Substantive Criminal Law

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Abstract

In *Stall v. State,* the Florida Supreme Court addressed the issue of whether prosecution under Florida’s Racketeer Influenced and Corrupt Organization (RICO) Act, predicated upon violations of Florida’s obscenity statute, violates the Florida constitutional right to privacy.

**KEYWORDS:** criminal, law, racketeer
This article is a brief survey of substantive criminal law cases decided by the Florida Supreme Court between December 1, 1989, and December 1, 1990.

I. CRIMINAL OFFENSES: CONSTITUTIONALITY OF STATUTES

In *Stall v. State*, the Florida Supreme Court addressed the issue of whether prosecution under Florida's Racketeer Influenced and Corrupt Organization (RICO) Act, predicated upon violations of Florida's obscenity statute, violates the Florida constitutional right to privacy. The court recognized that the right to privacy protects one's right to possess obscene materials in the privacy of one's home. However, the court found that the right to privacy does not extend to vendors of obscene materials and held the obscenity and RICO statutes constitutional.

The court also reviewed the constitutionality of Florida Statute section 893.12(1)(e), which prohibits selling, purchasing, delivering, etc., a controlled substance within 1,000 feet of a school. The statute was attacked as being violative of the single-subject provision of the Florida Constitution. The court held that the statute did not violate

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1. 570 So. 2d 257 (Fla. 1990).
2. FLA. STAT. § 895.01-.06 (1985).
3. FLA. STAT. § 847.011 (1985). This statute is violated through the showing, sale, distribution, and rental of obscene writings, tapes, and objects intended for obscene purposes. *Id.*
4. See FLA. CONST. art. 1, § 23.
6. *Stall*, 570 So. 2d at 258.
7. Burch v. State, 558 So. 2d 1 (Fla. 1990); see also Leonardi v. State, 567 So. 2d 408 (Fla. 1990); Bennett v. State, 559 So. 2d 1136 (Fla. 1990); Morrow v. State, 557 So. 2d 865 (Fla. 1990); Lewis v. State, 556 So. 2d 1103 (Fla. 1990); Blankenship v. State, 556 So. 2d 1108 (Fla. 1990); Dame v. State, 556 So. 2d 1109 (Fla. 1990).
this constitutional provision.9

II. SENTENCING

A. Length of Sentence

Florida Statute section 948.01(5) limits the duration of a sentence of community control to two years.10 However, where a defendant has been convicted of separate crimes, the sentencing court may impose consecutive terms of community control even if the sentences are imposed at the same sentencing hearing.11

Additionally, community control and probation may be stacked, provided the total term does not exceed the recommended guidelines range.12 Minimum mandatory sentences in capital felony cases may also be stacked.13 Such consecutive sentences are permitted in homicide cases as well as in other capital felony cases and even if the crimes arise out of the same criminal episode.14

The supreme court also addressed the issue of whether or not imprisonment in the county jail may exceed one year if successive sentences for various offenses are pending.15 The court held that if the sentences are imposed at the same time, the total time in the county jail may not exceed one year.16 However, if the defendant has previously been sentenced to imprisonment in the county jail, a subsequent sentence may be imposed for additional county jail time up to one year, even if the cumulative effect is that the defendant will be in the county jail for over one year.17

B. Resentencing Upon Violation of Probation or Community Control

When a defendant's probation is violated, upon resentencing, the

10. FLA. STAT. § 948.01(5) (Supp. 1988).
12. State v. Reed, 557 So. 2d 33 (Fla. 1990); Skeens v. State, 556 So. 2d 1113 (Fla. 1990).
14. Boatwright, 559 So. 2d at 211.
16. Id. at 1163.
17. Id.
defendant is entitled to gain time earned during his prior imprisonment on the charge for which probation was revoked.18 Accrued gain time equals time spent in prison.19 A defendant sentenced as a youthful offender whose probation is revoked is still entitled to the benefit of Florida Statute 958.14, which limits imprisonment to a maximum of six years.20

