IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

SC NO: SC19-1511
APPEAL NO: 4D17-3034
CASE NO: 94-12537CF10A

DAVID PUZIO,

Petitioner/Appellant,

vs.

STATE OF FLORIDA,

Respondent/Appellee.
_____/

JURISDICTIONAL BRIEF OF APPELLANT

On Discretionary Review from a Decision of the Fourth District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

Appellant was sixteen years old when he was found guilty after a jury trial of two counts of first-degree murder and one count of armed carjacking. The State sought the death penalty. The jury returned a unanimous recommendation of life over death. On the penalty phase jury instructions, the jury wrote the word "yes" next to the mitigating factor: "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor."

Appellant was sentenced to life in prison without parole. Appellant has been in prison for over 25 years. In 2017, Appellant had a resentencing hearing pursuant to *Miller v. Alabama,* 567 US 460 (2012), *Falcon v. State,* 162 So.3d 954 (Fla. 2015), and *Horsley v. State,* 160 So.3d 393 (Fla. 2015). At the time of the sentencing hearing *Williams v. State,* 211 So.3d 1070 (5th DCA 2017) had been certified to this Court but had not been decided.

Despite the jury's finding that "the offense was committed by another person and the defendant's participation was relatively minor," the trial judge decided that Appellant had shot and killed the victims. The judge sentenced Appellant under Florida Statute 775.082(1)(b)1, which applies when the defendant kills the victim, to 60 years on each count of first-degree murder to run concurrently. Appellant appealed the sentence.

Pursuant to *Williams v. State*, 242 So.3d 280 (Fla. 2018), the 4th DCA held that the trial court illegally sentenced Appellant as the individual who shot and killed the victims under F.S. 775.082(1)(b)1. The 4th DCA held that the jury did not find beyond a reasonable doubt that Appellant was the shooter. Based on the record, the 4th DCA held that the error was not harmless. The 4th DCA ordered that Appellant be resentenced under the correct statute. However, the 4th DCA stated that Appellant was not entitled to a new sentencing hearing and "need not be present for this ministerial correction of his sentence." The 4th DCA did not explain why Appellant was not entitled to a new sentencing hearing.

Appellant requested a rehearing and argued that his sentence would remain illegal unless Appellant was granted a new sentencing hearing pursuant to the jury's finding that he was not the individual who shot and killed the victims. The 4th DCA denied rehearing but substituted the attached opinion for the original opinion.

In its new opinion, the 4th DCA adopted the State's argument in its response to Appellant's request for rehearing. The 4th DCA held that Appellant was not entitled to a new sentencing hearing because when the trial judge was ordered by the 4th DCA to reduce his oral sentencing findings to writing, the judge added a comment that 60 years was appropriate under either statute "in light of the facts of the case." The trial judge issued the written sentencing order while the case was on appeal because Appellant requested that the 4th DCA relinquish jurisdiction for sole purpose

of requiring the trial judge to reduce his oral findings to writing in compliance with Florida Statute 775.082(1)(b)3.

In its new opinion, the 4th DCA repeated the State's argument in its response that the trial judge's comment conclusively showed that the judge would have imposed the same sentence. In its response, the State cited *Brooks v. State*, 969 So.2d 238 (Fla. 2007) and *Muyico v. State*, 50 So.3d 1227 (4th DCA 2011). In its new opinion, the 4th DCA cited the same cases.

SUMMARY OF THE ARGUMENT

First, the 4th DCA's decision expressly and directly conflicts with this Court's decision in *Williams v. State*, 242 So.3d 280 (Fla. 2018) and with *Leppert v. State*, 249 So.3d 1322 (5th DCA 2018). In Appellant's case, the 4th DCA held that the remedy for the trial court's non-harmless error was a "ministerial correction" of the sentence. This holding directly conflicts with *Williams* and *Leppert* which hold that a defendant is entitled to a resentencing hearing if the error is not harmless.

Second, the 4th DCA's decision conflicts with this Court's decisions in *Ashley v. State*, 850 So.2d 1265 (2003) and *State v. Jones*, 753 So.2d 1276 (Fla. 2000) In Appellant's case, the 4th DCA relied on one comment in the judge's written sentencing order to justify denying Appellant a new sentencing hearing. The trial judge did not orally make this comment at the sentencing hearing. *Ashley* and *Jones*

hold that a court's oral pronouncement of sentence controls over the written documents.

