The Florida Postconviction Journal

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a quarterly publication of Loren Rhoton, P.A.

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Welcome!

Welcome to the first issue of the Florida Postconviction Journal for 2013. The newsletter's readership has grown quite a bit since our first issue. The Office of Loren Rhoton, P.A., continues to provide free copies of FPJ to inmates. The letters of thanks from appreciative readers make it worth the effort to continue printing the FPJ.

We are glad to know that we are providing a much-needed service in helping to educate and empower inmates with the knowledge necessary to seek justice in their cases. If you find the newsletter helpful, please pass it along to others after you have had a chance to read it. Spread the word and let people know that we do provide subscriptions free of charge to Florida prisoners. And as always, we welcome suggestions for articles relating to postconviction issues. Thank you to all of our readers. It is a pleasure and rewarding to be able to provide the FPJ to those who need it the most.

No Stipulation to Factual Basis During Plea

In order for a court to accept a plea, a factual basis must be provided. In Hodges v. State, 107 So.3d 538 (Fla. 2d DCA 2013), the parties stipulated to a factual basis, without ever putting those facts on the record.

In a postconviction motion, Hodges argued that his plea was involuntary because there was no factual basis for his plea. Id. at 539. Furthermore, Hodges alleged that a conviction could not stand because there was no evidence that he committed any of the alleged offenses. Id.

Reviewing the record, the DCA determined that the parties agreed to the information contained within the probable cause affidavits, but failed to make those affidavits part of the record. Id. at 540. As such, there was no record material to refute Hodges' claims, requiring remand with directions to hold an evidentiary hearing. Id.

When Does an Extra Comma Require a New Trial?

The Second DCA recently encountered this question in Talley v. State, 106 So.3d 1015 (Fla. 2d DCA 2013). Talley was charged with aggravated battery and battery. Talley alleged the victim attacked first, and Talley was justified in using nondeadly force in self-defense. The victim, meanwhile, testified that Talley attacked first and the victim struck back in self-defense.

The trial court read the standard jury instruction on self-defense, in relevant part: "[Talley] had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed that it was necessary to do so to prevent death or great bodily harm." Talley was found guilty of the lesser-included offense of felony battery and sentenced to almost six years in prison.

Talley argued on appeal that the standard jury instruction, which includes a comma after "including deadly force" eliminated his only defense. The Stand Your Ground statute does not include that extra comma; in relevant part: "has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm." Fla. Stat. 776.013 (2012).

The DCA agreed with Talley, holding that the extra comma changed the entire meaning of the sentence, and was therefore altogether different from the statutory version. The extra comma eliminated Talley's defense by suggesting that Talley could use no force whatsoever in self-defense unless the victim threatened him with deadly force. Furthermore, if the victim had threatened nondeadly force, according to the instruction, Talley would have had the duty to retreat, which is also inconsistent with the statute. Under this mistaken instruction, the jury could have believed Talley's version of events and still found him guilty, thus requiring a new trial.

About Loren Rhoton, P.A.

Loren Rhoton, P.A. is a law firm that focuses exclusively on postconviction actions and inmate issues. The mission of Loren Rhoton, P.A. is to ensure that justice is accomplished in each and every case the firm undertakes. The firm's area of practice ranges from direct criminal appeals and postconviction actions to assisting inmates in dealing with the Florida Department of Corrections. Loren Rhoton, P.A., is a small firm, consisting of Mr. Loren D. Rhoton and Mr. Ryan J. Sydejko. The firm strives to keep a small caseload in order to give each case the individual attention it deserves. We are not a volume business. We do not accept every case that is presented to the firm for representation. A thorough review of any potential case will be conducted before the firm undertakes full representation. If you wish to have your case reviewed for representation, please contact Loren Rhoton for more information. If inquiring about representation, please do not send any materials to the firm that you wish to have returned to you.

Loren D. Rhoton, Esq.

Loren D. Rhoton is an attorney in private practice with the law office of Loren Rhoton, P.A., in Tampa, Florida. Mr. Rhoton graduated from the University of Toledo College of Law and has been a member in good standing with The Florida Bar since his admission to practice in 1995. The exclusive focus of Mr. Rhoton's practice is dedicated to assisting Florida inmates with their criminal appeal/postconviction cases.

