Case Law Update
February 27, 2023
Prepared by
Richard L. Polin

First District Court of Appeal

Farmer v. State, 1D22-3273 (Feb. 22, 2023)

The First District issued a revised opinion denying the Public Defender's motion to withdraw as counsel.

In the motion to withdraw as counsel on appeal, counsel from the Public Defender for the Second Judicial Circuit asserted 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 proceeding now 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. This means the criteria set out in section 27.5303 do not apply here, so PD2's certification is insufficient to invoke operation of section 27.511(8)."

Furthermore, from the perspective of the former client, the witness, there was "no indication that an APD from the office had represented the witness in connection with the same or related criminal conduct for which Farmer was charged, and the motion does not explain how Farmer's interests in this appeal would be 'materially adverse' to the witness's interests."

"The fact that PD2 was permitted to withdraw in the trial court based on a conflict is not relevant to our consideration of the present motion. A criminal appeal is a different proceeding. An imputable conflict extant at a criminal trial that justifies withdrawal there does not ineluctably translate into an imputable conflict that supports withdrawal in the ensuing appeal here."

Second District Court of Appeal

O.W. v. State, 2D21-3839 (Feb. 24, 2023)

The trial court erred in denying a motion to suppress weapons seized during a pat down.

Officers observed two individuals riding bicycles with no lights at night. One stopped and was speaking to an officer when the arresting officer asked O.W. to stop. O.W. stopped and provided his name, date of birth and address. "While on his bicycle, O.W. had a jacket over his left shoulder; the jacket remained over his left shoulder during the initial stage of the encounter after O.W. had dismounted from the bicycle. O.W. kept his left arm still and the left side of his body angled away from the arresting officer; he faced the other officer and the other bicyclist." The arresting officer thought O.W. was trying to hide something, possibly a weapon in his waistband. The officer, upon questioning, referenced O.W.'s demeanor and the way O.W. spoke, including nervousness and shakiness in his voice, and the fact that O.W. was not looking at the officer. The firearm was not visible; there was no bulge in O.W.'s clothing. After O.W. declined a request for the pat down, the officer placed O.W. in handcuffs and the firearm was then removed.

Under the above facts, the officer lacked reasonable suspicion to believe that O.W. was armed and dangerous and the pat down was therefore unlawful.

Harlow v. State, 2D22-1374 (Feb. 24, 2023)

The Second District affirmed an order denying a motion to correct illegal sentence under Rule 3.800(a). Harlow's motion alleged that he did not qualify for the designation as a sexual predator under the controlling statute. He argued "that he had not been convicted of an enumerated offense and that he did not agree to be sentenced as a sexual predator as part of his plea agreement. But Mr. Harlow's motion was facially insufficient because it failed to attach documents demonstrating his entitlement to relief or state where in the record such documents were located."

Third District Court of Appeal

Unborn Child, etc., v. Reyes, 3D23-279 (Feb. 24, 2023)

An unborn child's mother was in jail awaiting trial on a murder charge. A habeas corpus petition, filed on behalf of the unborn child, sought release from custody, challenging "the adequacy of the medical care being provided the pregnant mother."

The petition was denied because it was "filed without a record to establish a factual basis and because consideration of this petition will be factually intensive, we follow Supreme Court precedent and exercise our discretion to dismiss the petition without prejudice to a remedy being pursued in a circuit court."

One judge, in a partially concurring and partially dissenting opinion would have gone further because "habeas corpus does not lie under these limited and specific circumstances." Although provisions of some Florida statutes express "clear intent to afford certain protections to unborn children," other statutory provisions reflect that lawful incarceration may result in an unborn child being in a correctional facility. This includes a statute that mandates that a correctional facility provide prenatal care and medical treatment.

I.P. v. State, 3D21-2256 (Feb. 22, 2023)

In a one-paragraph opinion, the Third District reversed for a new adjudicatory hearing, based on prior decisions holding that where the juvenile objected to a remote proceeding, the trial court must make "case specific findings supporting the need to conduct the proceeding remotely."

Fourth District Court of Appeal

Kittles v. State, 4D21-3168 (Feb. 22, 2023)

Although a "plea agreement entered into by a *pro se* defendant who improperly waived [his or her] right to counsel is involuntary as a matter of law," in order to challenge voluntariness on appeal, "the defendant is required to have first filed a motion to withdraw plea." There is no exemption of juveniles from that requirement.

Lowe v. State, 4D22-101 (Feb. 22, 2023)

The Fourth District reversed a conviction and sentence for a new trial. Lowe filed a motion in limine, challenging the admissibility of references to a stolen firearm as irrelevant and statements made by a witness to an officer as hearsay. The trial court treated this as a motion to suppress and denied it as untimely, without addressing the merits. Lowe renewed the motion when the trial began but the court again declined to address the merits, finding that Lowe waived evidentiary objections.

