Case Law Update
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Eleventh Circuit Court of Appeals

United States v. Shamsid-Deen, 20-11877 (Mar. 6, 2023)

Shamsid-Deen was charged under 18 U.S.C. §922(g), with the unlawful possession of a firearm, based on a previous misdemeanor conviction for battery under a Georgia statute. The district court granted the defendant's motion to exclude evidence of the previous conviction "after determining that [the defendant's] waiver of a jury trial in the earlier state proceeding resulting in the conviction had not been knowing and intelligent." As the prosecution in the current federal case was now unable to prove the qualifying predicate conviction for the §922(g) offense, it pursued this appeal. The Eleventh Circuit reversed for further proceedings.

Section 922(g)(9) makes it unlawful for a person "who has been convicted in any court of a misdemeanor crime of domestic violence [to] possess in or affecting commerce, any firearm or ammunition." There is a further definition of "misdemeanor crime of domestic violence," as well as an exception to that definition. The exception excludes prosecutions for offenses "for which a person was entitled to a jury trial" where that person did not "knowingly and intelligently waive[] the right to have the case tried by a jury."

The Eleventh Circuit first held that the federal court's determination of whether the knowing and intelligent waiver of the prior misdemeanor jury trial is under the de novo review standard. The Court next held that the statutory exception at issue here – whether there was a valid waiver of the misdemeanor jury trial – involved an affirmative defense, and that the burden of production was therefore on the defendant. The Court further concluded that the burden of persuasion on this issue was also on the defendant because the exception based on the waiver of the jury trial did not negate an element of the federal crime.

Turning to the ultimate question of whether a valid waiver of the jury trial existed, the Court focused on a form that the defendant read and signed prior to the Georgia misdemeanor bench trial, which included the following: "I understand an attorney has education and experience concerning . . . how to select a jury if I desire a jury trial." Another portion of the form signed by the defendant acknowledged: "I

am fully aware that upon a not guilty plea, I have the right to a trial, either before a jury or the Court. . . ." On the other hand, the form did not contain any indication that the defendant "wanted to plead not guilty and request a jury trial." The form included an option for a "guilty plea," and an option for a "not guilty plea," which stated: "I plead NOT GUILTY to the charge(s) against me and request a non jury trial. I knowingly and voluntarily waive (give up) my right to a trial before a jury . . . who would hear the evidence and law and decide if I am guilty or not guilty. I want my case to be heard and decided by the Judge acting without a jury."

The forms used in state court were deemed ambiguous because the "plea form did not contain any space to initial that would have let Shamsid-Deen plead not guilty, as he did, without indicating that he was waiving his right to a jury trial. The forms alone are ambiguous." There was also a transcript of a colloquy with the defendant. The state-court prosecutor advised the judge that the defendant wished to plead not guilty and proceed with an attorney and a non-jury trial. The judge asked the defendant: Is that what you want to do," and the defendant responded, "Yes, sir."

After the state court non-jury trial, defense counsel asked for a lenient sentence, adding "we" "deliberately chose a bench trial so that they wouldn't 'waste jurors' time." The federal district court thus viewed the waiver as a strategic decision by defense counsel. The Eleventh Circuit disagreed, concluding that the "lawyer's statement in court that they deliberately chose a bench trial reflected a decision Shamsid-Deen made, or at least consented to, after advice from his lawyer about the possible risks of a jury trial."

National Rifle Association v. Pam Bondi, et al., 21-12314 (Mar. 9, 2023)

In a civil case, the Eleventh Circuit addressed constitutional challenges to the Marjory Stoneman Douglas High School Public Safety Act, which "precludes those under 21 only from buying firearms while still leaving that age group free to possess and use firearms of any legal type." The Court concluded that Florida's law was "consistent with our Nation's historical tradition of firearm regulation."

The NRA's appeal asserted challenges under the Second and Fourteenth Amendments. The Eleventh Circuit's analysis includes substantial material regarding the scope of the Second Amendment based on both the Founding Era and the Reconstruction Era, finding the "historical sources from the Reconstruction Era . . . more probative of the Second Amendment's scope than those from the Founding

Era . . . because the Fourteenth Amendment is what *caused* the Second Amendment to apply to the States. . . ."

