Case Law Update
December 5, 2022
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First District Court of Appeal

Hranek v. State, 1D22-1668 (Dec. 2, 2022)

The First District affirmed, without written opinion, the summary denial of a Rule 3.850 motion which set forth seven claims of ineffective assistance of counsel. One judge issued a concurring opinion addressing all seven claims. The concurring opinion has no precedential value, but includes analysis as to typical claims that are raised in Rule 3.850 motions, including the alleged failure of counsel to object to testimony, the failure to retain an expert, and the failure to investigate.

Acord v. State, 1D21-1708 (Nov. 30, 2022)

The First District agreed with the State's concession that the evidence was insufficient to support a revocation of probation for absconding, because a revocation may not be based entirely on hearsay. The evidence is not set forth in the opinion. The State also conceded, and the Court agreed, that the evidence was insufficient to support the remaining violation for failing to pay court costs and fines. The State failed to present evidence of the defendant's willfulness, "which includes evidence on ability to pay."

Johnson v. State, 1D21-1934 (Nov. 30, 2022)

The First District affirmed convictions for first-degree murder and armed burglary.

The trial court did not abuse its discretion in permitting the State to use a demonstrative exhibit. "The exhibit consists of a one minute and fifty-five second video showing a computer-generated animation depicting the mannequin-type figure of a woman. The animation uses a ruler-like projection to show the path of each of the stab wounds made into the Victim's body." The exhibit was used in conjunction with the medical examiner's testimony when the individual wounds were explained. The defense argued that the exhibit was misleading by making it appear that the victim was "stabbed seventeen times simultaneously at once," and that the animation used a figure "which was more svelte than the actual Victim, which tended to

mislead the jury because the depth of the stab wounds was not as proportionally deep into the Victim's body as presented by the ruler in the animation." The appellate court found that the exhibit "did not attempt to recreate the scene of the stabbing incident, so it is immaterial that the Victim was not stabbed seventeen times at once."

Barr v. State, 1D21-2166 (Nov. 30, 2022)

Appellate review of the denial of a downward departure sentence "is only appropriate when the trial court 'misapprehends its discretion to depart or refuses to exercise that discretion as a matter of policy.'"

Rollo v. State, 1D21-2429 (Nov. 30, 2022)

The First District rejected a claim of objective entrapment. Rollo argued that "the conduct of law enforcement in engaging a confidential informant to initiate a drug transaction with Rollo as the seller was so outrageous that the government should be barred from invoking the judicial process to obtain a conviction." The First District, without setting forth detailed facts, concluded that "[l]aw enforcement's work with the confidential informant was controlled, and otherwise appropriate. Rollo had previously sold drugs to the very confidential informant engaged by law enforcement. This was a traditional, straightforward sting operation that has long been understood to be permissible."

Duffy v. State, 1D21-3774 (Nov. 30, 2022)

The First District affirmed a conviction for sexual battery of a child under twelve by a person 18 or older.

While the trial court's findings regarding the reliability of the six-year old child's hearsay statements to a Child Protection Team and to the child's father could have been more detailed, they were nevertheless sufficient. "The trial court noted the age-appropriate language used by the child and the open-ended questions during the interview." The statements to the father had been unsolicited. The information regarding the timeframe of the alleged crime "was fairly specific," and the statements were made within six or seven months of the incident.

A claim of an alleged defect in the information, which charged capital sexual battery, and which defect was not referenced in the appellate court's opinion, was not preserved for review by any objection, and would either have been denied by the trial court or would have resulted in leave to file an amended information.

State v. Wagner, 1D21-3802 (Nov. 30, 2022)

After a conviction for attempted first-degree murder was affirmed, the trial court granted a new trial based on a claim of ineffective assistance of trial counsel. The State appealed and the First District reversed the order granting the new trial. After an evidentiary hearing, the trial court granted relief based on the claim that counsel failed to request a "no duty to retreat" instruction under the Stand Your Ground law.

