Filing # 130739976 E-Filed 07/15/2021 02:57:10 PM

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, *Petitioner,*	)	No. SC21-____
	)	DCA No. 5D20-632
v.	)	
HERBERT LEON MANAGO, JR., *Respondent.*	)	

PETITIONER'S APPENDIX TO
JURISDICTIONAL BRIEF

Manago v. State, No. 5D20-632, 2021 WL 400568 (Fla. 5th DCA Feb. 5, 2021), *reh'g denied* (Fla. 5th DCA June 4, 2021) 1

Certificate of Service 10

Dated: July 15, 2021

ASHLEY MOODY
Attorney General

/s/ Kevin A. Golembiewski
HENRY C. WHITAKER
Solicitor General
JEFFREY PAUL DESOUSA (FBN 110951)
Chief Deputy Solicitor General
KEVIN A. GOLEMBIEWSKI (FBN 1002339)
Deputy Solicitor General
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399
(850) 414-3300
kevin.golembiewski@myfloridalegal.com

REBECCA ROCK MCGUIGAN
(FBN 0568759)
Chief Assistant Attorney General
BONNIE JEAN PARRISH (FBN 0768870)
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard
Daytona Beach, FL 32118
(386) 238-4990

Counsel for State of Florida

RECEIVED, 07/15/2021 02:57:30 PM, Clerk, Supreme Court

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

HERBERT LEON MANAGO, JR.,

Appellant,

v. Case No. 5D20-632

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed February 5, 2021

Appeal from the Circuit Court
for Volusia County,
Matthew M. Foxman, Judge.

Matthew R. McLain, of McLain Law, P.A., Longwood, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Appellant, Herbert Leon Manago, Jr., was a juvenile at the time he committed first-degree felony murder in 2004. He originally received a mandatory sentence of life in prison with no possibility of parole for that charge. Based upon changes in juvenile sentencing laws, he petitioned to be and was resentenced. Appellant argues on appeal that the court should have resentenced him, regarding that charge, pursuant to section

775.082(1)(b)2., Florida Statutes (2014), as he requested and that the court erred by sentencing him pursuant to section 775.082(1)(b)1. We agree. We reverse and remand for further proceedings. As to all other issues raised by Appellant, we affirm without need for discussion.

Appellant was seventeen years old when he and three others carjacked a vehicle and shot the driver in the process. Appellant and two co-defendants were charged with first-degree felony murder in connection with the carjacking. The State presented evidence to the jury that Appellant was the shooter. The State argued to the jury and, at the State's request, the jury was instructed that Appellant could be found guilty as the shooter or under the principal theory. The jury returned its verdict, finding Appellant guilty as charged in the indictment of first-degree felony murder and of carjacking with a firearm. The verdict did not specify whether Appellant was the shooter, nor under which theory he was found guilty of first-degree felony murder.

In the years following his original sentencing, the law concerning juvenile sentencing has evolved. Appellant sought resentencing, claiming that his sentence of life without the possibility of parole was illegal for a juvenile. He sought to be resentenced pursuant to section 775.082(1)(b)2., which provides that a juvenile convicted of a capital felony, "who did not actually kill, intend to kill, or attempt to kill the victim," may be sentenced to prison for life or a term of years equivalent to life, but would be entitled to a review of his sentence under section 921.1402(2)(c), Florida Statutes (2014), after fifteen years.

However, the State requested that he be resentenced pursuant to section 775.082(1)(b)1. Section (b)1. provides that a juvenile defendant convicted of a capital

felony, "who actually killed, intended to kill, or attempted to kill the victim," may be sentenced to prison for a term of life, but must be sentenced to imprisonment for at least forty years if the court finds a life sentence inappropriate. A person sentenced under (b)1. would be entitled to a section 921.1402(2)(a) sentence review after twenty-five years.

While Appellant could still be sentenced to life under either section, if he were to be resentenced pursuant to (b)2., he would not face a mandatory minimum of forty years imprisonment and he would be entitled to a sentence review in fifteen rather than twenty-five years.

