Case Law Summary: Florida

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This summary of Florida appellate case law addresses five topics: availability of and general standards for appellate review, standards and allowable grounds for departure, constitutional requirements for proof of facts that permitting upward departure (*Blakely v. Washington*) constitutional requirements for proof of facts that increase the minimum sentence (*Alleyne v. United States*), and other important appellate sentencing decisions.

1. Availability of and General Standards for Appellate Review.

"The State's right to appeal in a criminal case must be expressly conferred by statute."[1] This means that "courts may not extend, modify, or limit the statute's express terms or its reasonable or obvious implications" to allow a party to appeal a sentence based on a ground not specified in the statute.[2] Statutes affording the State the right to appeal in criminal cases should also be construed narrowly.[3]

By statute, both defendants and the government may appeal certain sentences.[4] For instance, either party may appeal an unlawful or illegal sentence, which includes unconstitutional statutes.[5] In addition, the defendant may also appeal a sentence exceeding statutory maxima, and the prosecutor may appeal a sentence outside the permissible and/or recommended guidelines range.[6] Furthermore, because a court has the discretion to sentence all the way up to the statutory maximum, the defendant would have no "departure" to appeal.[7]

Although many sentencing objections are first raised at the trial court, in 1996, the Criminal Appeal Reform Act amended Fla. Stat. § 921.051 to allow an unpreserved, "fundamental error" to be raised for the first time on appellate review.[8] A "fundamental error" in regards to sentencing "must be basic to the judicial decision under review and equivalent to a denial of due process".[9] Being sentenced under an unconstitutional statute that "affects a quantifiable determinant of the length of sentence that may be imposed on a defendant" is an example of a fundamental error.[10]

2. Standards and Allowable Grounds for Departure.

In general, the only possible departures in Florida's sentencing guidelines are downward departures, as the sentencing court has discretion to sentence all the way up to the statutory maximum.[11] The one exception is that found in Fla. Stat. § 775.082(10), which states that defendants with 22 points or fewer are required to be sentenced to a non-prison sanction, unless the court makes written findings that a non-prison sanction could present a danger to the public, thereby essentially permitting an aggravated dispositional

[1] *State v. McMahon*, 94 So. 3d 468, 472 (Fla. 2012) (quoting *Ramos v. State*, 505 So. 2d 418, 421 (Fla. 1987)).
[2] *Id*.
[3] *Id*.
[4] Fla. Stat. § 924.02 (2018).
[5] Fla. Stat. § 924.06(1)(d), (e) (2018); Fla. R. App. P. 9.140 (b)(1)(E), (c)(1)(M) (2017). An example of an illegal sentence is one based on an unconstitutional statute. *See Heggs v. State*, 759 So. 2d 620, 627 (Fla. 2000). *Contra McMahon,* 94 at 474-75. An improper, court-initiated plea negotiation is not per se illegal for the purposes of appeal. *See also Leonard v. State*, 760 So. 2d 114, 116 (2000) (a sentence is illegal if over the statutory maximum).
[6] Fla. Stat. § 924.06(1)(e) (2018); Fla. Stat. § 924.07(1)(i) (2018); Fla. R. App. P. 9.140(b)(1)(F), (c)(1)(M), (c)(1)(N) (2017). Florida Rule 9.140(b)(1)(f) of Appellate Procedure allows the allows a defendant to appeal a sentence as required or permitted by general law. In tandem, Florida Statute § 924.06(1) only permits the defendant to appeal a sentence if it is illegal or if it exceeds statutory maxima.
[7] *See* Fla. Stat. § 921.0024(2) (2018).
[8] *Maddox v. State*, 760 So. 2d 89, 95 (Fla. 2000).
[9] *State v. Johnson*, 616 So. 2d 1, 3 (Fla. 1993). In this case, the defendant was sentenced as a habitual offender, but the habitual offender statute was later struck down in violation of Florida's constitution.
[10] *Id*.
[11] Fla. Stat. § 921.0024(2) (2018).

departure subject to the *Blakely* requirements discussed in the next section.[12] If the court does not provide the required written findings at sentencing, no departure sentence is allowed on remand.[13]