The jury instruction at trial "omitted only the last sentence of the Stand Your Ground statute, . . ., which eliminates any duty to retreat under certain circumstances. Nevertheless, the trial court robustly instructed the jury on self-defense within the instructions on justifiable use of deadly force, again with respect to excusable homicide, and again under justifiable attempted homicide." With respect to the omitted sentence, lawyers for both parties "initially agreed that the evidence did not support giving the duty-to-retreat instruction." Subsequently, there were some unclear discussions regarding other instructions regarding self-defense, as to which, on appeal, the parties provided differing interpretations, with the State arguing that "there was no intent to re-introduce discussion of a duty-to-retreat instruction," and the defendant arguing to the contrary. The appellate court accepted the State's construction of the legal arguments in the trial court and found that "neither the lawyers nor the trial court intended to include a duty-to-retreat instruction, given the evidence adduced at trial." And, as the evidence did not support the duty-to-retreat instruction, counsel was not deficient for failing to procure the instruction; and, similarly, as the evidence did not support the instruction, "its omission did not prejudice Appellee."

The SYG law "suspends the common-law duty to retreat only in limited, defined circumstances, which the record demonstrates did not exist here. The threat must be 'imminent' in time; and in nature it must be deadly, or sufficient to cause 'great bodily harm,' or constitute a 'forcible' felony." Applying the foregoing principles to the facts, the Court found:

> The relevant time is immediately before, and the moment when, Appellee shot her husband. The evidence is clear that she was under no 'imminent' threat of death, great bodily harm, or the commission of any forcible felony against herself or anyone else. A materially significant temporal and physical break had occurred. The

> fighting had stopped. She had left the house, while her husband had stayed inside. She had walked across the cul-de-sac to a neighboring house, knocked, waited, walked back to check her car door, and then walked over to the front yard. She and she alone was armed and pointing her loaded weapon, with a round chambered and the safety off, at her unarmed husband spotlighted by a porch light.

The defendant's professed fear that her unarmed husband would "come down and get her and drag her back inside" fell "far, far short of the 'imminent' threat circumstances in which the Stand Your Ground law applies."

Miles v. State, 1D22-1990 (Nov. 30, 2022)

The First District denied a petition alleging ineffective assistance of appellate counsel.

In one claim, Miles argued that appellate counsel failed to contest the admission of collateral offense evidence which occurred two years after the charged offense. "The fact that a collateral crime occurred *after* the charged offense does not render evidence of the collateral crime inadmissible." Furthermore, that argument was not preserved for appellate review.

Miles further argued that "it was improper for the trial court to allow K.W. to testify with full details about the encounter but prohibit him from testifying about her state of mind at the time of the incident on the grounds that it was hearsay." This claim lacked merit because under the Evidence Code, while a hearsay exception exists regarding a statement of the declarant's then-existing state of mind, for the purpose of proving "the declarant's state of mind . . . at that time or at any other time when such state is an issue in the action," the phrase "at that time" is limited to a victim's statements "immediately prior to, and at the time of the sexual encounter. . ."

In this case, the defendant sought to testify regarding statements by the victim, K.W., and, over objection by the State, proffered that the defendant was going to testify that he believed the encounter involved was consensual. The judge permitted the defense to proceed with some testimony over the State's objections, and the defendant testified that K.W. said to him, "go ahead and do what you want so I can leave." He further testified that "K.W. willingly came into his bedroom, that they exchanged phone numbers, and that she did not say no or fight him off in any way."

Thus, the defendant was permitted to present substantial testimony that went to the victim's state of mind. As a result, any error in excluding testimony of other statements that had been made, if raised on direct appeal, would have been deemed harmless error and could not provide the basis for a claim of ineffective assistance of appellate counsel.

Second District Court of Appeal

Stephens v. State, 2D20-3256 (Dec. 2, 2022)

The Second District affirmed a conviction for sexual battery with great force on a victim over twelve years of age.

Stephens argued that "the DNA and fingerprint evidence was insufficient to support his conviction." The Appellant's argument was based on two prior decisions, Hodgkins v. State, 175 So. 3d 741 (Fla. 2015) and Rodriguez v. State, 335 So. 3d 168 (Fla. 3d DCA 2021), both of which the Second District addresses in detail and ultimately distinguishes because in this case, the State "presented fingerprint evidence linking Stephens to the vehicle found at the crime scene. Stephens also admitted that he was living in the area where the crime occurred in 1988. Moreover, Stephens' claim that he did not know the victim and did not recall having contact with her is arguably inconsistent with the presence of his DNA under her fingernails and the presence of his fingerprint on her vehicle."

