Case Law Update
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Eleventh Circuit Court of Appeals

United States v. King, 21-12963 (Jan. 23, 2023)

King raised multiple challenges to his 36-month sentence, which was imposed upon a revocation of supervised release. He previously pled guilty to the charge of conspiracy to manufacture methamphetamine.

The sentence was not substantively unreasonable. King argued that the sentence was nine times the low end and more than 3.5 times the high end of the advisory guidelines. He also argued that he "repeatedly accepted responsibility for his conduct," and "he was less than one year away from completing his supervised release."

The district court, within its discretion, gave "greater weight to the nature and frequency of King's violations of the conditions of his supervisory release – including his continual methamphetamine use, failure to attend substance abuse treatment programs, and failure to report to his probation officer – than to his admission of the violations, lack of new criminal charges, and near completion of the term of the release."

In a previous decision, United States v. Vandergrift, 754 F. 3d 1303 (11th Cir. 2014), the Court held that a district court, after revoking supervised release, "erred in sending him to prison for the purpose of rehabilitation." That argument was not raised by the appellant in this case. The dissent, however, concluded that this constituted a sentencing error warranting reversal. The majority opinion, after noting that the issue was forfeited by not being raised in either the district court or the Eleventh Circuit, addressed it as a claim of plain error as a result of the dissent's reliance on Vandergrift. The majority found the record unclear as to whether the district court imposed incarceration based upon the need for rehabilitation. The district judge did state that King needed "at least a 24-month term of imprisonment to have a chance at [participating in] the intensive residential substance abuse treatment program" of the Bureau of Prisons. A sentencing court, however, errs only "when it actually imposes or extends a prison sentence for the purpose of promoting rehabilitation.." "Here, the District Court only mentioned a substance abuse

treatment program after it announced a prison term that it said would serve valid sentencing purposes."

First District Court of Appeal

Susick v. State, 1D21-2070 (Jan. 25, 2023)

Susick, a federal prisoner with a state detainer for failing to appear at a probation violation hearing, filed a habeas corpus petition in state court, seeking to set aside the detainer because it interfered with benefits that he was otherwise entitled to receive in federal prison. The trial court dismissed the petition and the First District affirmed that denial.

"A detainer is a request, not an order, and concerns agreement between two executive branch agencies. Susick may be losing out on benefits in federal prison, but that is a result of executive discretion that we cannot examine." Only in the rare instance where a detainer is preventing a prisoner from immediate release will the detainer be viewed as resulting in the custody of the habeas petitioner, and only then will a habeas court entertain a claim related to the detainer. Furthermore, a state court has "no power to interfere with federal custody decisions." Susick could not "force the circuit court to dispose of the violation of probation while he is in prison on other charges."

Second District Court of Appeal

Corona v. State, 2D21-1162 (Jan. 27, 2023)

A conviction for robbery was reversed and remanded for a new trial because the trial court denied a request for an instruction on robbery by sudden snatching, a permissive lesser-include offense.

The information alleged that Corona committed a robbery, by taking a cell phone from the victim by force, violence, assault or putting the victim in fear. At trial, there was evidence of a "recorded call where Corona told the victim 'all I did was push you away.'" As the allegations in the information as to the greater offense of robbery were sufficient to cover the elements of robbery by snatching, and there was evidence at trial from which a jury could find the lesser offense or robbery by sudden snatching, the trial court erred in denying the requested instruction.

N.D. v. State, 2D21-2660 (Jan. 27, 2023)

The trial court erred inf finding N.D. guilty of burglary of an unoccupied conveyance as the evidence was insufficient.