The sentencing court is prohibited from departing downward from the lowest permissible sentence "unless there are circumstances or factors that reasonably justify the downward departure."[14] There is a two-part process for a sentencing court to impose a downward departure. First, the court must determine whether it has a legal basis to depart, using legal grounds set forth in case law and statute.[15] The facts supporting the departure must be proven by a preponderance of evidence.[16] This step is a mixture of law and fact, and will be sustained on appellate review if the sentencing court applied the right rule of law, and if competent, substantial evidence supports its ruling.[17] Second, the court must determine whether a departure is the best sentencing option for the defendant, taking the totality of the circumstances into account, including aggravating and mitigating factors.[18] The second step will be reviewed with an abuse of discretion standard, which means that it will be overturned "only where no reasonable person would agree with the trial court's decision."[19] "A downward departure sentence may be affirmed on appeal when the trial court orally pronounced valid reasons for departure at the sentencing hearing, but inadvertently failed to file written reasons."[20]

Florida's Criminal Punishment Code includes a non-exhaustive list of mitigating factors for determining when a downward departure is "reasonably justified." The only statutorily prohibited factor is that "the defendant's substance abuse or addiction, including intoxication at the time of the offense" cannot justify a downward departure.[21]

The extent of a departure is not appealable by the state.[22]

3. Constitutional Requirements for Proof of Facts that Permit Upward Departure

Florida sentencing judges have discretion under the guidelines to sentence a crime up to the statutory maximum.[23] Note that this sentencing scheme was not a reaction to *Blakely.* The 1995 Sentencing Guidelines gave judges the discretion to impose an upward departure of between 25% above the presumptive sentence and the statutory maximum, but amid concerns that it was too difficult to aggravate the sentence beyond what was recommended in the guidelines, the Criminal Punishment Code enacted in 1998 "removed the guidelines' upper limits on sentences and, instead, set the maximum penalty for a crime at the statutory limit."[24] Therefore, the concept of "upward departure" in the sense of sentencing above the guidelines range generally does not exist in the Florida sentencing guidelines, with one exception. Fla. Stat. § 775.082(10), which states that defendants with 22 points or fewer are required to be sentenced to a non-prison sanction, permits the court to impose a prison sentence "if the court makes written findings that a

[12] *Bryant v. State*, 148 So. 3d 1251, 1258 (Fla. 2014) (the original Criminal Punishment Code "does not contemplate upward departure sentences, because generally the statutory maximum sentence is the highest possible sentence for any crime. The practice of upward departure sentences was reinstated in 2009, when the Legislature enacted subsection (10) of section 775.082, Florida Statutes…").
[13] *Pope v. State*, 561 So. 2d 554, 556 (Fla. 1990).
[14] *State v. Chubbuck*, 141 So. 3d 1163, 1168 (Fla. 2014); Fla. Stat. § 921.0026(1) (2018).
[15] *Banks*, 732 So. 2d at 1067-68.
[16] *Id*. Fla. Stat. § 921.002(1)(f) (2018).
[17] *Id.* The appellate court only assesses the evidence for sufficiency, not weight.
[18] *Id.*
[19] *Id*.
[20] *Bryant v. State*, 148 So. 3d 1251, n.1 (Fla. 2014) (citing *Smith v. State*, 598 So.2d. 1063 (Fla. 1992).
[21] Fla. Stat. § 921.0026(2)–(3) (2018). However, there is an exception for departing in order to place certain drug offenders (those convicted of a non-violent felony who have a score of 60 points or fewer) in a treatment-based drug court program. Fla. Stat. § 921.0026(2)(m) (2018).
[22] Fla. Stat. § 921.0026(1) (2018).
[23] Fla. Stat. § 921.0024(2) (2018).
[24] Matthew S. Crow, *Florida's Evolving Sentencing Policy: An Analysis of the Impact of Sentencing Guidelines Transformations* 22-26 (2005), available at https://pdfs.semanticscholar.org/39bb/717843673b704ed6c5e58bf9dc093dc7242a.pdf.

nonstate prison sanction could present a danger to the public."[25] However, the Florida Supreme Court invalidated Fla. Stat. § 775.082(10) in 2018 to the extent that it requires judicial factfinding to sentence such a defendant to prison.[26] Therefore, it appears that while an upward departure is still possible for defendants with 22 points or fewer, a jury must find the facts justifying such a departure.

