Case Law Update
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Eleventh Circuit Court of Appeals

Carey v. Department of Corrections, 20-14602 (Jan. 17, 2023)

The Eleventh Circuit affirmed the denial of a federal habeas corpus petition which challenged a state court conviction.

Carey was charged with first-degree murder (premeditated and/or felony murder) and armed robbery. The indictment charged that both offenses were committed with the use of a firearm. After a jury trial, Carey was convicted of the lesser-included offense of second-degree murder and robbery. The jury's verdict form found that Carey did not actually possess, actually discharge or actually inflict death as a result of the discharge of a firearm.

Carey argued that trial counsel was ineffective for requesting lesser-included offenses for the jury instructions on murder. The first part of this claim was that the murder and robbery were undisputedly committed with a firearm, and the instructions on second-degree murder did not reference the firearm. This argument asserted that because the indictment referenced a firearm, second-degree murder without a firearm did not constitute a lesser included offense, as there were no allegations in the charging document regarding murder without a firearm. He further argued that any benefit from the lesser-included offenses was "illusory" as to the murder because both first-degree murder and second-degree murder with a firearm carried the same maximum penalty of a life sentence.

Second-degree murder is a necessarily lesser included offense of first-degree premeditated murder. As it was a necessarily lesser included offense, it does not matter under Florida law whether the prosecutor or judge thought there was no evidence to support the lesser offense; it must be given on request, and the prosecutor had requested it in addition to defense counsel. As to the claim regarding the absence of any benefit from the lesser included offense, that ignored the fact that second-degree murder carries a maximum penalty of life, while first-degree murder carries a mandatory minimum sentence of life when the death penalty is not imposed.

Carey also argued that the evidence was insufficient. This claim was procedurally barred in the federal habeas proceedings. The claim had first been raised in a successive Rule 3.850 motion and that was one reason for the state court's denial of it. The First District Court of Appeal affirmed the trial court's order denying the 3.850 motion without written opinion. As a result, the federal court looked to the last reasoned state-court decision, which was the trial court's order addressing the claim That order predicated the denial on the "reasons contained in the State's Response . . . incorporated herein by reference." As the State's response in the trial court relied, inter alia, on successiveness, the highest state court was found to have relied upon the successive motion bar and the claim was therefore procedurally barred when it was asserted in the federal habeas petition.

United States v. Oudomsine, 22-10924 (Jan. 18, 2023)

After the defendant pled guilty to providing false information to obtain an $85,000 loan under the Coronavirus Aid, Relief, and Economic Security Act, he received a 36 month sentence for wire fraud, which sentence was an upward variance from the guidelines range of 8-14 months. On appeal, he challenged the procedural and substantive reasonableness of the sentence.

The procedural reasonableness of the sentence was reviewed under the plain error standard, as there was no objection on that basis in the district court. The focus of procedural reasonableness is on the adequacy of the sentencing court's explanation of the upward variance. The district court stated that it "considered the parties' arguments, the sentencing guidelines, the advisory range, the presentence report (PSR), and the 18 U.S.C. s. 3553(a) sentencing factors." The court further explained that the defendant's fraud was not "the kind of fraud contemplated by the guidelines because he used 'his education, ability, and background to steal money from a national benevolence,' taking $85,000 from a federal relief program designed to save the economy during the pandemic." The court was "not required to state on the record that it explicitly considered each s. 3553(a) factor or to discuss each factor."

The substantive reasonableness of the sentence was reviewed for an abuse of discretion, based on the totality of the circumstances. The district court has "considerable discretion" in determining whether relevant factors warrant a variance. The Appellant's argument was that the court erred in the sentence imposed because "it did not like him," and "the reason it didn't was that of the $85000 he obtained by fraud he spent $57,789 to buy a single Pokemon card." The appellate court disagreed, based on the record showing that the district court "considered the

importance of deterrence along with other s. 3553(a) factors in varying upward." Deterrence weighed heavily with the district court, but that court also considered other factors, including "the seriousness of [the] crime, the nature and circumstances of it, and the need to promote respect for the law and to provide just punishment."

The Appellant's argument that deterrence was "not particularly relevant here because the pandemic relief efforts have pretty much ended and there is no longer an opportunity (or as much opportunity) to commit the specific type of fraud he committed" failed because the deterrent effect goes beyond that of the specific government program; the sentence serves to deter "others from committing white collar crimes."