Even if the motion qualified as a motion to suppress, as the lower court appeared to have treated it, Rule 3.190(g)(4) "generally requires a motion to suppress to be filed before trial, but the rule allows the court to consider the motion at trial." The rule does not require suppression motions to be heard prior to trial. And, the

failure to file a pretrial suppression motion "does not result in a waiver of the defendant's right to file a motion during trial."

Douchard v. State, 4D22-286 (Feb. 22, 2023)

In an appeal from a conviction for DUI, the Fourth District affirmed the conviction without discussion, but reversed the sentence because several conditions of probation needed to be corrected or stricken.

A condition prohibiting the defendant from visiting places where intoxicants, drugs or other dangerous substances were unlawfully sold, dispensed or used, had to be modified to provide that the defendant would know "knowingly visit" such places. A condition requiring the defendant to submit to drug testing at his own expense was erroneous. Submission to drug testing is a general condition of probation; payment by the probationer is not, and, absent an oral pronouncement during sentencing, the payment requirement had to be stricken.

The addition of a date by which the defendant had to provide proof of prescriptions for drugs, although not pronounced at the sentencing hearing, was permissible. It was "merely a detail" to "assure . . . compliance" with the condition requiring the defendant to submit to random testing.

Several other costs and fees assessed were stricken because they were not orally pronounced at sentencing.

Perozo v. State, 4D22-527 (Feb. 22, 2023)

Convictions for multiple offenses were reversed for a new trial "because the trial court erred in denying Defendant's motion to continue trial to hire counsel without making an adequate inquiry into the surrounding circumstances and clear findings to show that Defendant's constitutional right to counsel of choice was not being arbitrarily denied."

One week prior to a scheduled trial date, a substitution of counsel was filed and private counsel replaced an assistant public defender. Two days later, new counsel filed a notice of appearance and the next day, a status check was held. Private counsel requested leave to represent the defendant and mentioned a further request, but the court cut counsel off and stated that a continuance would not be granted; that counsel had to be prepared to try the case the next week.

Private counsel then filed a motion to withdraw, because counsel's appearance had been contingent upon the court granting a continuance. The motion to substitute was then deemed withdrawn and the defendant filed a motion for a 30-day continuance to hire counsel of his choice and to engage in further depositions. The motion was denied and the trial proceeded with the prior assistant public defender who had been handling the case.

Although the requested continuance was made on the eve of the trial date, the court failed to conduct "any inquiry into the surrounding circumstances" and failed to make "any findings to show that the Defendant's right to counsel of his choice was not being arbitrarily denied." The judge cut off counsel when counsel was attempting to provide an explanation. The judge made a statement that the court "was not gong to allow 'defendant[s to]run the show around here, picking hew lawyers . . . and getting continuances.'" This indicated "that the trial court denied Defendant's request for a continuance based on a general policy, rather than on the circumstances of the case."

Gillig v. State, 4D22-1027 (Feb. 22, 2023)

A conviction for DUI was reversed because the trial court erred "in admitting evidence that [the defendant] committed a DUI five years earlier." The evidence of the prior conviction did not meet the "strict standards of relevance" that are required for similar fact evidence.

The fact of the prior conviction "did not tend to prove or disprove that he was driving or in actual physical control of the truck or was under the influence of a controlled substance" at the time of the offense for which the defendant was being tried. The defendant did not assert a mistake or accident, and the State's theory that it was proving "the absence of mistake or accident" was erroneous as that was not at issue.

The defense was that the defendant had been sleep-deprived and sick and pulled over to sleep in his truck, "which also served as his home." The evidence of the prior offense was therefore not rebutting a theory of defense. "Taken to its logical extreme, the state's position would open the floodgates to propensity evidence anytime a defendant denied that alcohol or controlled substances found in his system caused behavior that is otherwise consistent with impairment by those substances, so long as there were some points of similarity between the prior and current episodes, which occur often in DUI cases." As the defendant "did not testify on

direct that he had never been impaired by his medications while driving or that he was unaware the medications could cause impairment," "he did not open the door."

Fifth District Court of Appeal

Colley v. State, 5D23-140 (Feb. 24, 2023)

An appeal of a traffic hearing officer's determination that the defendant exceeded the speed limit under section 316.187(1), Florida Statutes (2022), should have been appealed to the circuit court under section 318.33 and was transferred to the circuit court by the district court of appeal.

Sixth District Court of Appeal

Webster v. State, 6D23-37 (Feb. 24, 2023)

Where a judgment of guilt was previously entered, a second judgment should not be entered upon a revocation of probation.

May v. State, 6D23-179 (Feb. 24, 2023)

A conviction for petit theft was affirmed. A claim based on the exclusion of testimony as hearsay was not preserved because "May never proffered the testimony he sought to elicit from the witnesses, and the substance of that testimony is not apparent from the record."