Third, the 4th DCA's decision conflicts with its own decision in *Hadley v. State*, 190 So.3d 217 (4th DCA 2016). In *Hadley* the 4th DCA remanded the case for a new sentencing hearing when the judge made an erroneous determination of a statutory sentencing factor. In Appellant's case, the trial court made an erroneous determination of two statutory sentencing factors, but the 4th DCA denied Appellant a new sentencing hearing.

ARGUMENT

This Court should exercise its discretion and entertain Appellant's case on the merits to protect Appellant's constitutional right to have the jury determine beyond a reasonable doubt whether Appellant shot and killed the victims and be sentenced accordingly. The jury made specific factual findings that Appellant did not shoot and kill the victims; that the offense was committed by another person; and that Appellant's participation was relatively minor. The 4th DCA's decision renders the jury's specific factual finding meaningless in violation of *Williams* and Appellant's right to due process under the United States and Florida Constitutions. The 4th DCA's opinion opens the door for courts to simply pay lip service to the holding in *Williams* and the right of due process by allowing a judge to ignore and overrule the jury's finding if the judge believes a defendant was the shooter. This Court must

rectify Appellant's unconstitutional and illegal sentence because it is in direct conflict with the jury's factual findings.

I. The 4th DCA's decision expressly and directly conflicts with *Williams v. State*, 242 So.3d 280 (Fla. 2018) and *Leppert v. State*, 249 So.3d 1322 (5th DCA 2018)

In Appellant's case, the 4th DCA relied on *Williams* and *Alleyne v. United States*, 570 U.S. 99 (2013) to hold that the jury, not the trial court, must find beyond a reasonable that a defendant was the shooter. The 4th DCA held that the jury did not find beyond a reasonable doubt that Appellant killed the victims, and in fact the jury found that "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor."

Further, as in *Williams*, the 4th DCA held the error was not harmless. However, the 4th DCA expressly and directly conflicted with *Williams* by holding that Appellant was not entitled to a new sentencing hearing. Instead the 4th DCA's remedy was to remand Appellant's case for the trial judge to change the disposition to the correct statute. The 4th DCA held that Appellant need not be present for this "ministerial correction of his sentence." This holding conflicts with *Williams*.

In *Williams*, this Court held that a resentencing hearing was the proper remedy where the error was not harmless. Williams himself was sent back to the trial court

and received a new sentencing hearing under the correct statute, and more importantly, pursuant to the correct determination that Williams was not the individual who killed the victims. Similarly, in *Leppert*, the 5th DCA, pursuant to *Williams*, held that the defendant was entitled to a new sentencing hearing and remanded the Defendant to be resentenced.

Nowhere in *Williams* or *Leppert* do the courts hold that the defendant's remedy is merely a ministerial correction of the sentence. By holding that the trial court need only change Appellant's sentence by substituting the correct statute, the 4th DCA denied Appellant his right under *Williams* and Florida Statute 921.1401 to be sentenced as the individual who did not kill the victims. Specifically, Appellant was denied his right to be sentenced by a trial judge who acknowledges that the jury decided that Appellant was not the shooter and that "his participation in the offense was relatively minor."

In its original opinion, the 4th DCA gave no justification for denying Appellant a new sentencing hearing. In its new opinion, the 4th DCA adopted and repeated the State's argument in its response to Appellant's request for rehearing. The 4th DCA never explained why it originally held that Appellant was not entitled to a new sentencing hearing or why Appellant's remedy was merely a "ministerial correction" of his sentence.

In its new opinion the 4th DCA's justification for the "ministerial correction"

was based entirely on the State's response. In its response, the State pointed out that the trial judge added a comment in his written sentencing order that 60 years was appropriate under either statute "in light of the facts of the case." In agreement with the State, the 4th DCA held that this comment conclusively showed that the judge would have imposed the same sentence under either statute.

The problem with this justification is twofold and results in a direct and express conflict with this Court. First, pursuant to *Williams*, the "facts of the case" found by the trial judge were false and the findings made by the trial judge were illegal. According to *Williams*, the trial judge illegally found that Appellant shot and killed the two victims. Further, in the sentencing order itself, the trial judge falsely stated that the jury found the Defendant guilty first-degree murder by shooting the victims with a handgun. Thus, under the 4th DCA's remedy, Appellant's sentence remains illegal and in direct and express conflict *Williams* because Appellant was sentenced pursuant to the false and illegal conclusion that he was the shooter.

