Case Law Update
February 6, 2022
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Eleventh Circuit Court of Appeals

In Re: Grand Jury Subpoena, 21-13651 (Jan. 31, 2023)

The Eleventh Circuit dismissed an appeal for lack of jurisdiction. The Appellant had moved to quash subpoenas based on privileges. That motion was denied and when the Appellant still refused to comply, the Appellant was found in civil contempt. The district court stayed the issuance of sanctions pending appeal. Contempt citations are not final and are not appealable "unless there is both a finding of contempt and a non-contingent order of sanctions."

United States v. Jackson, 19-11955 (Feb. 3, 2023)

On remand from the Supreme Court for reconsideration in light of Concepcion v. United States, 142 S. Ct. 2389 (2022), the Eleventh Circuit again affirmed the denial of a motion for a reduced sentence under the First Step Act of 2018.

Jackson was tried for possessing with intent to distribute more than 50 grams of cocaine. He was tried prior to Apprendi v. New Jersey, and the jury did not make a finding as to the specific drug quantity involved. The district court found that the offense involved 287 grams, and based on that, plus a sentencing enhancement for three prior felony drug convictions, sentenced Jackson to a mandatory term of life imprisonment. That was later commuted by the President to 300 months.

In 2019, Jackson moved for a reduction under the First Step Act. He argued that he was eligible for a "sentence reduction because a judge, not a jury, made the drug-quantity finding that increased his statutory range." After the district court denied the motion, the Eleventh Circuit affirmed. The Court concluded that the Act "does not permit reducing a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." And, "in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." That finding of quantity was found to have been permissible even if made by a judge. Apprendi was considered by the Eleventh Circuit, but that Court

found that it was inapplicable to a motion for sentence reduction just as it was inapplicable to a collateral attack.

Subsequently, the Supreme Court, in Concepcion, held, inter alia, that a district court "may consider other intervening changes of law . . . or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion." The Eleventh Circuit, upon post-Concepcion review, found that that decision did not abrogate the Eleventh Circuit's prior holding that "the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." Further, Jackson could not "use a motion for a reduced sentence to correct an error based on *Apprendi*."

Jackson's argument focused on Concepcion's vesting of the district court with discretion to consider changes in law. The Eleventh Circuit did not read Concepcion as broadly as did Jackson. The discretion referenced by the Supreme court came into play in "determining how much of a drug the defendant possessed."

Apprendi was decided while Jackson's direct appeal was pending in 2000. That, however, did not create an entitlement to the application of Apprendi on the motion for reduced sentence. Jackson could have relied on Apprendi in the direct appeal, but failed to do so.

First District Court of Appeal

Martina v. State, 1D20-3776 (Feb. 1, 2023)

Discretionary cost assessments, including a fine of $2,000 under section 775.083(1), Florida Statutes, and a $100 surcharge under section 938.04, were stricken because they were not orally pronounced at sentencing and the defendant was not provided prior notice and an opportunity to be heard.

Brown v. State, 1D21-3233 (Feb. 1, 2023)

An appeal was affirmed with a brief opinion quoting section 924.06(3), Florida Statutes (2021): "a defendant who pleads nolo contendere with no express reservation of the right to appeal a legally dispositive issue, shall have to right to a direct appeal." The opinion also quoted case law for the point that "there is no fundamental error exception to the preservation requirement of rule 9.140(b)(2)(A)(ii)(c)."

Sims v. State, 1D21-0869 (Feb. 1, 2023)

A revocation of probation for commission of a battery on the defendant's ex-girlfriend and burglarizing her apartment was affirmed. The combination of hearsay and non-hearsay evidence was sufficient and "non-hearsay evidence does not have to independently establish that Sims committed the offenses."

In this case, the state presented "the victim's hearsay statements that after Sims had called and texted her all night, he broke into her home and dragged her downstairs by her hair." The same deputy who provided this testimony also presented "his personal observations that corroborated the victim's statements." This included photos of injuries to the victim and damage to the residence.

