to think that after a curative instruction, the outcome of the trial would have differed. The Court emphasized the strength of the evidence of guilt, which included testimony from "the two victims of the charged crimes, a collateral victim, and the mother of Appellant's child to whom Appellant sent a letter from jail asking her to contact the victims, apologize for him, and ask them to change their stories."

Luster v. State, 1D21-2902 (Dec. 7, 2022)

The First District affirmed a conviction for attempted burglary of a dwelling. The jury was instructed on the statutory definitions of structure and dwelling. "The statutory definition of dwelling encompasses the statutory definition of structure. If it is a dwelling, it is also a structure." The jury submitted a question asking if all dwellings were structures. The trial court responded affirmatively, and that was a correct response.

Second District Court of Appeal

Enamorado v. State, 2D21-1621 (Dec. 9, 2022)

In a one-paragraph opinion, the Court affirmed the defendant's sentence and declined to address the issue on the State's cross-appeal – an alleged scrivener's error in the written sentence – because that was not preserved by either objection in the trial court or a Rule 3.800(b) motion during the course of the appeal. The affirmance of the sentences was without prejudice to any right the State had to seek relief under Rule 3.800(a) after the appeal.

Roberts v. State, 2D21-2139 (Dec. 7, 2022)

The Second District reversed Roberts' conviction because the trial court held a bench trial "without obtaining an effective waiver of Roberts' right to a jury trial." Defense counsel requested the bench trial at a pretrial conference for which Roberts was not present. Such a waiver by counsel, "whether written or oral, is insufficient, without more, to constitute a proper waiver." There was no colloquy of Roberts at any time.

Cabrera v. State, 2D22-1378 (Dec. 7, 2022)

The Second District affirmed the denial of a motion to correct illegal sentence. Cabrera's claim was based on the alleged insufficiency of allegations in the information regarding the discharge of a firearm: he claimed the information did not allege that it resulted in great bodily harm of death, and that the jury's finding on that notwithstanding, the trial court cold impose only a 20-yer mandatory minimum as opposed to the 25-year mandatory minimum that was imposed.

An error in a charging document "does not result in the type of illegal sentence contemplated by rule 3.800(a)." The claim was not cognizable in a rule 3.800(a) motion.

Rubright v. State, 2D22-2008 (Dec. 7, 2022)

The Second District reversed the summary denial of a Rule 3.850 motion for further proceedings.

Rubright was facing multiple charges in four separate criminal cases. His 3.850 motion alleged that as to one of the four cases, counsel was ineffective "for not advising him that he qualified as a PRR and therefore faced a fifteen-year mandatory minimum sentence when the State offered to accept his plea in exchange for a seventy-two month sentence."

The trial court found that the claim was refuted by the record, as the defendant entered into an open plea to the court after the State filed its notice of intent to seek PRR sentencing and that the court offered to permit the defendant to withdraw his open plea. The judge further found that the defendant was aware of the maximum penalty he faced.

The Second District reversed on the basis of its own recent decision in Kohutka v. State, 343 So. 3d 660 (Fla. 2d DCA 2022). In both that case and the current case, the trial court erred by concluding that events occurring after the rejection of the State's plea offer overcame prejudice that might have been caused by counsel's deficiencies.

Fourth District Court of Appeal

Taylor v. State, 4D21-3277 (Dec. 7, 2022)

On direct a0pepal, the assessment of a $500 public defender fee was reversed because there was no evidence or factual findings to support an award in excess of $50. The assessment of $100 for prosecution costs, in excess of the statutory amount of $50, was reversed for the same reason. An assessment of $25 for investigative costs was stricken. Although it was requested by the prosecution, there was no evidence showing that the police requested the State to ask for it.

Wagner v. State, 4D21-3387 (Dec. 7, 2022)

Accepting the State's confession of error, the Fourth District reversed a conviction for misdemeanor DUI with property damage.

Wagner moved to suppress evidence obtained at the scene because the arresting officer did not witness the defendant operating or actually possessing the vehicle while impaired; nor did any other officer. While a public safety aide had been present and apparently witnessed the events, that aide was not a deputized police officer and lacked the power to arrest. As a result, the ultimate arresting officer could not rely upon the public safety aide for the purpose of the fellow officer rule and the arrest was therefore unlawful.

"An officer can arrest a person for misdemeanor DUI in only three circumstances: '(1) the officer witnesses each element of a prima facie case; (2) the officer is investigating an accident and develops probable cause to charge DUI, or (3) one officer calls upon another for assistance and the combined observations of the two or more officers are united to establish the probable cause to the arrest.'"