The owner of the vehicle testified that she had parked the car in her apartment complex parking lot at night and left her credit card in or near the center console. Another resident of the complex testified that around 1 a.m. that night she observed a few teenagers, walking in the area in question. She could not provide any facial recognition and said that they were wearing hoodies and basketball shorts or sweats. She observed them "feeling on vehicles to see if the doors were unlocked." Only two of them were observed doing that; the third was walking towards her, and they appeared to be together. They were subsequently walking and standing near her vehicle. With respect to this witness's neighbor's vehicle, "[i]t just appeared that they were in the trunk because the trunk was open and it looked like they were, like rummaging through things. . ." The witness called 911 and officers apprehended three suspects "who matched the description provided by the witness," one of whom was N.D. "The victim's credit car was discovered on the ground of the third-floor landing two to three feet away from where the juveniles were apprehended." The witness never identified "which two individuals were rummaging through the victim's vehicle and which one was standing nearby."

"Here, the State failed to establish which of the three individuals was N.D. The State presented no testimony as to whether he was one of the individuals seen pulling on car door handles and rummaging through the car's trunk or instead was the individual walking toward the witness and later standing nearby. As such, at best, the State established that N.D. stood nearby while two other juveniles pulled car handles and broke into a vehicle's trunk." Nor was there sufficient evidence to "establish that the individual walking toward the witness and later standing on the sidewalk was acting as a principal." The State did not "establish that N.D. performed one of the overt criminal acts witnessed or that he "d[id] some act or sa[id] some word which was intended to and d[id] incite, cause, encourage, assist[,] or advise' the other juveniles to commit the crime."

Third District Court of Appeal

Carballo v. State, 3D21-1583 (Jan. 25, 2023) (on motion for rehearing)

The Third District issued a revised opinion on rehearing.

Carballo appealed the summary denial of Rule 3.850 motion. One claim was that counsel was ineffective "in advising [Carballo] not to testify in her own defense. The claim was facially sufficient was not refuted by record attachments. Further proceedings were needed as to this claim.

Carballo was convicted for the first-degree murder of her husband's former business partner, who was believed to have been behind the murder of her husband and wounding of her infant child. There were no eyewitnesses. During the criminal investigation, Carballo made incriminating statements. Prior to trial, she unsuccessfully claimed immunity under the Stand Your Ground law and testified at the pretrial evidentiary hearing. In the subsequent 3.850 motion, she argued that absent her testimony, the defense of self-defense was not viable.

In the 3.850 proceedings, the trial court set an evidentiary hearing for this claim, but, prior to the hearing, without the presence of Carballo, "both her attorney and the State proposed that the issue of prejudice [for ineffective assistance] was ripe for determination on the cold record of the pre-trial immunity hearing." Then, without any evidentiary hearing, the court concluded "that because Carballo's pre-trial testimony was inconsistent and 'highly impeachable,' the advice not to testify was both reasonable and strategic. The court did not, however, render any findings as to prejudice."

On appeal, the Third District first concluded that on the basis of the foregoing, the jury, at trial, "was arguably left without a reasonable basis for inferring self-defense." Further, the claim in the 3.850 motion was facially sufficient. At trial, the judge colloquied Carballo regarding the decision as to whether to testify and she "refused to confirm whether she had adequate time to discuss her decision with her attorney or her satisfaction with strategic decisions, but she did confirm she did not wish to testify." That decision, however, does not waive a subsequent claim that counsel improperly advised her regarding the decision to testify. Additionally, the determination of whether a tactical decision of trial counsel was reasonable generally requires an evidentiary hearing. And, when issues of witness credibility exist, a trial court's examination of "a cold record without the benefit of the insights gained from viewing live testimony" is generally not permitted, including in postconviction proceedings.

While a stipulation to rely on prior testimony may be permissible, in this case, Carballo was not present when counsel entered into that postconviction stipulation. "Upon remand, any stipulation concerning a testimonial waiver should occur in Carballo's presence."

Bernabeu v. State, 3D22-91 (Jan. 25, 2023)

The Third District affirmed the denial of a Rule 3.850 motion. The trial court conducted an evidentiary hearing on the claim that counsel was ineffective for failing to advise Bernabeu to testify at trial. Bernabeu was convicted for first-degree premeditated murder and felony murder and proceeded on the defense that the crime was a crime of passion, and was not premeditated.