United States v. Dupree, 19-13776 (Jan. 18, 2023)

The Eleventh Circuit issued an en banc opinion addressing "whether an inchoate offense qualifies as a 'controlled substance offense' for purposes of the career offender sentencing enhancement under" s. 4B1.2(b) of the Sentencing Guidelines. Dupree's s. 846 conspiracy conviction was used as a predicate for his career offender enhancement. A majority of the en banc court held that the definition of "controlled substance offense" "does not include inchoate offenses."

"Controlled substance offense" is defined in s. 4B1.2(b), and "means an offense . . . punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." Commentary to s. 4B1.2 adds that the term "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."

Dupree argued that the Commentary should be disregarded because the Guideline itself was unambiguous, and it excluded inchoate offenses. The Court agreed. The Court relied upon the general principle that "the commentary cannot expand the interpretation of unambiguous sentencing guidelines." The Court then went back to the definition in s. 4B1.2(b), which referenced offenses that prohibited "the manufacture import, export, distribution, or dispensing of a controlled substance. . . with intent to manufacture, import, export, distribute, or dispense." The "lack of any reference to conspiracy or attempt crimes stands in stark contrast to the other definition found in s. 4B1.2." Elsewhere in the Guidelines, the Sentencing Commission had expressly defined "crime of violence" to include attempts.

Two judges dissented.

United States v. Scott, 21-11467 (Jan. 20, 2023)

Scott appealed convictions for healthcare fraud and related offenses, arising out of the submission of "claims to Medicare for genetic cancer-screening (CGx) tests for beneficiaries who did not have cancer or a familial history of cancer and that were not ordered by the beneficiaries' primary care physicians." The government claimed that the tests were not covered by Medicare because they did not "diagnose cancer but only assess the risks of developing the disease." The convictions were affirmed.

Scott argued on appeal that he did not commit a crime because the tests were covered by Medicare. He did not present evidence on the coverage issue in the trial court; nor did he request jury instructions that Medicare generally paid for the tests. The Eleventh Circuit chose to entertain the issue as a belated challenge to the indictment.

The indictment "alleged that Medicare did not cover diagnostic testing that was not reasonable or necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." It was further alleged that "if testing was necessary for diagnosis or treatment, Medicare required that it be ordered by the physician who is treating the beneficiary, i.e., the physician who furnishes a consultation or treats a beneficiary for a specific medical problem and who uses the results in the management of the patient's specific medical problem."

The Eleventh Circuit rejected Scott's argument that the preventive screening tests were recommended by the U.S. Preventive Services Task Force and were therefore covered. Scott did not cite any statutes or regulations requiring Medicare to pay for tests recommended by the USPSTF. Even if Medicare generally covered such testing, the indictment was still sufficient. The USPSTF recommendation provided for testing "after an assessment by primary care physicians of patients with a personal or family history of certain cancers with 'an appropriate brief familial risk assessment tool.'" The indictment did not reflect that the tested individuals had such histories of cancer.

First District Court of Appeal

Heming v. State, 1D21-1648 (Jan. 18, 2023)

After Heming appealed a conviction and sentence, the trial court imposed restitution. Heming challenged the authority of the trial court to impose restitution while the appeal was pending. The First District dismissed the appeal with respect to restitution because Heming did not file a separate notice of appeal from the subsequent restitution order.

Second District Court of Appeal

Beasley v. State, 2D19-4257 (Jan. 20, 2023)

The Second District affirmed convictions for conspiracy to commit racketeering and intentionally possessing or capturing alligators or alligator eggs, a violation of section 379.409, Florida Statutes.

Beasley challenged the conspiracy conviction, arguing that theft of alligator eggs was not a proper predicate offense for a racketeering conspiracy. While that was correct, the Second District concluded that there was sufficient evidence "that Beasley agreed to participate in the affairs of the criminal enterprise with knowledge and intent that others would carry out the racketeering activity, such as predicate acts of forgery. . . ." [Note – the racketeering statute was amended in 2021 to include offenses pertaining to the illegal harvesting of alligator eggs and other similar offenses.] The evidence regarding forgery involved falsifying documents pertaining to the transfer of the alligator eggs.