Mr. Rhoton is a member of The Florida Bar's Appellate Division. He is also a member of the U.S. District Court, in and for the Southern, Middle and Northern Districts of Florida. Mr. Rhoton is licensed to practice before the U.S. Court of Appeals for the 11th Circuit and is also certified to practice before the U.S. Supreme Court. Mr. Rhoton regularly practices before Federal District Courts and the U.S. Court of Appeals for the 11th Circuit.

Mr. Rhoton typically deals with clients who have lengthy prison sentences. Mr. Rhoton has investigated and pursued hundreds of postconviction cases. He has practiced in all phases of the Florida Judicial System, all the way from misdemeanor county courts up to the Florida Supreme Court. Additionally, Mr. Rhoton has been directly responsible for amendments to Florida Rule of Criminal Procedure 3.850 (the main vehicle for most postconviction actions). Mr. Rhoton was appointed by the Florida Supreme Court to the Florida Criminal Rules Steering Committee, Subcommittee on Postconviction Relief, which focused on rewriting Florida Rule of Criminal Procedure 3.850. Mr. Rhoton worked on said subcommittee with judges and other governmental officials in an effort to improve the administration and execution of postconviction proceedings. Mr. Rhoton's role on said committee was to advocate for changes that were beneficial to postconviction litigants.

For over a decade, Mr. Rhoton authored a bimonthly article, *Post Conviction Corner*, for Florida Prison Legal Perspectives. Selected articles from *Post Conviction Corner* have been compiled and printed in a legal self-help book, *Postconviction Relief for the Florida Prisoner*. Mr. Rhoton also served on the Board of Directors of the Florida Prisoners' Legal Aid Organization.

Ryan J. Sydejko, Esq.

Ryan J. Sydejko is an attorney with the law office of Loren Rhoton, P.A. His practice focuses primarily on postconviction matters for those incarcerated throughout the State of Florida. He has argued cases before many circuit courts and District Courts of Appeal and has several published opinions. Mr. Sydejko has also presented cases to the Supreme Court of Florida and the U.S. District Courts for the Middle and Northern Districts of Florida.

Mr. Sydejko graduated from the University of Minnesota with a degree in political science and attended the University of Tulsa College of Law. As a student, he authored a law review article entitled: "International Influence on Democracy: How Terrorism Exploited a Deteriorating Fourth Amendment." The article, exploring how domestic terrorist threats have reshaped everyday law enforcement procedures, was published in the Spring 2006 edition of the Wayne State University Law School Journal of Law in Society. Mr. Sydejko also wrote articles for the Florida Prison Legal Perspectives. Mr. Sydejko is a member in good standing with the Florida Bar and is qualified to practice in all Florida state courts, as well as the Federal District Courts for the Middle and Northern Districts of Florida.

Notable Firm Cases

Dames v. State, 773 So.2d 563 (Fla. 2d DCA 2000) – Improper summary denial of Rule 3.850 Motion reversed & remanded for evidentiary hearing.

Dames v. State, 807 So.2d 756 (Fla. 2d DCA 2002) – First Degree Murder conviction vacated & new trial granted due to ineffective counsel

Battle v. State, 710 So.2d 628 (Fla. 2d DCA 1998) – Improper Habitual Felony Offender Sentence on violation of probation reversed & remanded for resentencing

Mitchell v. State, 734 So.2d 1067 (Fla. 1st DCA 1999) - counsel can render ineffective assistance for failure to argue boarded-up structure is not a 'dwelling' under arson statute

Caban v. State, 9 So.3d 50 (Fla. 5th DCA 2009) – counsel can be ineffective for failing to object to improper impeachment of defense expert witnesses in Shaken Baby Syndrome case

Graff v. State, 846 So.2d 582 (Fla. 2d DCA 2003) – attorney's misadvice as to potential sentence can amount to ineffective assistance of counsel sufficient to justify withdrawal of plea.

Easley v. State, 742 So.2d 463 (Fla. 2d DCA 1999) – counsel can render ineffective assistance for failure to investigate insanity defense.

Campbell v. State, 16 So.3d 316 (Fla. 2d DCA 2009) – Manifest Injustice – summary denial of Rule 3.800 motion to correct illegal sentence reversed & remanded on manifest injustice grounds.

Thompson v. State, 987 So.2d 727 (Fla. 4th DCA 2008) – Reversal of Life Sentences – entitled to *de novo* resentencing upon correction of improper consecutive life sentences for murder and burglary.