Farmer v. State, 1D22-3273 (Feb. 1, 2023)

The First District, as part of a series of recent written orders, denied the Public Defender's motion to withdraw as counsel for the appellant. "In the motion at hand, the APD does not assert that she presently is tasked with simultaneously representing both Farmer and another defendant while the interests of those two clients are 'so adverse or hostile' that she cannot adequately do so in a constitutionally consistent manner. Instead, the motion avers that one of PD2's lawyers at some time in the past had represented a witness who then testified for the State at Farmer's trial in the underlying case on review. There is no averment that one of PD2's lawyers would be representing the witness in a criminal proceeding *currently* and that at the same time one of her lawyers would be handling this appeal for Farmer."

Second District Court of Appeal

Weston v. State, 2D22-1216 (Feb. 3, 2023)

After Weston entered an open plea, he was sentenced as an habitual felony offender to a total of 10 years in prison on two cases. He did not appeal, but filed a Rule 3.800(a) motion, and was resentenced without the HFO designation. The trial court neglected to check the box for credit previously served with the Department of Corrections. He then filed another Rule 3.800(a) motion as to this, but withdrew it and refiled it as a Rule 3.800(b) motion, which was dismissed as untimely. It was further dismissed as a successive motion.

On appeal, the Second District held that the successive motion bar was inapplicable. The claim for prison credit is properly raised in a 3.800(a) motion.

Although Weston asked that the motion be treated as a 3.800(b) motion, "'when a movant files a properly pleaded postconviction claim but incorrectly styles the postconviction motion in which it is raised, the postconviction court must treat the claim as if it had been filed in an appropriately styled motion.'"

Fourth District Court of Appeal

Johnstone v. State, 4D21-1411 (Feb. 1, 2023)

The Court denied a motion for certification of questions of great public importance. One judge dissented, and would have certified the following two questions:

> DOES AN ACTION SERVE "NO LEGITIMATE PURPOSE" WITHIN THE MEANING OF SECTION 784.048(1)(A), FLORIDA STATUTES, WHEN THE ACTION IS NOT ENTIRELY BEREFT OF A VALID PURPOSE?
>
> DOES AN ACTION CAUSE "SUBSTANTIAL EMOTIONAL DISTRESS" WITHIN THE MEANING OF SECTION 784.048(1)(A), FLORIDA STATUTES, IF A REASONABLE OBSERVER WOULD NOT SUFFER SIGNIFICANTLY GREAT SUFFERING, DANGER, OR DESPERATE NEED AS A RESULT OF THE ACTION?

State v. Mancuso, 4D22-808 (Feb. 1, 2023)

On rehearing, the Fourth District withdrew its prior order denying relief and granted the State's petitions for prohibition or certiorari.

The trial court entered orders permitting the transfer of the criminal case to a veteran's treatment court program. The Fourth District first addressed its prohibition jurisdiction. The Court disagreed with Mancuso's argument that prohibition was "not appropriate in this case because the purpose of prohibition is 'to prevent the doing of something, not to compel the undoing of something already done.''" Participation in the veterans court program would postpone the "state's ability to proceed with a prosecution" and therefore prohibition was a viable remedy.

Based upon a review of several relevant statutes and 2021 amendments to them, the Court further concluded that the trial court exceeded its jurisdiction because the statutory scheme requires the approval of the State Attorney and the prosecution objected to participation.

The Court also addressed its jurisdiction to grant relief on the certiorari petition. The Court relied on prior decisions which emphasized the prosecutorial decision-making function and the negation of the "state's ability to prosecute its case." The trial court's orders harmed the State by infringing on the state's prosecutorial discretion; and by "encroach[ing] on the legislature's power to determine which defendants charged by the state attorney are eligible for [the program]."

Thompson v. State, 4D22-1136 (Feb. 1, 2023)

The summary denial of one claim in a Rule 3.850 motion for having been pled insufficiently was reversed and remanded due to the failure of the trial court to grant the defendant leave to amend the claim.