III. SENTENCING GUIDELINES

A. In General

Since the adoption of the sentencing guidelines, sentencing courts have been required to sentence all defendants convicted of a felony committed after the effective date of July 1, 1985, within the recommended guidelines range. Even where the statutory minimum or maximum sentences preclude sentencing within the guidelines, the court must impose either concurrent or consecutive sentences if there are multiple convictions in order to come as close as possible to the guidelines recommendation.21 The court must provide written reasons for departure at the time the sentence is imposed or the sentence will be invalidated.22 If the court does not provide written reasons, the reviewing court must remand for resentencing within the guidelines with no possibility of departure.23

In determining the recommended range, prior convictions include all convictions for crimes obtained prior to sentencing.24 The trial court

19. Heuring v. State, 559 So. 2d 207 (Fla. 1990) (imposition of a sentence of imprisonment for a specific term may not include probation for the time remaining when the defendant is released early due to gain time or otherwise).
20. State v. Watts, 558 So. 2d 994 (Fla. 1990). The court in Watts discussed the 1985 amendment to section 958.14, which limits the sentences of youthful offenders to six years, and held that the amendment was applicable to all violations of probation and community control occurring after the effective date of the amendment, even if the original offense occurred prior to the amendment. See also State v. Kerklin, 566 So. 2d 513 (Fla. 1990); Cole v. State, 565 So. 2d 1353 (Fla. 1990); State v. Warren, 559 So. 2d 1139 (Fla. 1990); State v. Johnson, 559 So. 2d 1136 (Fla. 1990); State v. Dixon, 558 So. 2d 1001 (Fla. 1990); State v. Miles, 558 So. 2d 1001 (Fla. 1990); James v. State, 558 So. 2d 1000 (Fla. 1990).
23. Robinson v. State, 571 So. 2d 429 (Fla. 1990); Ferguson v. State, 566 So. 2d 255 (Fla. 1990); Pope v. State, 561 So. 2d 554 (Fla. 1990).
should also score juvenile furlough, attendance in juvenile programs, and conditions of bail as legal constraint. 25

B. Departure Sentences

During the survey period, the Florida Supreme Court reviewed various departure sentences. In State v. Vanhorn, 26 an escalating pattern of criminal conduct was sufficient to justify a upward departure, even where the remaining reasons were invalid. However, in Herrin v. State, 27 the court found that substance abuse, coupled with reasonable possibility of successful treatment, was a valid reason for a downward departure.

In State v. Simpson, 28 the court held that although defendant's crimes were committed two days apart, it did not sustain a finding of an escalating criminal pattern and sentence departure. The mere fact the defendant committed a second offense while on probation, but was not convicted therefor, was not sufficient for the court in Wesson v. State to depart on the sentencing on the first offense. 29 The court in Brown v. State 30 held a violation of a condition of bail an invalid reason for departure. Additionally, in Wilson v. State 31 the court held that an abuse of a position of familial authority over the victim was not reason to justify the imposition of departure sentence on convictions of lewd and lascivious assault of child under sixteen years of age, even when the child is mildly retarded.

IV. DEATH PENALTY

The Florida Supreme Court reviewed numerous death penalty cases during the survey period. The court was again called upon to weigh the aggravating and mitigating factors present in each case to determine if the trial court properly imposed the most severe punishment our law allows.

25. Brown v. State, 569 So. 2d 1223 (Fla. 1990); State v. Young, 561 So. 2d 583 (Fla. 1990); State v. Ellison, 561 So. 2d 576 (Fla. 1990).
26. 561 So. 2d 584 (Fla. 1990).
27. 568 So. 2d 920 (Fla. 1990).
28. 554 So. 2d 506 (Fla. 1989).
29. 559 So. 2d 1100 (Fla. 1990).
30. 569 So. 2d 1223 (Fla. 1990).
31. 567 So. 2d 425 (Fla. 1990).
A. Constitutionality of Death Imposed in Florida's Electric Chair

During the survey period, the supreme court reviewed the novel issue of whether the death penalty was violative of the United States and Florida Constitutions' prohibition against cruel and unusual punishment because of a malfunction in the electric chair. The issue arose after the execution of Jesse Tafero on May 4, 1990. Flames and smoke spurted from Tafero's head and emanated from the area of the metallic skull cap. The state concluded, after an investigation, that the use of a synthetic sponge in the skull cap caused the problem. The court found that one malfunction is insufficient to justify additional inquiry and held the death penalty not to be cruel and unusual punishment under these circumstances.