Williams v. State, 777 So.2d 947 (Fla. 2000) – Right to Belated Postconviction Motion – if post-conviction counsel fails to timely file Rule 3.850 Motion, defendant has right to file belated appeal.

Parker v. State, 977 So.2d 671 (Fla. 4th DCA 2008) – Sentence reversed & remanded for resentencing due to judicial vindictiveness.

When Mental Illness Leads Defendant to Mistakenly Exercise Self-Defense

In Martin v. State, 2013 WL 646231, the First DCA recently dealt with an issue related to a delirious defendant and his response to a police presence on the defendant's property.

In Martin, the sheriff's office was performing a welfare check on Martin after receiving a call. Deputies approached, and Martin responded by cussing at the deputies and retrieving his firearm. As deputies slowly retreated, Martin fired a shot into the air.

Martin called two doctors at trial. The first, a board certified psychiatrist, testified that Martin was experiencing temporary insanity caused by delirium. The second, a clinical psychologist, testified that Martin was experiencing paranoid delusions. Both agreed that their diagnoses supported a finding that Martin feared for his safety. The trial court prohibited the defense's attempt to elicit testimony from the experts that Martin's firing of the gun was attempt at self-defense. Additionally, the trial court denied the defense's requested jury instruction of self-defense. Martin was found guilty of aggravated assault on a law enforcement officer.

The First DCA began by noting that a defendant's fundamental right to present witnesses and offer evidence relevant to the defense, even if only indirectly establishing reasonable doubt. In this respect, the DCA found error in prohibiting the defense from presenting testimony regarding self-defense.

To compound the error, the DCA also found the trial court erred in denying the self-defense jury instruction. The DCA noted an entitlement to the jury instruction if "any" evidence supports the defense theory. Because both defense doctors testified that Martin was experiencing episodes of confusion, misperception, and a general feeling that others were out to harm him, the requested instruction was relevant to the defense at trial.

The State argued that the error was harmless. The DCA rejected this argument, finding that the denial of Martin's ability to raise a valid self-defense claim was not harmless in light of his belief that he was threatened and his belief that firing the gun was an act of self-defense.

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Credit for Time-Served: Probationary Split Sentences vs. True Split Sentences

by Ryan Sydejko

A seemingly endless source of confusion for defendants, lawyers, and judges alike, is in what situations credit for time served may be applied to a sentence. The Fifth District Court attempted to address this confusion recently in Mann v. State, 2013 WL 1234682 (Fla. 5th DCA 2013).

First, it is important to distinguish the two sentences. A "true" split sentence is one in which a total period of confinement is imposed with a portion of the confinement period suspended and the defendant placed on probation for that suspended portion. Poore v. State, 531 So.2d 161, 164 (Fla. 1988). Whereas, a "probationary" split sentence consists of a period of confinement, none of which is suspended, followed by a period of probation. Id. To the naked eye, the difference may seem like semantics. But there are very real differences.

For example, a court could impose a true split sentence by sentencing a defendant to 42-months incarceration with two-years suspended. Mann, 2013 WL 1234682. In practicality, the defendant would serve 18-months incarceration, and, assuming no violations, would serve the following 24-months on probation.

By contrast, a court could achieve a similar result via a probationary split sentence by imposing 18-months incarceration followed by 24 months' probation. Notice the lack of a 'suspended' portion of incarceration. Franklin v. State, 545 So.2d 851, 852 (Fla. 1989).

The difference is important for one significant reason: credit for time served. "A defendant sentenced to a probationary split sentence who violates probation and is resentenced to prison is entitled to credit for all time actually served in prison prior to his release on probation unless such credit is waived." Mann (citing Bradley v. State, 631 So.2d 1096 (Fla. 1994). Thus, in the example above, the hypothetical defendant given a probationary split sentence that violates probation could be sentenced to two-years imprisonment, but would be awarded 18-months credit for time served. Mann, 2013 WL 1234682. In the situation of a true split sentence, however, a trial court can revoke probation and impose either the suspended portion of incarceration or the original period of incarceration. Moore v. Stephens, 804 So.2d 575, 577 (Fla. 5th DCA 2002). Credit for time served is available only if the court re-imposes the original period of incarceration. Moore v. Stephens, 804 So.2d 575, 577 (Fla. 5th DCA 2002).

In the example above, the hypothetical defendant whom violated the true split sentence could either be sentenced to the original term of imprisonment (42-months) with credit for time served, or to only the suspended portion (24-months) with no credit for time served.