The Court then assumed without deciding that the Second Amendment's plain test covered "persons between eighteen and twenty years old when they seek to buy a firearm." The Court then concluded that the Act's "restriction on the sale of firearms to 18-to-twenty-year-olds is consistent with this Nation's relevant historical tradition of firearm regulation." The Court's opinion also includes an Appendix with details of Reconstruction Era Laws Banning the Sale of Firearms to 18-20-year olds.

First District Court of Appeal

McGhee v. State, 1D21-3514 (Mar. 8, 2023)

In an appeal from a conviction for failing to register as a sex offender, McGhee challenged the sufficiency of evidence and the First District affirmed. McGhee argued that the State failed to prove that he was the same individual as in the prior California conviction that served as the predicate sex offense conviction.

The First District observed that the "California documents contained McGhee's full name, a clear photograph, date of birth, state of birth, extensive tattoo descriptions, gender, race, and height. All of which matched McGhee."

Additionally, the Court rejected McGhee's argument that the jury was required to determine whether his California conviction for forced oral copulation was similar to a Florida offense and therefore triggered the registration requirement. That was a legal determination to be made by the trial court.

Loveless v. State, 1D21-3613 (Mar. 8, 2023)

The First District affirmed the denial of a Rule 3.850 motion after an evidentiary hearing was held. There was no abuse of discretion in denying the defendant's request for counsel in the trial court. The "issues here were factual, concerning the nature of plea offers and communications to Loveless." Nor was there an abuse of discretion in denying a request for discovery. Loveless did not demonstrate that it was necessary. Finally, the claim of ineffective assistance was refuted by defense counsel's testimony at trial, when counsel testified that the State never made the favorable plea offers Loveless claimed to have accepted. Counsel also testified that other factual allegations by Loveless were not true.

Diekow v. State, 1D22-1186 (Mar. 8, 2023)

In a one-sentence opinion, the Court cited an earlier decision for the holding that "the failure to swear to the facts contained in a motion to dismiss information is fatal."

Second District Court of Appeal

State v. Wilson, 2D22-1802 (Mar. 10, 2023)

The Second District granted a certiorari petition and quashed an order granting a subpoena duces tecum. Wilson is charged with sexual battery on a mentally defective person. The trial court issued an order requiring "production to the court for in camera inspection [] the victim's mental health records held by third-party entities."

The parties agreed in this case that the records were protected by the psychotherapist privilege. Wilson argued that an exception, which states that the privilege does not apply to "communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of his or her claim or defense."

The exception Wilson relied on was not applicable. It applies when the "patient" relies on the condition. In the criminal case, the case is brought by the State and the exception "does not authorize the State to waive the privilege on behalf of the individual who holds it." The "irreparable harm" element of a certiorari proceeding was deemed satisfied by the State even though the order of the lower court provided only for an in camera inspection of the documents. The Court quoted language from an earlier decision of the United States Supreme Court: "making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."

Third District Court of Appeal

Destin v. State, 3D22-1361 (Mar. 8, 2023)

In a one paragraph opinion, the Court, on its own, dismissed "the appeal of the trial court's order denying appellant's pro se motion to dismiss" because the appeal was "taken from a non-final, non-appealable order."

Alcazar v. State, 3D23-0083 (Mar. 8, 2023)

In a pretrial habeas corpus petition, Alcazar sought review of an order of pretrial detention. Alcazar was accused of attempted first-degree murder "after allegedly hiring an undercover officer to kill his ex-girlfriend's then-husband."

Florida's pretrial detention statute authorizes pretrial detention in some cases involving "dangerous crimes," which are enumerated in the statute. Attempted first-degree murder qualifies as a dangerous crime. That offense was charged in an amended information in this case. The original charge in the case was solicitation to commit first-degree murder, and, as solicitation did not qualify as an enumerated offense for dangerous crimes, a previous habeas corpus petition granted Alcazar relief from pretrial detention. The State then amended the information to charge attempted first-degree murder.

In this second habeas corpus proceeding, the Third District concluded that the acts involved went beyond solicitation and established attempted murder. Testimony at a hearing included: "Alcazar solicited a hitman (undercover officer), provided the hitman with the victim's personal information, . . ., contacted and met with the hitman, provided $100 for surveillance, identified a location for the crime (the victim's driveway), asked for the murder to be staged as a robbery gone wrong, and provided $400 as a down payment for the crime." The evidence adduced showed that the "alleged scheme advanced from preparation to overt acts putting the murder-for-hire scheme in motion."

One judge dissented, concluding that the evidence established only solicitation, not attempt.