Jefferson v. State, 2D21-1106 (Dec. 2, 2022)

An order summarily denying a Rule 3.850 motion was reversed because the lower court failed to attach records refuting three of the claim and did not hold an evidentiary hearing on those claims.

One claim was that counsel was ineffective for failing to convey a plea offer before it expired. An original 3.850 motion and an amended motion contained conflicting factual allegations as to whether the defendant had been aware of the offer, with the amended motion adding that he became aware after its expiration. An evidentiary hearing, which was held on other claims, referenced the existence of plea offers that had been made but did not refute the allegations for this claim.

Another claim asserted that counsel was ineffective for failing to argue that statements should have been suppressed because Miranda warnings were not provided for custodial interrogation. The motion alleged that the defendant was

"summoned" to the police department and told by a detective that codefendants gave sworn testimony implicating him in the crime. A detective was alleged to have told him that it was known that he previously lied, and he was told that he "would be arrested if he didn't come to the station and provide a sworn, truthful statement implicating himself in the crime." The trial court found that the statements were made in a non-custodial interview and that warnings were not required. A pretrial suppression motion addressed only the claim of the voluntariness of the statements, not whether the interrogation was custodial. The lower court's reliance on the pretrial suppression findings was therefore not sufficient to refute the claim.

The final claim at issue was the alleged failure to cross-examine a detective effectively. The detective was the one involved in obtaining the confession. The lower court attached the transcript of the cross-examination as the basis for refuting this claim, but "it did not address Mr. Jefferson's specific claim that his counsel did not attempt to impeach Detective Smith with the fact that he was allegedly fired from Highlands County Sheriff's Office for obtaining confessions in an improper manner."

Douglas v. State, 2D21-1642 (Dec. 2, 2022)

The trial court order, when revoking probation, failed to include any specific factual findings or explanation of its reasoning when concluding that the defendant was a danger to the community or purposes of section948.06(8)(e)1, Florida Statutes – violent felony offender of special concern. The court's order merely cited the statutory factors without elaboration. While there was evidence to support a finding that Douglas would pose a danger if released, the revocation order was reversed because the appellate court could not determine 'from the record whether the trial court would have revoked Douglas's probation if the trial court had not determined him to be a danger to the community." On remand, the trial court must "determine anew whether to revoke Douglas's probation" and may reimpose the VFOSC designation "if it makes the requisite written findings based on the record."

Marley v. State, 2D21-2071 (Dec. 2, 2022)

Oral pronouncements at sentencing with respect to the imposition of costs and fees prevailed over the written order and the case was remanded to have the written sentence conform to the oral pronouncements.

Chapper v. State, 2D21-1278 (Nov. 30, 2022)

The Second District reversed a conviction for obstructing an officer without violence and addressed the following novel question: "can talking loudly on the phone in the vicinity of a police officer's investigation constitute obstruction without violence under section 843.02, Florida Statutes (2020). Because our case law holds that words alone, without more, are rarely obstructive conduct, we answer this question in the negative."

During the course of an investigation of a domestic dispute, officers observed injuries to Chapper's wife and were interviewing her. At the same time, Chapper "stood outside, 'speaking loudly' to his father on 'speaker phone.' And critical to this case, Mr. Chapper's voice was audible in the kitchen," where the wife was being interviewed. There was no evidence that the defendant's words "were threatening or that they prevented the officer from hearing Mrs. Chapper's answers to his questions." The officer "believed Mr. Chapper's phone conversation was agitating and distracting Mrs. Chapper from the interview." Upon requests to lower his voice or get off the phone, Chapper walked further away and continued his conversation outdoors, about 25-30 feet from the kitchen door. The officer approached him again and asked him to get off the phone or lower his voice. Upon the failure to do that, Chapper was arrested for resisting an officer without violence.

While "the officer testified that Mr. Chapper's call appeared to agitate Mrs. Chapper, there was no evidence indicating what Mr. Chapper said to upset her or that he intended to upset her."

One judge dissented, finding that the officer twice asked the defendant to lower his voice and move away and that the officer "had no duty to attempt to conduct the interview of [the wife] somewhere else, nor was he required to mediate for the warring couple; his sole remit as a law enforcement officer was to investigate the complaint." The dissent described Chapper's telephone conversation as being "in a very loud voice – shouting and using belligerent language which, in the perception of the officer who was there – could only have been intended to disrupt the officer's attempt to interview Mrs. Chapper by distracting the officer in the performance of his duty and by causing Mrs. Chapper to emotionally react to Chapper's shouts and taunts."