The jury was instructed regarding the offense under section 379.409, which prohibits, inter alia, intentionally killing, injuring, possessing, or capturing, or attempting to kill, injure, possess, or capture, an alligator or the eggs of an alligator. In addition to tracking the statutory elements, the jury instructions noted that such acts were not unlawful if the defendant acted pursuant to a valid permit and possessed an appropriate valid license. Beasley argued on appeal that the instructions were confusing and misleading "because they did not provide instructions on the specifics of the FWC licensing and permit rules and because the failure to provide such specifics negated his defense that his actions were merely violations of FWC regulations." In this case, "Beasley did not request the trial court to provide the permit provisions and licensing rules in the instructions, despite the trial court asking if he wanted anything further in the instructions. . . ." The

instructions as given were deemed to constitute an accurate statement of the law. While the statutory language uses the phrase “unless authorized by rules of the commission,” the language used in the instructions about acting pursuant to a valid permit and possessing an appropriate valid license was deemed to sufficiently convey the same thing as the statutory phrase “unless authorized by rules of the commission.”

Beasley further argued that the misdemeanor under section 379.3751(4) preempted the felony under section 379.409 “because both statutes prohibit the same conduct yet a violation of the former is a second-degree misdemeanor while a violation of the latter is a third-degree felony.” The Second District concluded that Beasley did not demonstrate any due process violation. The felony statute explicitly referenced that its punishment was “in addition to such other punishment as provided by law.”

The Court further rejected the claim that section 379.409 improperly “delegated the power to determine what constitutes criminal conduct to the FWC.” The same argument had previously been rejected by the Florida Supreme Court when addressing a different statutory scheme which used similar statutory language – Avatar Dev. Corp. v. State, 723 So. 2d 199 (Fla. 1998). Section 379.409 “does not leave it to the FWC to define what acts constitute crimes. The FWC uses its expertise and specialized knowledge to set the parameters of the alligator management program, including the standards by which licenses and permits that will be issued, and the rules for management of alligators that are both held captive and harvested for meat and skins. These acts are clearly outside the expertise of the legislature. However, the legislature has enacted section 379.409 to serve as an enforcement mechanism to ensure compliance with the FWC’s rules, regulations, and permitting structure.”

The Court also rejected the State’s cross appeal regarding a downward departure sentence. The court found that “Beasley was a relatively minor participant in the conspiracy.” This was supported by evidence. Beasley was paid $15 an hour for the work that he was doing. Albritton “put the operation together, engaged int eh majority of the trickery and deceit, and was the one who financially benefitted from the operation.” Another codefendant “was not involved in the day-to-day operations of the farm as Beasley was, but [he] was paid per egg and was paid over $58,000. . . .”

Walker v. State, 2D21-2675 (Jan. 20, 2023)

The Second District affirmed a revocation of probation but reversed for resentencing.

At the commencement of the revocation hearing, defense counsel inquired whether the judge wanted "to just consider the same testimony in deciding the Motion to Suppress the Identification, or if we should set that for a hearing on a separate date." The judge responded that the court did not "have a Motion to Suppress in front of me." On appeal, Walker argued that the court erred "by failing to hear his motion to suppress before commencing the violation of probation [VOP] hearing." The court did not err, because no suppression motion had been filed in the revocation case prior to the hearing. A suppression motion had been filed under a different case number, a new substantive offense (which served as the basis for the revocation proceeding) the day prior to the VOP hearing, and the judge had not yet received it.

Alternatively, the suppression motion lacked merit. Walker argued that an in-court identification was influenced by an out-of-court identification, but the victim's in-court identification was "based on an independent recollection." The victim knew Walker, "had seen him several times before, and was 100% sure it was Walker who shot him."

Walker qualified as a violent felony offender of special concern, but the court did not make the statutorily required findings "as to whether or not the violent felony offender of special concern poses a danger to the community." Under the statutory scheme, the findings regarding whether the defendant is a danger to the community come into play only after the court "has already determined that the offender is a VFOSC." The determination of whether the defendant poses such a danger then corresponds to the subsequent decision as to whether revocation will be mandatory or discretionary. Here, the trial court, at sentencing, did not make findings as to the statutory factors related to whether the defendant posed a danger to the community. This required a new sentencing hearing; the Second District rejected the State's argument that a conforming written order would suffice on remand.

Jimenez v. State, 2D22-1792 (Jan. 20, 2023)

The Second District granted a certiorari petition which challenged the dismissal of a Stand Your Ground motion as legally insufficient.

The trial court found that the motion to dismiss was legally insufficient because it admitted the defendant "was engaged in unlawful legal activity." "Even though Mr. Jimenez's motion admitted that he was engaged in unlawful activity, he also alleged that the circumstances precluded any ability to retreat or otherwise terminate the encounter before resorting to deadly force. That additional allegation, which the trial court did not address, entitled Mr. Jimenez to an evidentiary hearing."