B. Written Findings

To impose a sentence of death, the sentencing court must issue written findings regarding aggravating and mitigating factors. Merely stating that "[t]he court has considered the aggravating and mitigating circumstances in evidence . . . and determines that sufficient aggravating circumstances exist, and there are insufficient mitigating circumstances to outweigh the aggravating circumstances" does not comport with the statute and is insufficient to justify a death sentence. The trial court does not have to expressly address each nonstatutory mitigating factor to sufficiently reject them. However, the written findings must be sufficient so as to allow an opportunity for meaningful review by the supreme court. If the written findings are insufficient, the death penalty will be vacated and a life sentence imposed.

32. Bertolotti v. State, 565 So. 2d 1343 (Fla. 1990); White v. State, 565 So. 2d 322 (Fla. 1990); Hamblen v. State, 565 So. 2d 320 (Fla. 1990); Squires v. State, 565 So. 2d 318 (Fla. 1990); Buenoano v. State, 565 So. 2d 309 (Fla. 1990).
33. Buenoano, 565 So. 2d at 310.
34. Id. at 311.
35. Id.; see also Bertolotti, 565 So. 2d at 1343; White, 565 So. 2d at 323; Hamblen, 565 So. 2d at 321; Squires, 565 So. 2d at 319.
39. Id.
40. Id.; see also Bouie, 559 So. 2d at 1115-16; Fla. Stat. § 921.141(3) (1989).
C. Jury Recommendation of Life

During the survey period, the supreme court reviewed five cases wherein the trial court overrode the jury's recommendation of life imprisonment.\textsuperscript{41} In all five cases, the supreme court vacated the death sentence. In four of the cases, the supreme court remanded for imposition of a life sentence.\textsuperscript{42} In one case, the court remanded for an evidentiary hearing on the issue of ineffective assistance of counsel during the sentencing hearing.\textsuperscript{43}

D. Mitigating Factors

1. Statutory

Section 921.141(6) of the Florida Statutes sets out the statutory mitigating factors to be considered in determining whether or not to impose the death penalty.\textsuperscript{44} The defendant is entitled to an instruction

\begin{itemize}
  \item \textsuperscript{41} Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (trial court failed to consider emotional disturbance as mitigating factor and erred in finding aggravating factor of heinous, atrocious or cruel where defendant shot his estranged wife); Carter v. State, 560 So. 2d 1166 (Fla. 1990) (statutory and nonstatutory mitigating factors outweigh evidence of five aggravating factors found by the trial court); Hallman v. State, 560 So. 2d 223 (Fla. 1990) (four of six aggravating factors found to be valid but insufficient to outweigh the nonstatutory mitigating factors present); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990) (Hitchcock error found to be harmless beyond a reasonable doubt, case remanded for an evidentiary hearing on defendant's claim of ineffective assistance of counsel at sentencing); Morris v. State, 557 So. 2d 27 (Fla. 1990) (override of jury recommendation of death penalty based on finding of single aggravating factor of heinous, atrocious, or cruel, insufficient to overcome the great weight given jury's recommendation).
  \item \textsuperscript{42} See Cheshire, 568 So. 2d at 913; Carter, 560 So. 2d at 1169; Hallman, 560 So. 2d at 228; Morris, 557 So. 2d at 30.
  \item \textsuperscript{43} Heiney, 558 So. 2d at 400.
  \item \textsuperscript{44} The mitigating factors include:
    \begin{itemize}
      \item (a) The defendant has no significant history of prior criminal activity.
      \item (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
      \item (c) The victim was a participant in the defendant's conduct or consented to the act.
      \item (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
      \item (e) The defendant acted under extreme duress or under the substantial domination of another person.
      \item (f) The capacity of the defendant to appreciate the criminality of his con-
regarding each factor for which evidence was adduced, unless the defendant specifically waives such an instruction.\textsuperscript{46} If the trial court fails to appropriately instruct the jury, the reviewing court must determine whether the failure to so instruct the jury affected the jury's recommendation.\textsuperscript{48} If the court cannot say beyond a reasonable doubt that the failure had no effect on the jury's recommendation, a new sentencing proceeding must be held.\textsuperscript{47}