Hill v. State, 2D21-1444 (Nov. 30, 2022)

Multiple convictions for failure to register as a sex offender (vehicle registration) were reversed because they resulted in a double jeopardy violation. Four counts "arose from a single reporting event." The "focus of our analysis is whether a failure to register 'all vehicles owned' during a single reporting event constitutes one distinct act or multiple acts based on the failure to register each vehicle."

The "four vehicles in question belonged to Hill's parent whom he resided with for at least five or mor consecutive days. Hill had previously registered as a sex offender numerous times; the failure to register the four vehicles in question occurred at the time of Hill's reregistration." The relevant statute requires sex offenders to register all vehicles owned at initial registration and to make any changes to that information at reregistration. Any change in vehicles must be reported within 48 hours. "Vehicles owned" is defined as "any" qualifying vehicle "which is registered, coregistered, leased, titled, or rented by a sexual predator of sexual offender," "a" vehicle for which the offender is insured as a drive, and "any" vehicle registered, etc., "by a person or persons residing at a sexual predator's or sexual offender's permanent residence for 5 or more consecutive days."

The appellate court's analysis focused on the distinctive statutory uses of the words "a," "any," and "all." The inconsistent terminology led the Court to conclude that the statute was "ambiguous as to whether the legislature intended for a sex offender to be charged with only one count or multiple counts of failure to properly register as a sex offender (vehicle registration) where the offender fails to register all applicable vehicles owned during a single reporting event." As a result of the ambiguity within the statute, the rule of lenity required the statute to be construed in the manner most favorable to the defendant.

State v. Jesus, 2D21-1843 (Nov. 30, 2022)

The trial court found that trial counsel was ineffective for failing to "identify and advise the appellee of the existence of exculpatory evidence," and granted a new trial. The Second District reversed that order because the lower court "did not apply the correct standard in evaluating" the claim.

The defendant's clam was based on a video of the incident and he alleged that it showed "someone else firing the gun at the vehicle and that had he known the video was exculpatory, he would not have entered a plea." The lower court

conducted an evidentiary hearing. In granting relief, the lower court "focused only on its conclusion that counsel could have used the video at trial to show that another fired the weapon and that this defense could have succeeded at trial." The lower court failed to "consider other factors in determining whether a reasonable probability exist that the appellee would have insisted on going to trial."

Thompson v. State, 2D21-2602 (Nov. 30, 2022)

Thompson appealed convictions for felony DUI and two counts of misdemeanor DUI with property damage. The dual convictions for DUI with property damage constituted a doble jeopardy violation "where the evidence established that the damaged property – two traffic signs – belonged to the same victim."

Neer v. State, 2D21-2680 (Nov. 30, 2022)

Neer appealed a conviction for misdemeanor DUI with a breath alcohol level of .15 or above. The Second District reversed because the trial court erred "in excluding two defense witnesses for a discovery violation" and the lower court "failed to consider less extreme sanctions than the exclusion of defense witnesses and the State has failed to establish harmless error."

Prior to the start of jury selection, the defense announced two expected witnesses, and the State moved to exclude them, as well as a records custodian witness, because they were not included on the defense witness list as part of reciprocal discovery. One was an inspector with FDLE; the other a sergeant. The court conducted an inquiry as to the discovery violation. The prosecutor learned of one witness 36 hours before trial, and the second witness on the morning of trial.

The defense argued that "the State could not be surprised by the witnesses because the State discloses the FDLE's website for the alcohol testing program to the defense in every DUI case in the county." After finding a discovery violation, the court excluded the witnesses without considering any lesser sanctions. The defense later proffered that it was seeking to "call into question the reliability of Intoxilyzer 1363 by showing that it had been out of service for months due to problems with the flow sensor," adding that the sergeant could have addressed that and that the FDLE inspection would have been introduced through the second witness. A witness for the State had not been able to explain discrepancies in tests performed with the Intoxilyzer 1363.