The second problem with the justification is that during the actual sentencing hearing, the trial judge decided unequivocally that Appellant was the shooter and sentenced him accordingly. The trial judge made no mention that 60 years was appropriate under either statute. The trial court only made this comment nine months later in his written sentencing order. The 4th DCA's reliance on the trial court's written comment constitutes another express and direct conflict with this Court.

II. The 4th DCA's decision expressly and directly conflicts with *Ashley v. State*, 850 So.2d 1265 (2003) and *State v. Jones*, 753 So.2d 1276, 1277 (Fla. 2000)

The 4th DCA's holding that the trial court's comment in his written sentencing order controls over the court's oral pronouncement is in express and direct conflict with *Ashley v. State*, 850 So.2d 1265 (2003), In *Ashley*, this Court cited a long-standing principal of law that a court's oral pronouncement of sentence controls over the written documents. Citing *State v. Jones*, 753 So.2d 1276, 1277 (Fla. 2000) In Appellant's case, the 4th DCA relied on one comment in the trial court's sentencing order to justify denying Appellant a sentencing hearing.

The trial judge issued the sentencing order after this Court decided *Williams* and while Appellant's case was on appeal. The trial judge issued the sentencing order because Appellant requested that the 4th DCA relinquish jurisdiction for sole purpose of requiring the trial judge to reduce his oral findings to writing in compliance with Florida Statute 775.082(1)(b)3. In in a footnote of the written sentencing order, the trial judge acknowledged that while he was aware of the recent Florid Supreme Court decision in *Williams*, "the remand was limited for the sole purpose of issuing written findings." Thus, any comment in the written sentencing order that does not simply memorialize the judge's oral findings at the sentencing hearing is outside of the trial court's limited jurisdiction under F.S. 775. 082(1)(b)(3).

Nowhere in the transcript of Appellant's sentencing hearing does the trial judge mention that 60 years would be appropriate under either statute. The trial judge did not even contemplate a scenario where Appellant did not shoot and kill the two victims. To the contrary, at the sentencing hearing the trial judge decided without reservation that Appellant was the shooter. The trial court considered every sentencing factor in F.S. 921.1401(2) within the context of the judge's determination that Appellant shot and killed the two victims.

It is impossible to conclude that the trial judge "would have" given Appellant the same sentence under either statute because during the actual sentencing hearing the trial judge unequivocally decided that Appellant shot and killed the two victims and did not consider any other scenario. The 4th DCA's reliance on *Brooks* and *Muyico* is misplaced. By relying on one comment in the belated sentencing order, instead of the trial judge's oral findings during the sentencing hearing, the 4th DCA directly and expressly conflicts with *Ashley* and *Jones.*

III. The 4th DCA's decision expressly and directly conflicts with *Hadley v. State*, 190 So.3d 217 (4th DCA 2016)

Finally, the 4th DCA's opinion conflicts with its own decision in *Hadley v. State*, 190 So.3d 217 (4th DCA 2016). In *Hadley*, the 4th DCA remanded the defendant back to the trial court for a new sentencing hearing because the trial judge made an incorrect finding as to "the nature and extent of the defendant's prior

criminal history" under F.S. 921.1401(2)(h). *Id*. at 219 Specifically, the trial judge erroneously decided that Hadley had previously committed a capital offense and sentenced him according. *Id*. The 4th DCA remanded the defendant for a resentencing with the proper consideration of the sentencing factor. *Id*.

Similar to *Hadley*, in Appellant's case the trial judge made an incorrect finding as to the "nature and circumstances of the offense committed by the defendant" and "the extent of the defendant's participation in the case" under F.S 921.1401(2)(a)&(f). As discussed, the jury did not find that Appellant was the shooter and found specifically that "the offense was committed by another person and the defendant's participation was relatively minor."

Contrary to the jury's finding, the trial judge erroneously found that Appellant shot and killed the two victims. This false conclusion informed the judge's consideration of the statutory sentencing factors. As in *Hadley*, the trial judge "made a finding of fact that was unsupported by the record." *Id*. The 4th DCA expressly and directly conflicted with its decision in *Hadley* by failing to remand Appellant's case for a new sentencing hearing without any erroneous findings of fact.

CONCLUSION

The 4th DCA expressly and directly conflicted with the decisions of this Court and the district courts of appeal on the same questions of law. This Court should exercise its jurisdiction to consider Appellant's case on the merits.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Office of the Attorney General, West Palm Beach; 1515 North Flagler Dr. Suite 900, West Palm Beach. Florida 33401, at CrimAppWPB@myfloridalegal.com this 13th day of September 2019.