2. Nonstatutory

The supreme court again reviewed \textit{Hitchcock} violations.\textsuperscript{48} Once the court determines that there is a \textit{Hitchcock} violation, it must apply the harmless error doctrine to determine if reversible error occurred.\textsuperscript{49} Where the jury recommends life, there is no doubt that the error is harmless.\textsuperscript{50} Where the jury recommends death, the error could be prejudicial or harmless depending on the evidence of mitigating factors presented during the penalty phase.\textsuperscript{51}

E. Aggravating Factors

Aggravating factors to be considered by the court are dictated by

\begin{itemize}
\item[(g)] The age of the defendant at the time of the crime.
\end{itemize}

\textsc{Fla. Stat.} \textsection 921.141 (1989).

\textsuperscript{45} Nixon v. State, 572 So. 2d 1336 (Fla. 1990).

\textsuperscript{46} Stewart v. State, 558 So. 2d 416 (Fla. 1990).

\textsuperscript{47} \textit{Id.} at 421.

\textsuperscript{48} \textit{See} Hitchcock v. Dugger, 481 U.S. 393 (1987) (death sentence held invalid where trial court failed to instruct jury that it may consider all mitigating circumstances in determining whether to recommend death). The trial court must allow the consideration of nonstatutory as well as statutory mitigating circumstances to avoid a \textit{Hitchcock} violation.

\textsuperscript{49} \textit{See} Copeland v. Dugger, 565 So. 2d 1348 (Fla. 1990) (state conceded error and record contained many items of potentially mitigating evidence and also was unclear as to whether trial court was aware that it could consider nonstatutory mitigating factors); Smith v. State, 556 So. 2d 1096 (Fla. 1990) (state conceded error but met burden of proving harmless error where overwhelming body of aggravating factors exist).

\textsuperscript{50} \textit{Heiney}, 558 So. 2d 398.

\textsuperscript{51} Way v. Dugger, 568 So. 2d 1263 (Fla. 1990) (not harmless error where evidence of numerous mitigating factors presented during penalty phase which the jury should have considered); \textit{see also} Copeland, 565 So. 2d 1348; Smith, 556 So. 2d 1096.
section 921.141(5) of the Florida Statutes. Once the jury makes its recommendation, the trial court must weigh the aggravating factors present before imposing sentence.

In the cases surveyed in this subsection, the jury recommended death. The supreme court upheld the death sentence in fourteen cases. The cases reviewed contained the following aggravating factors: prior conviction of a felony involving the use or threat of violence; felony committed for pecuniary gain; felony committed in a cold, calculated, and premeditated manner; felony committed while engaged in an enumerated felony; felony particularly heinous, atrocious, or cruel; felony committed to avoid lawful arrest; felony committed under sen-

52. Aggravating factors include:
(a) The capital felony was committed by a person under sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.
(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

53. § 921.141(5)(b).
54. § 921.141(5)(f).
55. § 921.141(5)(i).
56. § 921.141(5)(d).
57. § 921.141(5)(h).
58. § 921.141(5)(e).
tance of imprisonment; defendant created a great risk of death to many persons; and felony committed to disrupt a governmental function.