Sixth District Court of Appeal

Tacy v. State, 6D23-43 (Feb. 3, 2023)

An appeal from a revocation of probation was dismissed as moot with respect to a challenge to the award of credit for time served, where the sentence had already been completed.

Souels v. State, 6D23-48 (Feb. 3, 2023)

A one-paragraph opinion affirmed a conviction, citing two prior decisions for the points that a statement that a defendant was in jail at the time of buccal swabs was not reversible where the only charge that the defendant was in jail for at the time of the swabs was the one for which he was being tried; and a second prior decision finding no abuse of discretion in denying a motion for mistrial when a curative instruction was issued "after the victim described appellant's co-defendant as 'the one in jail.'"

Jefferson v. State, 6D23-1208 (Feb. 3, 2023)

The Sixth District affirmed a conviction for first-degree murder and addressed the warrantless seizure of Jefferson's phone. The seizure of the phone was not supported by probable cause, but the admission of the contents of the phone into evidence was found to be harmless error.

The murder victim's body was found in a canal next to Jefferson's apartment complex. Blood evidence was traced to Jefferson's apartment; he lived alone in the apartment at that time and his girlfriend had moved out shortly prior to the day when the body was found. A search warrant for the apartment was found, and officers observed blood stains that appeared to have been diluted, as well as an empty bleach bottle in a garbage can on the balcony.

Jefferson was contacted by detectives two days later, at the apartment complex, after he had been identified as the occupant of the apartment that was the focus of the investigation. Detectives at that time believed there could be relevant information on Jefferson's phone, and when he refused to voluntarily turn it over, a detective seized it and placed it in a "Faraday bag," which prevents the phone "from communicating with cell towers so that the information on the phone cannot be compromised. A search warrant for the contents of the phone was obtained several days later.

The trial court relied on the open view doctrine when denying the motion to suppress the seizure of the phone. On appeal, the State did not rely on that doctrine, arguing, instead, that there was probable cause and the seizure of the phone "was necessary to prevent the destruction of evidence, touching on another exception to the warrant requirement."

The Sixth District considered the following facts and concluded that they did not establish probable cause: The State, at the suppression hearing, relied solely on a four-page police report. At the time of the seizure of the phone, the detective knew: "that the victim was dead, that the trail of evidence led to Jefferson's apartment, that Jefferson was previously acquainted with the victim and was with her at his apartment on May 24, and that Jefferson had been 'less than forthcoming' during an earlier interview with law enforcement. Because Jefferson and the victim were together at his apartment, the detectives believed there would likely be communications between them on Jefferson's cell phone."

"That assertion was completely speculative. Those facts standing alone do not establish probable cause to believe Jefferson's cell phone contained evidence of a crime."

The admission of the evidence from the phone, however, was harmless. The evidence included text messages that "showed the victim wanted drugs and Jefferson wanted sex in return and to use his apartment for her to engage in prostitution. That same information came into evidence through phone calls made from jail by Jefferson and Jefferson's interview with Detective Ferrara. Additionally, in closing arguments, the defense presented those messages as indicative of a lack of premeditation." Additionally, "the testimony and evidence as to the location of Jefferson's phone over the course of the weekend was not dependent on either the seizure of Jefferson's phone or the phone's contents," as those facts were established through the service provider.

Brand v. State, 6D23-1217 (Feb. 3, 2023)

The Sixth District affirmed a conviction for possession of a firearm by a convicted felon. The Court, however, found that the prosecutor's closing argument erroneously relied on facts not in evidence, but the comment was harmless error.

In closing argument, the prosecutor addressed factors concerning the reliability of testimony, including: "Has the witness been convicted of a felony? Deputy Worth has not been convicted of a felony." There was no evidence of that. As part of the harmless error analysis, the Court emphasized that the court's instructions to the jury covered how to assess credibility, and "told the jury that what the lawyers say is not evidence, and that they are to rely on their own recollection of the evidence, rather than deferring to the lawyers' arguments." The comment was "isolated and brief."