CERTIFICATE OF FONT AND TYPE SIZE

This brief was word-processed using 14-point Times New Roman type.

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DAVID PUZIO,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D17-3034

[August 7, 2019]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Paul L. Backman, Judge; L.T. Case No. 94-12537CF10A.

Ashley D. Kay and Kevin J. Kulik, P.A., Fort Lauderdale, for appellant.

Ashley Moody, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

ON APPELLANT'S MOTION FOR REHEARING

GERBER, J.

We deny appellant's motion for rehearing. However, we substitute the following opinion for the opinion which we issued on May 8, 2019.

The defendant appeals from his re-sentences for two counts of first degree murder and one count of armed carjacking committed while he was a juvenile. The defendant argues the circuit court erred in four respects: (1) by sentencing him on the first degree murder counts under section 775.082(1)(b)1., Florida Statutes (2017), when no jury has found beyond a reasonable doubt that he actually killed, intended to kill, or attempted to kill the victims; (2) by not reviewing his penalty phase witnesses' testimony from his original sentencing; (3) by departing from the guidelines in sentencing him on the armed carjacking; and (4) by increasing his sentences on the first degree murder counts several months after pronouncing sentence, by adding forty-year mandatory minimums required under section 775.082(1)(b)1.

We reverse on the defendant's first argument, and remand for correction of his sentences on the first degree murder counts under section 775.082(1)(b)2., Florida Statutes (2017). Because section 775.082(1)(b)2. does not require forty-year mandatory minimums, we also reverse the inclusion of the forty-year mandatory minimums as referenced in the defendant's fourth argument, and do not need to reach the defendant's double jeopardy argument. We affirm on the defendant's second and third arguments without further discussion.

Procedural History

In 1994, the state charged the then sixteen-year-old defendant with two counts of first degree murder and one count of armed carjacking, and sought the death penalty.

At trial, the state presented evidence that the defendant was one of three men in the backseat of a car, with two women in the driver's and front passenger's seats. The men intended to rob the victims, and directed the women to drive to a location, where the defendant shot and killed the women. The defendant presented evidence that one of the other men was the shooter.

The state ultimately argued to the jury, and the trial court instructed the jury, that the defendant could be found guilty of first degree murder as either a premeditated act or under a felony murder theory if one of the other men was the shooter. The verdict form asked the jury if the defendant was guilty of first degree murder, but did not ask the jury to decide between premeditation and felony murder.

The jury found the defendant guilty on all three counts. During the penalty phase, the jury was asked to consider aggravating and mitigating factors. Next to the mitigating factor, "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor," the jury wrote the word "yes." The jury also recommended life in prison.

The trial court sentenced the defendant to life in prison without parole for all three counts.

Twenty-one years later, in 2017, the defendant appeared before the trial court for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), which held that "mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id.* at 470.

The trial court had to decide whether to resentence the defendant under subsection 1. or 2. of section 775.082(1)(b), Florida Statutes (2017), which provides, in pertinent part:

> 1. A person *who actually killed, intended to kill, or attempted to kill the victim* and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. *If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).*
>
> 2. A person *who did not actually kill, intend to kill, or attempt to kill the victim* and who is convicted under s. 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. *A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).*

§ 775.082(1)(b)1.-2., Fla. Stat. (2017) (emphasis added). Section 921.1402(2), Florida Statutes (2017), provides in pertinent part:

> (a) A juvenile offender sentenced under s. 775.082(1)(b)1. is entitled to a review of his or her sentence *after 25 years* . . . [unless the juvenile offender has been previously convicted of certain enumerated offenses that were part of a separate criminal transaction or episode].
>
> . . .

> (c) A juvenile offender sentenced to a term of more than 15 years under s. 775.082(1)(b)2. . . . is entitled to a review of his or her sentence *after 15 years*.

§ 921.1402(2)(a), (c), Fla. Stat. (2017) (emphasis added).

The defendant argued he should be sentenced under section 775.082(1)(b)2., and therefore entitled to review after having spent fifteen years in prison, because the jury was not asked to find, and did not find, that he actually killed, attempted to kill, or intended to kill the victims, as required under section 775.082(1)(b)1.

The state argued the defendant should be sentenced under section 775.082(1)(b)1., and therefore not entitled to review until having spent twenty-five years in prison, because the state's evidence pointed to the defendant as having actually killed, attempted to kill, or intended to kill the victims.