Obviously, the calculations play significantly to the defendant's favor with a probationary split sentence, which is what the defendant sought in Mann. In Mann, the court confusingly sentenced the defendant to 18-months incarceration, followed by "12-months probation, within that 12-months probation is a two year suspended sentence back at DOC." Id. When Mann violated probation, the court imposed incarceration of two-years (representing imprisonment for that originally suspended portion). Id. The District Court reversed, holding that Mann's sentence was not a 'true' split sentence because the court imposed a specific term of incarceration, followed by a specific term of probation. Remember, in a 'true' split, the court sentences a defendant to a term of incarceration, and suspends a portion of it. Thus, Mann was entitled to credit for the 18-months previously served on his new 24-month sentence.

Thus, it is important to carefully review the sentencing judge's language at sentencing to determine exactly what type of sentence was imposed. There are occasions, such as Mann's, where the trial judge intends one thing, but does another. This is especially true in situations, such as Mann's, where the sentence is arrived at pursuant to a negotiated plea as the judge's imposed sentence may differ significantly from that which a defendant thinks he has negotiated. While some of this language can be confusing, a quick read of Mann and Moore should help shed light on the sentence and allow a pro-se movant to determine whether any additional credits are available.

Florida Supreme Court Rejects DCA Attempts to Limit Montgomery Claims

Often, when caselaw helpful to criminal defendants is issued, the appellate courts rush to limit the application of said legal authority. This was definitely the case with Montgomery v. State, 39 So. 3d 252 (Fla. 2010), which held that the standard jury instruction for manslaughter was fundamental error because it required intent to cause death.

For example, the Second DCA has held that the giving of the erroneous manslaughter by act instruction was not fundamental error where the jury was also instructed on manslaughter by culpable negligence. Haygood v. State, 54 So.3d 1035 (Fla. 2nd DCA, 2011). The Fourth and Fifth DCAs also applied the *Haygood* Rule: Cary v. State, 84 So.3d 404 (Fla. 4th DCA, 2012); and Paul v. State, 63 So.3d 828 (Fla. 5th DCA 2011). However, in Haygood v. State, 38 F.L.W. S93 (Fla. 2013),the Florida Supreme Court has now rejected the Second DCA's *Haygood* Rule. In so doing, the Florida Supreme Court held that a trial court's jury instruction on manslaughter by culpable negligence does not cure the fundamental error in giving an erroneous manslaughter by act instruction where the defendant is convicted of second-degree murder and the evidence supports a finding of manslaughter by act, but does not reasonably support a finding that the death occurred due to the culpable negligence of the defendant.

Therefore, the Florida Supreme Court's decision potentially opens additional avenues of relief to inmates who were previously denied the ability to successfully argue a Montgomery claim

Support Services for Inmates & Their Families Available

If you have a suggestion for a group or inmate resource that should be listed in our newsletter, please contact us with the information and we will share any helpful information in future issues.

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Phone: (850) 400-1205; Email: myfplp@aol.com
****FPLAO publishes a newsletter for inmates called the Florida Postconviction Legal Perspectives (FPLP). The FPLP addresses issues of interest to Florida prisoners such as promoting accountability of corrections officials. To become a member and receive monthly FPLP newsletters, contact FPLAO as the address above. Subscriptions cost $18.00 for prisoners and $26.00 for family members/individuals. [The Florida Postconviction Journal is not affiliated with FPLAO or FPLP, and derives no funds from the subscription costs. We merely provide this information as a service to our readers. DO NOT SEND MONEY TO THE FLORIDA POSTCONVICTION JOURNAL FOR FPLAO MEMBERSHIP. ALL INQUIRIES ABOUT FPLAO MEMBERSHIP MUST BE ADDRESSED TO FPLAO'S ADDRESS ABOVE.*

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*Provides referrals in civil matters.

Prisontalk.com. An Internet community/forum that provides general information and networking for families of inmates. Also, has Florida specific forum that addresses issues ranging from dealing with the D.O.C. to coping with incarceration.

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100 S.E. Second Street
Miami, FL, 33131
Phone: (305) 358-2081
Contact: Randall C. Berg, Jr.
Email: rcberg@floridajusticeinstitute.org
Handles civil-rights cases regarding conditions in prisons and jails; advocates and lobbies on behalf of prisoners.