The Second District rejected Neer's argument that he did not have to disclose the witnesses based on a document provided by the State that contained a link to an FDLE website, which in turn contained documents with the names of the two excluded witnesses. "Neer failed to show that the State could reasonably be expected to know of potential trial witnesses who created or were named in documents that could be found somewhere on the FDLE website." However, the lower court failed to consider sanctions short of witness exclusion. The court "did not consider allowing the State to talk to Haughey and Kern before the trial began, allowing a short continuance to conduct depositions, or any other alternative to exclusion of the witnesses."

Finally, the State could not prove that the error was harmless. The appellate court emphasized that the defense was unable to elicit the desired information about testing accuracy and discrepancies on cross-examination of the prosecutions' witness, who indicated that he did not know the answer to defense counsel's questions.

Meinecke v. State, 2D21-2880 (Nov. 30, 2022)

The Second District affirmed convictions for trespass within a school safety zone and disruption of school function. The Court addressed constitutional challenges to sections 810.0975(2)(b) and 877.13(1)(a), Florida Statutes (2019), on vagueness and overbreadth grounds and rejected those arguments.

Section 810.0975(1) addresses trespass in a school safety zone, and applies, in part, "when that person does not have legitimate business in the school safety zone. . . ." The defendant argued that "the phrase 'legitimate business' could result in enforcement of the statute against purely innocent, inadvertent, and constitutionally protected conduct in public and quasi-public areas within school safety zones." The "zone" is defined as extending to 500 feet from real property owned or leased by school boards and used for schools. The Second District agreed with the Third District's analysis in an earlier case, emphasizing that the phrase "legitimate business" "'when read in context, has an ordinary meaning which is reasonably understandable to a person of ordinary intelligence, to wit: that one entering or remaining on a school campus must lack any purpose for being there which is connected with the operation of the school.'" The Court similarly found that other words in the statute, "other authorization, license or invitation," when read in context, could "be understood by a person of ordinary intelligence to mean that approval to be present must be obtained by a person with authority over the particular area of the school safety zone at issue."

The defendant also argued that section 910.0975(2)(b) waws overbroad, both facially and as applied. He argued that the statute "regulates an individual's constitutionally protected right to free speech in traditionally public areas such as sidewalks, streets, residential neighborhoods, public parks, and hospitals." The Court disagreed. The statute did not regulate speech or expression. "Rather it addresses the presence in a school safety zone by someone who does not have legitimate business connected to the lawful function of the areas within the school safety zone or other authorization to be there." Nor was the statute overbroad as applied to him because it criminalized his "right to free speech on a public sidewalk." For the as-applied claim, the defendant had the burden of establishing that his own "'admitted conduct was wholly innocent and its proscription not supported by any rational relationship to a proper governmental objective.'" As he was in the zone without legitimate business, his exercise of First Amendment rights while there "does not save him from prosecution for trespass."

Finally, the defendant argued that section 877.13(1)(a) was overbroad. This section makes it unlawful to "knowingly . . . disrupt or interfere with the lawful administration of any educational institution . . . ." The defendant was "on a sidewalk that abuts school property during school dismissal" and "was playing loud music and shouting through a bullhorn at the students." "He wanted to draw attention to himself so his message would be conveyed, and consequently, he drew the attention of students, parents, and school personnel away from the safe dismissal of school children. It was his conduct, not the content of his message, that caused the disruption of school administration or functions and resulted in his arrest." The statutory proscription "bears a rational relationship to [the] governmental objective" of enabling educational institutions to engage in "their lawful functions without undue or unwarranted interference or disruption from others."

State v. Hall, 2D21-3197 (Nov. 30, 2022)

The Second District reversed mitigated sentences that had been imposed because "the trial court lacked authority to modify the negotiated disposition to which Mr. Hall and the State agreed."

After sentencing, Hall filed a Rule 3.800(c) motion, seeking a reduction of the five-year sentence imposed by the court. The court granted it, based on the defendant's allegations of relatively minor participation in the armed robbery and his cooperation with the State.

The Second District first addressed the State's right to appeal, concluding that it did, as this qualified as an illegal sentence. A "trial court may not unilaterally modify a previously imposed negotiated sentence between a defendant and the State." The mitigated sentences were illegal because "the trial court could not unilaterally modify a contract to which it was not a party."