The trial court decided, on each of the first degree murder counts, to sentence the defendant under section 775.082(1)(b)1. to sixty years in prison, with entitlement to review after having spent twenty-five years in prison. The trial court did not state that the defendant would be punished by a term of imprisonment of at least forty years on the first degree murder counts. On the armed carjacking count, the court sentenced the defendant to forty years in prison.

In 2018, several months after pronouncing the new sentences, the trial court filed a new disposition order without a hearing and without otherwise notifying the parties. On the 2018 order's first page, the trial court handwrote: "Corrected as to min/man." On the second page, the trial court checked the box next to "other mandatory minimum" and handwrote: "40 yrs CT I and II pursuant to F.S. 921.1402(2)(a)." At the bottom of that page, next to the trial court's signature, the trial court handwrote: "nunc pro tunc" to the 2017 resentencing order. In effect, the 2018 disposition order altered the 2017 resentencing order's sixty-year sentences on the first degree murder counts by adding forty-year mandatory minimums.

Along with the new disposition order, the trial court issued a new sentencing order to detail its resentencing findings in writing. Besides the findings described above, the court also noted that "although it proceeded under subsection 775.082(1)(b)(1), Florida Statutes, that it equally finds a sixty-year sentence appropriate under section 775.082(1)(b)(2) in light of the facts of this case."

This Appeal

This appeal followed. As stated above, the defendant's first argument contends that the trial court erred by sentencing him under section 775.082(1)(b)1. when no jury has found beyond a reasonable doubt that he actually killed, intended to kill, or attempted to kill the victims.

We agree. In *Williams v. State*, 242 So. 3d 280 (Fla. 2018), our supreme court held: "Because a finding of actual killing, intent to kill, or attempt to kill aggravates the legally prescribed range of allowable sentences . . . by increasing the sentencing floor from zero to forty years and lengthening the time before which a juvenile offender is entitled to a sentence review from fifteen to twenty-five years, this finding is an element of the offense, which [is required to] be submitted to a jury and found beyond a reasonable doubt." *Id.* at 288 (quotation marks and internal citations omitted). However, our supreme court also held that a violation of this requirement can be harmless if "the record demonstrates beyond a reasonable doubt that a rational jury would have found the [defendant] actually killed, intended to kill, or attempted to kill the victim." *Id.* at 290.

Here, the verdict form did not ask the jury to choose between premeditation and felony murder, and it cannot be determined from the verdict form whether the jury found beyond a reasonable doubt that the defendant actually killed, intended to kill, or attempted to kill the victims.

This lack of jury finding cannot be deemed harmless. The record does not demonstrate beyond a reasonable doubt that a rational jury would have found the defendant killed, intended to kill, or attempted to kill the victim. Although the state presented evidence that the defendant was the shooter, the defendant presented evidence that one of the other men was the shooter. The state ultimately argued to the jury, and the trial court instructed the jury, that the defendant could be found guilty of murder as either a premeditated act or under a felony murder theory. After the jury found the defendant guilty of first degree murder, the jury was asked during the sentencing phase to consider aggravating and mitigating factors. Next to the mitigating factor, "the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor," the jury wrote the word "yes."

Based on the foregoing, we reverse the trial court's resentencing of the defendant for the first degree murder counts under section

775.082(1)(b)1. We remand for correction of his sentences on the first degree murder counts under section 775.082(1)(b)2., entitling the defendant to review after having spent fifteen years in prison. *Williams*, 242 So. 3d at 292. The defendant need not be present for this ministerial correction of his sentence. The defendant is not entitled to a new sentencing hearing under section 775.082(1)(b)2., because the trial court already stated that "it equally finds a sixty-year sentence appropriate under section 775.082(1)(b)(2) in light of the facts of this case." We agree with the state that the trial court's comments conclusively show that the court would have imposed the same sentence. *See Brooks v. State*, 969 So. 2d 238, 238 (Fla. 2007); *Muyico v. State*, 50 So. 3d 1227, 1228 (Fla. 4th DCA 2011).

As stated above, because section 775.082(1)(b)2. does not require forty-year mandatory minimums, we also reverse the inclusion of the forty-year mandatory minimums as referenced in the defendant's fourth argument, and do not need to reach the defendant's double jeopardy argument. We affirm on the defendant's second and third arguments without further discussion.

Affirmed in part, reversed in part, and remanded for correction of sentences.

CONNER, J., and METZGER, ELIZABETH, Associate Judge, concur.

* * *

No further motions for rehearing shall be permitted.