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Juror's Use of Cell Phone Results in New Trial

A new trial can be warranted if the jurors considered unauthorized materials affecting their verdict. Bush v. State, 809 So.2d 107 (Fla. 4th DCA 2002). And, juror misconduct gives rise to a rebuttable presumption of prejudice. James v. State, 843 So.2d 933, 937 (Fla. 4th DCA 200). In Tapanes v. State, 43 So.3d 159, 162 (Fla.4th DCA 2010), a juror used his cell phone to look up the definition of "prudent" and such use of a cell phone was found to be juror misconduct. The Tapanes Court found that using a phone to "access a dictionary is, of course, no different than utilizing a bound dictionary. A dictionary is not one of the materials permitted to be taken into the jury room." *See*, Smith v. State, 95 So.2d 525, 528 (Fla.1957); Greenfield v. State, 739 So.2d 1197 (Fla. 2nd DCA 1999). Thus, a dictionary cannot be considered by the jurors. The fact that the foreperson utilized the phone to look up the definition of the word during a break and later shared his recollection of the definition with other jurors during deliberations was no less a juror misconduct than if the foreperson physically brought the phone into the jury room and read the definition therefrom.

Once juror misconduct is established by juror interview, the moving party is entitled to a new trial *unless* the opposing party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict." Norman v. Gloria Farms, Inc., 668 So.2d 1016, 1020 (Fla. 4th DCA 1996). In Tapanes, looking up the definition of "prudent" was not irrelevant. The word "prudent" was mentioned in the jury instructions given by the trial court and the state mentioned the term repeatedly during closing argument. The facts of Tapanes's case centered on whether the appellant acted in a "prudent" manner by his actions when confronted by the victim at his front door and whether the appellant should have called 911 instead of opening the door. The concept of "prudence" could well have been the key to the jury's deliberations. At the very least, the court could not say that there was no reasonable possibility that the juror's misconduct, by utilizing the phone to retrieve the definition of "prudence," did not affect the verdict.

The results of Tapanes are consistent with that of other courts which, for many years, have reversed convictions for the improper utilization of dictionaries. *See* Smith, 95 So.2d at 528; Grissinger v. Griffin, 186 So.2d 58 (Fla. 4th DCA 1966); Jordan v. Brantley, 589 So.2d 680 (Ala.1991) (finding prejudice where foreperson used a dictionary to look up meaning of "prudent" and "reasonable" and discussed the meanings with other jurors); Alvarez v. People, 653 P.2d 1127, 1130-32 (Colo.1982) (finding prejudice where a juror looked up the words "reasonable," "imaginary," and "vague" and shared the definitions with another juror).

Desperate Prosecutors and Improper Closing Arguments

The Fourth District Court of Appeal recently handed down opinions in three cases dealing with overly aggressive prosecutorial arguments.

In the first such case, Becker v. State, 2013 WL 811664, the DCA reversed a conviction for solicitation to commit home invasion robbery and ordered a new trial. The State's star witness, a fourteen-time convicted felon serving probation at the time of trial, testified as an informant against Becker. The defense relied entirely on this witness' lack of credibility as their defense. The witness testified that he was getting no favors from the State for his testimony. Yet, the defense showed on cross-examination that the witness had been arrested recently on two felonies, but somehow didn't spend a single day in prison, thus eluding that something was going on behind the scenes. In closing, the prosecutor argued: "I can stand here today, ladies and gentlemen, as an officer of this Court, and tell you that [the informant] is not getting anything out of this."

The Court, in no uncertain terms, held that the prosecutor's comments were improper bolstering and vouching. In effect, the prosecutor "offered extra-testimonial knowledge" invoking his status "as an officer of the court to assure the jury that the informant was being truthful." Ultimately, the Court found these comments to have "undermined the integrity of the judicial process and irreparably contaminated the verdict and resulting sentence."

In the second case, Garcia v. State, 2013 WL 811598, the DCA reversed a conviction of dealing in stolen property. Prior to her arrest, Garcia had given a statement to police. At trial, Garcia's defense focused on the involuntariness of that statement as a reason for the jury to disregard it. The State countered, however, arguing: "I assure you, you wouldn't be listening to that tape if they were not freely and voluntarily made. That is an argument by the defendant. I assure you that does not apply here."