Hicks v. State, 2D21-3503 (Nov. 30, 2022)

In conjunction with postconviction proceedings, the trial court entered an order, in four criminal cases, directing the attorney for the defendant's husband to disburse her dissolution award, held in the attorney's trust account, "to one of Ms. Hicks' crime victims . . . as partial payment of restitution ordered as a condition of probation." There was nothing in the record showing authority of the court to enter such an order and it was therefore reversed for further proceedings.

The appellate court concluded that it had jurisdiction to entertain this appeal as a postconviction appeal. The court looked at potential authorizations for such an order and found none. One was the possibility that it could be deemed a modification of probation. And, while the trial court could have accomplished this by modifying the conditions of probation, the trial court did not expressly do that and the appellate court therefore did not deem it a modification of probation.

One judge dissented, treating this as the modification of an existing condition of probation.

Thomas v. State, 2D21-4004 (Nov. 30, 2022)

The Court addressed a 3.800(a) appeal en banc and addressed the decision of Cotto v. State, 139 So. 3d 283 (Fla. 2014), which required the Court to recede from some of its prior opinions.

Thomas challenged consecutive sentences because "they arose from the same criminal episode and one sentence is habitualized and one is not." At the relevant resentencing proceedings prior to this appeal, Thomas had been sentenced to an unenhanced life sentence without the possibility of parole before serving 25 years in prison for first-degree murder; and a 30-year sentence as an HVFO, without any minimum mandatory provision, for attempted robbery. The two sentences were consecutive. In Cotto, the Supreme Court "specifically held that an enhanced habitualized sentence can be imposed to run consecutively to an unenhanced PRR sentence." That ruling contradicted prior decisions of the Second District and the

Second District receded from the earlier decisions. Based on Cotto, Thomas was not entitled to any relief.

Bennett v. State, 2D22-768 (Nov. 30, 2022)

The Second District reversed the summary denial of two claims of a Rule 3.850 motion for further proceedings. Ine one claim, the defendant alleged that an officer should have been impeached by counsel with favorable testimony "regarding the victim's description of the driver and shooter." The trial court concluded that this would have been inadmissible hearsay and thus rejected the claim. While it is true that a physical description is not an "identification" under section 90.801(2)(c), the statement which the defendant's motion referenced was part of a police report. That report was not made a part of the trial court record prior to the filing of the 3.850 motion and could not serve as the basis of the denial of the claim. A 3.850 motion may be summarily denied by court records that conclusively refute the claim; documents that were not previously a part of the trial court record do not qualify for that purpose.

Murphy v. State, 2D22-2126 (Nov. 30, 2022)

The Second District, having previously granted a writ of prohibition, now issued an opinion, explaining why the prosecution was barred based on the Sixth Amendment speedy trial provision.

Murphy was charged by information, filed on May 9, 2019, with grand theft and scheme to defraud, for offenses alleged to have been committed between September 1, 2015 and March 31, 2016. A capias was issued for Murphy's arrest in May 2019 and was received by the Highland County Sheriff at that time. Murphy was in custody in the Seminole County jail at that time, and the Highlands County sheriff placed a hold on him. He was transferred to the Florida Department of Correction in January 2021, for reasons that were not clear, and the capias warrant for the grand theft had never been executed. The Highlands County Sheriff placed a detainer on him and he was transferred to Highlands County on December 20, 2021, and the capias was executed. Thus, there was a delay of more than 30 months for the execution of the capias warrant, while Murphy was in state custody the entire time.

Applying federal constitutional analysis, the Second District first found that the 2 ½ year delay was "presumptively prejudicial and triggered a full consideration of the remaining three factors under *Barker [v. Wingo]*." The second factor, the

reason for the delay, rested entirely with the State, as no reason for the failure to execute the capias warrant for 2 ½ years was ever provided. The proffered justification of COVID-19 for any part of the delay was rejected by the appellate court. The Florida Supreme Court's suspension of the speedy trial procedural rule by administrative order did not address the constitutional right to a speedy trial.

The third factor, the timely assertion of the right to a speedy trial, favored Murphy, who filed his motion to dismiss less than two months after his arrest on the grand theft charge. Finally, particularized proof of actual prejudice was not required in this case. The trial court, in denying the motion to dismiss, found that the deaths of two victim witnesses may have actually helped the defense. That, however, was speculation and there was no evidence as to what their testimony would have been and how it would have impacted the case. The prejudice here was deemed "glaring because the State's delay has effectively thwarted Mr. Murphy's ability to call or cross-examine two witnesses the State contended were among the victims of what was allegedly a scheme to defraud thirteen people."