Aside from defendants with fewer than 22 points, *Blakely* and *Apprendi* did not disturb Florida sentencing courts' discretion to conduct judicial factfinding to enhance the sentence, provided the resulting sentence is not above the statutory maximum.[27] Consistent with *Blakely*, the fact of a prior conviction also does not need to be determined by a jury.[28]

Regarding legal remedies, a defendant may attack his or her sentence on *Blakely* or *Apprendi* grounds with Rule 3.800(a) of the Florida Rules of Criminal Procedure, which allows defendants to petition "the courts to correct sentencing errors that may be identified on the face of the record" at a time other than that usually designated for 3.800(b)(1) motions to correct sentencing errors.[29]

Neither *Blakely* nor *Apprendi* apply retroactively to final sentences imposed before each case was decided.[30] However, if resentencing proceedings began after *Apprendi*, and the sentences were not final when *Blakely* was decided, both *Blakely* and *Apprendi* apply in such resentencing proceedings.[31] For example, in *Fleming*, the defendant was convicted and sentenced in 1997 (before *Apprendi*), was resentenced in 2003 (after *Apprendi*) on unrelated grounds, and was again resentenced in 2005 (after *Blakely*) on unrelated grounds.[32] The Florida Supreme Court ruled in 2011 that both *Apprendi* and *Blakely* applied to the 2005 resentencing hearing.[33]

Though upward departures are uncommon as previously discussed, even if a *Blakely* or *Apprendi* violation does occur, the sentence may still be upheld under the harmless error analysis.[34] Harmless error can be found if no reasonable jury would have disputed the aggravating factors found by the judge, and if the defendant admitted to the facts found by the judge.[35]

4. Constitutional Requirements for Proof of Facts That Increase the Minimum Sentence

The Florida Supreme Court has recognized the impact of *Alleyne*[36] on mandatory minimums by requiring a jury to find every fact necessary to increase a defendant's mandatory minimum sentence.[37] Additionally, there have been some appellate cases addressing the application of *Alleyne* to provisions of the Criminal

[25] *Bryant*, 148 at 1258.
[26] *Brown v. State*, 260 So. 3d 147, 148-49 (Fla. 2018) ("…because subsection (10) requires the court, not the jury, to find the fact of dangerousness to the public that is necessary to increase the statutory maximum nonstate prison sanction, we hold that subsection (10) violates the Sixth Amendment to the United States Constitution and quash the Fifth District's decision."); *see also Booker v. State*, 244 So. 3d 1151, 1156-57 (Fla. Dist. Ct. App. 2018) ("Given the momentous role of the jury in our country's legal history, and the clarity of the stated principle in *Apprendi* and *Blakely* that judicial fact-finding is no substitute for jury fact-finding if used for sentencing beyond a relevant statutory maximum, we conclude that the last sentence of subsection (10) violates this principle as applied to Booker.").

[27] *State v. Fleming*, 61 So. 3d 399, 402-03 (referencing *Hall v. State*, 823 So. 2d 757, 764 (Fla. 2002) and *Isaac v. State*, 826 So. 2d 396 (Fla. Dist. Ct. App. 2002).
[28] *See, e.g.*, *Pham v. State*, 70 So. 3d 485, 495 (Fla. 2011) (referencing *Frances v. State*, 970 So. 2d 806, 822 (Fla. 2007) and *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003) (if a death sentence is supported by the "prior violent felony" aggravating circumstance, Florida's capital sentencing scheme does not violate *Ring* or *Apprendi*)).
[29] *Plott v. State*, 148 So. 3d 90, 91-93, (Fla. 2014) (quoting *Williams v. State*, 957 So. 2d 600, 602 (Fla. 2007)).
[30] *State v. Johnson*, 122 So. 3d 856, 857 (Fla. 2013) (*Blakely* does not apply retroactively); *Hughes v. State*, 901 So. 2d 837, 838 (Fla. 2005) (*Apprendi* does not apply retroactively).
[31] *Fleming*, 61 at 400.
[32] *Id*. at 400-01.
[33] *Id*.
[34] *Galindez v. State*, 955 So. 2d 517, 518 (Fla. 2007). *See also Jackson v. State*, 213 So. 3d 754, 786 (Fla. 2017) (a *Ring* error imposing the death sentence based on judicial factfinding is also subject to harmless error review).
[35] *Galindez*, 955 So. 2d at 523-24.
[36] *Alleyne v. United States*, 570 U.S. 99 (2013)
[37] *Williams v. State*, 242 So. 3d 280, 287-88 (Fla. 2018); *Britten v. State*, 181 So. 3d 1215, 1217-18 (Fla. Dist. Ct. App. 2015).

Punishment Code that govern the sentencing scoresheet process, though the issue has not yet been reviewed by the Florida Supreme Court. Thus far, Florida appellate courts have ruled that facts which merely add points to the guidelines score *are not* subject to *Alleyne* unless those facts also implicate a mandatory minimum sentence, but that sentence multipliers (facts which in result in the scoresheet subtotal being multiplied by a factor ranging from 1.5 to 2.5)[38] *are* subject to *Alleyne*.