The Court held, as the jury instructions stated, that a jury can disregard a confession if the jury believes it was involuntarily given. The State's argument incorrectly implied the voluntariness of Garcia's confession had been predetermined, warranting a new trial.

In the final case, Petruschke v. State, 2013 WL 811616, the DCA reversed two counts of lewd and lascivious molestation of a minor. During closing, the Court found the prosecutor to have made so many improper arguments that Petruschke was denied a fair trial. In closing, the prosecutor argued that the child-victim was so young as to have lacked the mental ability to lie and repeatedly referred to Petruschke as a pedophile. Both the bolstering and character attacks were "so egregious that [Petruschke] was deprived of a fair trial.

Open Plea that Violates Double Jeopardy Requires Resentencing

by Loren D. Rhoton

The 5th Amendment the U.S. Constitution provides, "No person shall … be subject for the same offence to be twice put in jeopardy of life or limb." This provision, known as the Double Jeopardy Clause, encompasses four distinct prohibitions: subsequent prosecution after acquittal, subsequent prosecution after conviction, subsequent prosecution after certain mistrials, and multiple punishments in the same indictment. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Double jeopardy claims will typically be raised on direct appeal. However, they can also be raised in a Rule 3.850 postconviction motion. The focus of this article will be on collaterally attacking a guilty or nolo contendere plea when there are double jeopardy violations because of multiple punishments resulting from the same conduct.

A double jeopardy violation, in the context of this article, results when a defendant has multiple sentences arising out of a single criminal episode, and the elements for the multiple charges are identical. Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Gavieres v. U.S., 220 U.S. 338, 342 (1911). If both offenses require the exact same elements, then there is a violation of the prohibition against double jeopardy. Blockburger v. U.S., 284 U.S. 299 (1932). But, a "single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." Blockberger at 304. In other words, if two criminal charges arise from a single criminal episode, and each charge requires an element of proof different from the other, then there is no double jeopardy violation. Some examples of double jeopardy violations include but are not limited to:

- Lewd and lascivious behavior with child, which arises out of single criminal episode when there is no significant spatial and/or temporal break in the episode. Cabanela v. State, 871 So.2d 279 (Fla. 3rd DCA 2004).
- Where a robbery conviction is enhanced because of use of firearm in committing the robbery, a single act involving use of the same firearm in the commission of the same robbery cannot form the basis of a separate conviction and sentence for use of firearm while committing the felony. Cleveland v. State, 587 So.2d 1145 (Fla. 1991).
- Where DUI manslaughter conviction was enhanced from a second-degree felony to a first-degree felony because defendant left the scene of the fatal accident, a separate conviction for leaving the scene of a fatal accident constitutes a double penalty. Ivey v. State, 47 So.3d 908, 911 (Fla.3rd DCA 2010).
- Resisting an officer with violence and resisting an officer without violence arose from a single criminal episode, and thus convictions for both offenses violated defendant's constitutional protection against double jeopardy. Williams v. State, 959 So.2d 790 (Fla. 2nd DCA 2007).
- Burglary of a dwelling with an assault or battery is subsumed by home-invasion robbery, such that convictions of both offenses arising from a single criminal episode violate the principles of double jeopardy. Davis v. State, 74 So.3d 1096, 1097 (Fla. 1st DCA 2011).

Sometimes a defendant will enter an open plea to charges and (for whatever reason) not realize that a conviction on several of the charges may amount to a violation of the protection against double jeopardy. Generally, a defendant who knowingly enters into plea bargain covering both charges and sentence waives any otherwise viable double jeopardy objection to the sentences. Novaton v. State, 634 So.2d 607 (Fla. 1994). But, in certain circumstances, such a plea that results in a double jeopardy violation can be attacked in a post conviction motion.

In Brown v. State, 1 So.3d 1231 (Fla. 2nd DCA 2009), the defendant entered an open guilty plea to four counts of robbery with a firearm, one count of carjacking, and one count of possession of cocaine. In a later 3.850 motion for postconviction relief, Brown contended that two of the robbery convictions involved only one taking from one victim during one criminal episode, thus amounting to a double jeopardy violation.