Third District Court of Appeal

Carballo v. State, 3D21-1583 (Nov. 30, 2022)

A claim of ineffective assistance of counsel for advising the defendant not to testify in her own defense was remanded for further proceedings because the records attached to the court's order did not conclusively refute the claim.

The trial court denied the claim on the basis of its examination of testimony that Carballo provided at her pretrial Stand Your Ground immunity hearing and concluded that it was inconsistent. "At trial, Carballo conceded through counsel she fired the shots that killed Nissim. Thus, the only issue left open for determination was whether the use of deadly force was justified under the law. Given that there were no other eyewitnesses to the crime and the admitted forensic evidence was overwhelmingly inculpatory, without Carballo's testimony, the jury was arguably left without a reasonable basis for inferring self-defense."

While strategic considerations based upon Carballo's credibility may have factored into counsel's advice, such tactical decisions generally require an evidentiary hearing, with testimony from counsel, and are generally not obvious on the face of the record. The record in this case was not clear as to whether the advice not to testify was a discretionary tactical decision.

This opinion has subsequently been withdrawn on rehearing with a revised opinion issued on January 25, 2023; the revised opinion will be addressed in a future issue of the Case Law Update.

Lopez v. State, 3D22-1837 (Nov. 30, 2022)

The denial of a motion for release pending appeal after a conviction was remanded for further proceedings. The "trial court erred in failing to render written findings supporting the denial of bail."

Fourth District Court of Appeal

Bennett v. State, 4D21-2925 (Nov. 30, 2022)

A conviction for misdemeanor DUI was affirmed. An issue regarding the violation of the Sixth Amendment Confrontation Clause was unpreserved, but the Court issued an opinion "to impress that, under most circumstances, such forensic reports [urinalysis toxicology report where the author did not testify] are inadmissible without the author's testimony."

Two toxicologists are involved in the reports prepared in Palm Beach County. The first "takes an inventory of the evidence, ensures it is properly sealed and labeled, performs screening tests to see what classes or kinds of drugs are present in the specimen, compiles the analytical data, makes a list of the findings, and prepares a toxicology report." "The second toxicologist, called the reviewer, reviews the entire toxicology file that was generated by the first toxicologist, ensures that all quality control criteria are met, and ensures that all conclusions and the results of the report reflect the analysis results." In this case, the first toxicologist signed the report and did not testify. Dr. Shan, the "reviewer," signed a "review form," and testified at trial.

Dr. Shan's testimony was not sufficient to avoid a violation of the Sixth Amendment. It would have been permissible for Dr. Shan "to testify to conclusions she reached utilizing raw data obtained in Miller's tests. But Dr. Shan's conclusions do not justify the *admission of the testimonial hearsay toxicology report authored by Miller*."

At trial, the defense objected on the basis of hearsay, "asserting that the report was drafted by someone 'no longer with the office' who 'wasn't' called to testify today,' . . . ." The objection did not reference the Confrontation Clause or Sixth

Amendment. The argument presented on appeal was therefore not preserved for review. The Fourth District noted that if there had been a sufficient Sixth Amendment objection, "the state may have been able to present its case based on Dr. Shan's analysis of the raw data and without admitting the toxicology report."

Fifth District Court of Appeal

Stridiron v. State, 5D21-2571 (Dec. 2, 2022)

Dual convictions for DUI with damage to the property of victim Ms. Tall and for serious bodily injury to Ms. Tall resulted in a double jeopardy violation. The offenses were based on the same accident caused by the defendant's driving and concerned the same individual victim. The offenses of DUI/property damage and DUI/serious bodily injury are degree variants of the same criminal offense.

Lai v. State, 5D22-453 (Dec. 2, 2022)

The Fifth District granted a petition alleging ineffective assistance of appellate counsel as to the claim that "fundamental error occurred because the jury returned inconsistent verdicts." Count III, as charged, alleged sexual battery with penetration of the victim's vagina. The jury's guilty verdict for that offense made a finding that "Lai did not penetrate the vagina of the victim." The Fifth District granted Lai a new direct appeal as to this issue. The Court noted that the "additional appeal would not be redundant considering the potential effect that a corrected sentence for Count Three would have on Lai's overall sentence."