The issue on appeal focused of counsel's advice. Counsel testified that Bernabeu was advised not to testify for strategic reasons. That was deemed supported by the evidence at the postconviction hearing, but the details were not set forth in the appellate court's opinions. Alternatively, it was held that even if counsel's performance was deficient, there was no prejudice. Two children witnessed the murder. Bernabeu conceded at the postconviction hearing that he stabbed the victim with a knife. The jury made alternative findings as to both premeditated and felony murder.

Holmes v. State, 3D22-1363 (Jan. 25, 2023)

The Third District reversed the summary denial of one claim of a Rule 3.850 motion. The claim asserted that counsel was ineffective for failing to raise an insanity defense. The claim was denied as being facially insufficient. That conclusion was accurate, but Holmes should have been provided an opportunity to amend the claim.

The claim regarding the failure to assert an insanity defense had been premeditated on facts showing that the defendant's lack of appreciation of the criminality of his conduct. This was developed with respect to potential statutory mitigation in the penalty phase of the capital trial. Insanity is distinct from the statutory mitigating factor in a penalty phase. Holmes' reliance on the penalty phase mitigation for his claim regarding insanity therefore did not set forth a sufficient claim with respect to the failure to assert an insanity defense.

Fourth District Court of Appeal

Randolph v. State, 4D21-3052 (Jan. 25, 2023)

The Fourth District affirmed the revocation of probation. The defendant admitted violating one condition and waived a hearing as to additional alleged new law violations.

The State made a plea offer that would resolve the VOP case and all of the new crimes. Randolph rejected the offer but entered an open plea to the violation of failing to pay the cost of supervision. The State advised the court that the State intended to present additional evidence on the other alleged violations. Defense counsel wanted the court to proceed solely with the one violation for costs of supervision. The judge accepted an open plea, recognizing that the admission was only as to the one condition. The judge made statements about being able to consider the other allegations for sentencing purposes and defense counsel for the VOP proceeding responded affirmatively.

On appeal, the Appellant argued that the trial court erred by failing to hold a violation hearing on the unadmitted alleged violations and by cosnidering those additional alleged violations at the sentencing hearing. At the sentencing hearing, the State introduced evidence of the commission of those additional violations.

The Fourth District found that the defendant "knowingly and strategically desired not to have a violation hearing on the new crime allegations." Several instances of comments by the defense were detailed to document this. As a result, the Fourth District found that there was a waiver of the right to a violation hearing, which was explained to the defendant, who said that he understood. As a result, there was no violation of due process, and any error "in not having a violation hearing on the unadmitted allegations was invited error."

With respect to the sentencing proceeding, the appellate argument relied upon the Florida Supreme Court's decision in Norvil v. State, which held that a "trial court may not consider a subsequent arrest without conviction during sentencing for the primary offense." The Fourth District concluded that that decision was not applicable to a VOP sentencing. The Court held "that the trial court properly considered evidence of Defendant's conduct during probation, including facts and conduct not directly related to the actual admitted violation, to have a complete picture of Defendant's amenability to reform in determining whether to revoke probation and impose a further sentence for the crimes for which Defendant was

placed on probation. The state did not have to prove additional new law violations to support revocation of Defendant's probation because Defendant freely and voluntarily admitted to violating condition 2. The state's purpose in presenting evidence of the new law violations was to establish Defendant's conduct while on probation showing lack of amenability to reform."

Alternatively, as with the preceding claim, the defendant invited error as the defendant "was fully aware that evidence of the new law violations would be utilized by the state at sentencing."

Vaughner v. State, 4D22-2169 (Jan. 25, 2023)

In a one paragraph opinion, the Court cited an earlier decision for the holding that "facts found by the judge under the Prison Releasee Reoffender Act are not elements of the offense and are within the 'prior conviction' exception to *Apprendi v. New Jersey*, 530 U.S. 466 (2000)."