Third District Court of Appeal

Arnold v. State, 3D21-1012 (Jan. 18, 2023)

The Third District affirmed an order revoking probation, referencing the defendant's suppression motion without addressing the merits, finding that any error in admitting Arnold's videotaped, sworn statement was harmless. The Court reversed the sentence for resentencing, because the sentencing hearing was conducted via Zoom, in violation of the "procedural due process right to be physically present at the hearing." The sentencing hearing was held on March 26, 2021.

The revocation was based on the commission of a new offense, second-degree murder. Evidence other than the defendant's statement consisted of 1) testimony from the victim's girlfriend, that Arnold "had a gun in the victim's home and that she overheard a loud argument between Arnold and the victim"; 2) testimony of the victim's brother to the same effect, adding that he heard an altercation between Arnold and the victim, followed by a shot and a statement by Arnold, "that's what you get"'; 3) Arnold's flight from the scene; and 4) forensic testimony that the person Arnold claimed to be the actual shooter did not testify positive for gunshot residue very shortly after the shooting.

With respect to the remote sentencing hearing, the Third District noted the Supreme Court's administrative order suspending rule 3.180's physical presence requirement, but further noted that the same order "clearly required the trial court, when faced with a constitutional challenge to a remote sentencing proceeding, to ensure that the remote proceeding would not infringe upon the defendant's constitutional rights." "Rather than balancing the parties' competing interests under the circumstances presented to ensure that the instant remote proceeding would comport with due process, the trial court overruled Arnold's objection to the remote sentencing proceeding primarily because the court did not seen anything 'unique about this case that requires an in person sentencing' and Arnold '[was] in the same

position as anyone else who [was] accused of violating their probation and the hearing occurs remotely.'"

Quispe v. State, 3D21-2150 (Jan. 18, 2023)

The defendant's sentence was reversed and remanded for resentencing because the trial court designated the defendant as a prison releasee reoffender, but failed to make the statutorily required findings of eligibility.

Otero-Rosario v. State, 3D22-0868 (Jan. 18, 2023)

A revocation of probation was affirmed. A Nelson inquiry was found to be adequate "because the complaints concerning the attorney of record were 'generalized grievances,' and Otero-Rosario 'never made a request for replacement of counsel with another court-appointed counsel, which is the fundamental prerequisite of a Nelson inquiry,' instead insisting on self-representation."

Evidence of a probation violation was deemed sufficient, as "the trial court was within its discretion in determining that Otero-Rosario's actions in failing to appear for his court-ordered mental health evaluation did 'not portray some inept attempt to comply' but rather constituted 'willful ignorance.'"

Fourth District Court of Appeal

Sibrun v. State, 4D19-1629 (Jan. 18, 2023)

This case was remanded to the Fourth District by the Florida Supreme Court, for further consideration in light of the Supreme Court's decision in Davis v. State, 332 So. 3d 970 (Fla. 2021).

The Fourth District, in its earlier opinion in the case, was bound by the Court's own precedent, and concluded that a trial court could not "consider a defendant's 'protestations of innocence and failure to show remorse in determining what sentence to impose.'" In light of the Supreme Court's recent decision in Davis, that was no longer true, and in a non-capital case, "the statutory scheme . . . does not foreclose consideration in sentencing of the defendant's failure to accept responsibility."

Korets v. State, 4D22-828 (Jan. 18, 2023)

The Fourth District reversed the summary denial of one claim in a Rule 3.850 motion for an evidentiary hearing. That claim asserted that counsel was ineffective "for failing to object to the jury being instructed on aggravated battery with a deadly weapon as a lesser-included offense of attempted first-degree murder as charged in count one of the amended information."

The State conceded error on appeal as to this claim "because the amended information did not allege that Korets used a deadly weapon."

Fifth District Court of Appeal

Bowen v. State, 5D22-1546 (Jan. 20, 2023)

The Fifth District affirmed the denial of a Rule 3.850 motion. Counsel was not ineffective for failing to object to the use of an out-of-court photographic lineup. Only one of two victims picked out the defendant. "Every photograph in the array had been edited to depict the person as though he were wearing a black t-shirt, consistent with the clothing described by the victims."

The photo of the defendant was edited "to remove a facial tattoo and scar or cut on his face." This was done to make the photos in the array more consistent with each other "as it would be difficult to find a sufficient number of filler photographs of subjects visually similar to Appellant who would also have a facial tattoo and scar." The Fifth District agreed with the trial court's conclusions that the lineup employed "was not unnecessarily or inappropriately suggestive." Any motion to suppress the lineup would have been denied and counsel could not be ineffective for "failing to make a meritless argument."