Brown held that a defendant may properly raise a double jeopardy claim in a 3.850 motion even after pleading guilty. *See* Coughlin v. State, 932 So.2d 1224, 1226 (Fla. 2d DCA 2006); Plowman v. State, 586 So.2d 454, 455 (Fla. 2d DCA 1991). This is so even though a

Open Plea (cont.)

guilty plea and adjudication of guilt generally precludes a later double jeopardy attack; an exception applies when the plea is a general or open plea, the double jeopardy is apparent from the face of the record, and there is nothing in the record to indicate a waiver of double jeopardy. Novaton v. State, 634 So.2d 607, 609 (Fla.1994); Demps v. State, 965 So.2d 1242, 1243 (Fla. 4th DCA 2007).

The Brown Court noted that a single taking from one cash register supports only one charge, and the presence of two employees does not transform one robbery into two. Lundy v. State, 614 So.2d 674 (Fla. 2d DCA 1993). It was held that the record in Brown did not support two separate robberies, and the double jeopardy violation was thus apparent from the record. Further, there was no indication in the record that Brown waived the double jeopardy claim.

The record attachments attached to the postconviction court's summary denial of the 3.850 failed to refute, and actually established Brown's double jeopardy claim. Accordingly, the Brown Court reversed the order denying Brown's motion for postconviction relief and remanded for the lower court to vacate the adjudication of guilt and sentence on the redundant count. It was ordered that Brown be resentenced pursuant to a corrected score sheet.

The Brown exception for collateral double jeopardy attacks is specific to open pleas where the double jeopardy violation is apparent on the face of the record and there was no waiver of the double jeopardy claim. The importance of Brown is in the relief that is required. Per Brown, a defendant can obtain a resentencing with the redundant double jeopardy charges omitted. This results in a resentencing pursuant to a corrected scoresheet, which omits the points for the duplicative counts, thus allowing for a lower minimum sentence score. Such a result is preferred where a defendant does not wish to actually withdraw the plea and take the case to trial (sometimes it is not wise to withdraw a plea and take the case to trial because the defendant will be subjected to a potentially harsher sentence).

A few words of warning are in order regarding a double jeopardy attack such as that addressed in Brown. A resentencing such as that in Brown should not result in a harsher sentence (and potentially can lead to a reduced sentence). Once a sentence has been imposed and the person begins to serve the sentence, that sentence may not later be increased without running afoul of double jeopardy principles; to do so is a clear violation of the Double Jeopardy Clause, which prohibits multiple punishment for the same offense. Ashley v. State, 850 So.2d 1265 (Fla. 2003). Despite the prohibition against a harsher sentence on the remaining count (after the redundant counts have been vacated), one should still guard against any possibility of vindictive sentencing. A defendant making a Brown claim should usually make sure that the original sentencing judge is still on the bench and ensure that the case is assigned to the original sentencing judge. Gay v. State, 898 So.2d 1203 (Fla. 2nd DCA 2005) [substitution of judges during post-conviction resentencing proceedings, with result that defendant was resentenced by judges other than the judge who originally sentenced him, without showing of necessity, constituted reversible error, especially where original sentencing judge was available]. It is important to ensure that the original judge is the judge for the resentencing in order to protect against a replacement judge wrongfully imposing a harsher sentence. If the original judge is involved in the resentencing, there is less chance of new sentence in excess of that which was already imposed because such a sentence would be deemed to be presumptively vindictive, and, thus subject to reversal. *See*, North Carolina v. Pearce, 395 U.S. 711 (1969) [where at behest of petitioner, state criminal conviction had been set aside, unexplained threefold increase in punishment in new sentence violated due process clause]. If a defendant is sentenced more harshly following appeal, then a presumption of vindictiveness arises which can only be overcome if reasons for harsher sentence affirmatively appear in the record and those reasons are based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence. Harris v. State, 653 So.2d 402 (Fla. 4th DCA1995). However, if a different judge is involved in the resentencing, and said judge imposes a harsher sentence, there is no presumption of vindictiveness, and the defendant must prove actual vindictiveness (which is much harder when there is no presumption of vindictiveness). Richardson v. State, 821 So.2d 428 (Fla. 5th DCA 2002). However, even with a new judge, the rationale of Ashley should still apply and it can still be argued that a harsher sentence is a violation of the protection against double jeopardy because of the increase in an already imposed sentence.

As mentioned above, Brown only applies to situations where there was an open plea and the double jeopardy violations were not waived and are apparent on the face of the record. Of course, double jeopardy issues can also be raised on direct appeal or in collateral attacks such as an ineffective assistance of counsel (trial or appellate counsel) claim. However, such claims are not the focus of this article and will likely be addressed in future issues of FPJ.

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