59. § 921.141(5)(a).
60. § 921.141(5)(c).
61. § 921.141(5)(g); see Holton v. State, 573 So. 2d 284 (Fla. 1990) (prior conviction of violent felony for a contemporaneous sexual battery and arson not upheld but proper as to prior attempted robbery conviction; committed during commission of sexual battery; heinous, atrocious, and cruel; cold, calculated, and premeditated not upheld — two mitigating factors insufficient to outweigh the valid aggravating factors); Downs v. State, 572 So. 2d 895 (Fla. 1990) (prior conviction of violent felony; committed for pecuniary gain; and cold, calculated, and premeditated not overcome by evidence of nonstatutory mitigating circumstances); Sanchez-Velasco v. State, 570 So. 2d 908 (Fla. 1990) (heinous, atrocious, and cruel; committed during commission of sexual battery — no mitigating factors found); Occhicone v. State, 570 So. 2d 902 (Fla. 1990) (prior conviction of violent felony; committed during a burglary; and cold, calculated, and premeditated supported by the record and death not disproportionate); Floyd v. State, 569 So. 2d 1225 (Fla. 1990) (committed for pecuniary gain and heinous, atrocious, and cruel sufficient to justify death penalty); Brown v. State, 565 So. 2d 304 (Fla. 1990) (committed during commission of a felony; previous conviction of a violent felony; and committed in a cold, calculated, and premeditated manner not outweighed by mitigating circumstances presented); Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990) (committed while under sentence of imprisonment, committed to escape from custody, created great risk of death to many persons and prior conviction of violent felony sufficiently outweighed mitigating evidence to sustain sentence of death); Porter v. State, 564 So. 2d 1060 (Fla. 1990) (prior conviction of violent felony; committed during commission of burglary; cold, calculated, and premeditated; heinous, atrocious, or cruel not upheld but the three valid aggravating factors sufficient to justify death penalty); Pardo v. State, 563 So. 2d 77 (Fla. 1990) (multiple murders — cold, calculated, and premeditated apply to all and committed to disrupt governmental function and committed for pecuniary gain applied to individual murders; additional aggravating factor present but not found by court is prior conviction of violent felony even though the conviction contemporaneous with other convictions where multiple victims or separate episodes involved); Freeman v. State, 563 So. 2d 73 (Fla. 1990) (prior conviction of violent felony and committed for pecuniary gain outweighed nonstatutory mitigating factors); Randolph v. State, 562 So. 2d 331 (Fla. 1990) (committed during commission of sexual battery; committed to avoid lawful arrest; committed for pecuniary gain; and heinous, atrocious, or cruel sufficient where no statutory mitigating factors found and only two nonstatutory mitigating factors present); Rivera v. State, 561 So. 2d 536 (Fla. 1990) (prior conviction of violent felony; committed during commission of enumerated felony; heinous, atrocious, or cruel; cold, calculated, and premeditated not upheld—three remaining factors sufficient where only one statutory mitigating circumstance present and no nonstatutory mitigating circumstances); Haliburton v. State, 561 So. 2d 248 (Fla. 1990) (under sentence of imprisonment; prior conviction of violent felony; committed during commission of a burglary; and cold, calculated, and premeditated sufficient to impose death where nonstatutory mitigating factors did not
The supreme court found the death penalty inappropriate in eight of the cases included under this subsection. In doing so, the court found in some of these cases that certain aggravating factors had not been established by the evidence. 62 Consistent with prior decisions, the court also found that introduction of evidence of the defendant's lack of remorse is improper and requires resentencing. 63 In other cases, the court found the death penalty disproportionate under the particular circumstances of the case. 64

Once the supreme court vacates the death penalty, it may remand for a new sentencing hearing or for imposition of a life sentence. The supreme court remanded four of the above cases for a new sentencing hearing and four for imposition of a life sentence. 65

62. Campbell v. State, 571 So. 2d 415 (Fla. 1990) (cold, calculated, and premeditated improperly found); Jones v. State, 569 So. 2d 1234 (Fla. 1990) (trial court found aggravating factors of committed for pecuniary gain and cold, calculated, and premeditated; error to instruct jury as to heinous, atrocious, or cruel sufficient even where aggravating factors of prior conviction of felony of violence and cold, calculated, and premeditated held invalid—total absence of mitigating circumstances).

63. Colina v. State, 570 So. 2d 929 (Fla. 1990).

64. Nibert v. State, 59 U.S.L.W. 3 (Fla. July 26, 1990) (one aggravating factor and trial court failed to find mitigating circumstances where such evidence presented and unrefuted); Farinas, 569 So. 2d 425; Blakely v. State, 561 So. 2d 560 (Fla. 1990) (disproportionate in light of penalty imposed in factually similar cases — killing resulting from ongoing domestic problems).

65. Nibert, 59 U.S.L.W. 3; Campbell, 571 So. 2d 415 (remanded for new sentencing hearing); Colina, 570 So. 2d 929; Farinas, 569 So. 2d 425; Jones v. State, 569 So. 2d 1234 (Fla. 1990), Thompson, 565 So. 2d 1311 (remanded for imposition of life sentence); Preston, 564 So. 2d 120; Blakely, 561 So. 2d 425.
Lastly, the supreme court approved an addition to the standard jury instruction on the aggravating factor of heinous, atrocious, or cruel. The addition defines the terms heinous, atrocious, and cruel.

67. Id.

('Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.)