In *Britten v. Florida*[39] and *Florida v. Blair,*[40] the underlying issue was whether the facts resulting in the assignment of victim injury points on the sentencing worksheet must be submitted to a jury. The question is critical to the scoresheet system used in Florida because the points accumulated on the worksheet determined the "minimum sentence that may be imposed by the trial court."[41] But rather than focus on the scoring system, the appellate courts seemed to focus on the intersection of the scoresheet process with mandatory minimum sentences. The facts in *Britten* also triggered a mandatory minimum sentence whereas in *Blair* they did not. Thus, the *Britten* court found that the facts should have been submitted to a jury whereas the *Blair* court determined the victim injury facts did not need to be proven to a jury because no mandatory minimum sentence had been implicated.[42] In a third case involving the scoring of victim injury points, *Bean v. State*, the appellate court considered the implications of a plea agreement. The court found that entry of a guilty plea constitutes acceptance of the lowest permissible sentence and therefore any necessary fact finding to support the assessment of victim injury points in reaching that sentencing range, and this acceptance obviated the need to submit the victim injury facts to a jury.[43]

In *Florida v. Cartagena*,[44] the court faced a different issue when it considered whether the facts resulting in the application of a sentence multiplier, which increases the scoresheet total by a factor of 1.5 to 2.5, should be proven to a jury. In *Cartagena*, the court applied a 1.5 sentence multiplier based on the judge's finding that the alleged act of domestic violence was committed in the presence of a related child.[45] The sentence multiplier increased the score enough that the minimum sentence increased from a probation to a non-probation sentence. The court found that *Alleyne* required that the facts supporting the sentence multiplier must be proven to a jury.[46]

Like *Blakely* and *Apprendi*, *Alleyne* is subject to a harmless error analysis.[47] Thus, when reviewing such cases, the court will uphold the fact finding decision made by the trial court "if the record demonstrates beyond a reasonable doubt that a rational jury would have found the [required] fact." [48]

5. Other Important Sentencing Decisions

Sentencing Errors First Introduced on Appeal After Probation Revocation. In *Tasker v. State*, the Florida Supreme Court held that a defendant may appeal an error in the sentencing calculations even if first raised after revocation of probation.[49] The purpose of the 1999 amendment to Rule 3.800 of the Florida

[38] Fla. Stat. § 921.0024(1)(b) (2019).
[39] 181 So.3d 1215 (Fla. Dist. Ct. App. 2015).
[40] 201 So.3d 800 (Fla. Dist. Ct. App. 2016).
[41] FLA. STAT. § 921.0024 (2018).
[42] *Blair*, 201 S.3d at 802.
[43] *Bean v. State*, 264 So. 3d 947, 951 (Fla. Dist. Ct. App. 2019) (referencing *Williams v. State*, 143 So. 3d 423 (Fla. Dist. Ct. App. 2014); *see also Blair v. State*, 201 So. 3d 800, 802 (Fla. Dist. Ct. App. 2016).
[44] 237 So.3d 417 (Fla. Dist. Ct. App. 2018).
[45] *Id.* at 418-19.
[46] *Id.*
[47] *Lee v. State*, 130 So. 3d 707, 710-11 (Fla. Dist. Ct. App. 2013) (the Court expressed some concern with the strictness of the *Galindez* test, worrying that it may create a "slippery slope that too frequently tempts an appellate court to dispense with the constitutional right to trial by jury").
[48] Britten v. Florida, 181 So.3d 1215, 1218 (Fla. Dist. Ct. App. 2015).
[49] *Tasker v. State*, 48 So. 3d 798, 802 (Fla. 2010).

Rules of Criminal Procedure was to afford defendants the opportunity to correct any sentencing errors on appellate review.[50]

Departures and Offense-Specific Mandatory Minimums. In *Rochester v. State*, the Florida Supreme Court held that the downward departure provisions in Florida's sentencing guidelines do not apply to offense-specific mandatory minimums. Therefore, the sentencing court could not use the general departure provisions in the Florida sentencing guidelines to justify a downward departure from the 25-year mandatory minimum for lewd or lascivious molestation of a child under the age of twelve.[51]

[50] *Id*. at 803.
[51] *Rochester v. State*, 140 So. 3d 973, 975-76 (Fla. 2014).