The Florida Supreme Court in *Williams v. State*, 242 So. 3d 280, 288 (Fla. 2018) held that, in accordance with *Alleyne v. United States*,[1] a defendant is entitled to have a jury, rather than the sentencing judge, determine whether the defendant "actually killed, intended to kill, or attempted to kill the victim." The court in *Williams* also held that an *Alleyne* violation[2] could be subject to a harmless error review. Thus, even if a trial court rather than a jury had made a finding of fact that led to a harsher sentence, *Williams* states that the *Alleyne* violation would be harmless if "the record demonstrates beyond a reasonable doubt that a rational jury would have found the juvenile offender actually killed, intended to kill, or attempted to kill the victim." *Id.* at 290.

Appellant argues that he was entitled to be resentenced under (b)2. rather than (b)1. because there was no finding by a jury that he "actually killed, intended to kill, or

---

[1] *Alleyne v. United States*, 570 U.S. 99 (2013). *Alleyne* is based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Supreme Court held that the Sixth Amendment requires "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

[2] An "*Alleyne* violation" refers to a situation in which the sentencing court, rather than a jury, makes a finding of fact that increases the penalty for the crime.

attempted to kill the victim." The resentencing court acknowledged that *Williams* required a jury to determine the existence of the (b)1. factors. It noted that because Appellant was charged as either the actual killer or a principal and the verdict form did not identify under which theory he was guilty, there was an inadequate jury finding to sentence him under (b)1.

Rather than simply sentencing Appellant pursuant to (b)2., the resentencing court conducted its own analysis to determine if it could make the requisite findings of fact required under (b)1. In other words, the resentencing court engaged in the type of fact-finding specifically forbidden by both *Alleyne* and *Williams*. It reviewed the court file, including the entire trial transcript, and concluded that the record demonstrated beyond a reasonable doubt that a rational jury would have found that Appellant actually killed the victim. Thus, the resentencing court concluded that its own *Alleyne* violation would constitute harmless error.

Based on the resentencing court's conclusion that a rational jury would have found that Appellant actually killed the victim, Appellant was resentenced pursuant to (b)1. During sentencing, the court engaged in consideration of the factors set out in section 921.1401. The court concluded that a sentence of life imprisonment was appropriate and noted that Appellant would be entitled to a sentence review after twenty-five years of incarceration on the first-degree felony murder conviction. Appellant was also resentenced to a concurrent term of thirty years in prison for carjacking with a firearm with a sentence review after twenty years of incarceration.

We agree with the Third District "that harmless error is the standard that is applicable in the reviewing court; it is not the standard employed by the trial court during

resentencing." *See Green v. State*, 46 Fla. L. Weekly D17 (Fla. 3d DCA Dec. 23, 2020). The resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation. "Even if the error could be considered harmless error, however, it is not appropriate for a [trial] court to commit error simply because it might be found to be harmless." *United States v. Salery*, 119 F. Supp. 2d 1268, 1272 n.3 (M.D. Ala. 2000). According to *Williams*, once the resentencing court determined that there was an insufficient jury finding to subject Appellant to sentencing under (b)1., it was compelled to sentence him pursuant to (b)2. *See* 242 So. 3d at 282, 292.

In *Green*, the Third District remanded that similar case "for resentencing pursuant to section 775.082(1)(b)2., or, if requested by the State, to empanel a jury to make the necessary factual determinations." 46 Fla. L. Weekly D17. There is certainly a logical and legal basis for empaneling a jury under certain resentencing scenarios to make factual findings that were not required in the original trial. As noted in *Green*, such a remedy is described as "proper" in *Gaymon v. State*, 288 So. 3d 1087, 1093 (Fla. 2020), which concerns a slightly different factual determination under section 775.082(10).

However, the supreme court in *Williams* specifically considered and rejected the option of empaneling a new jury to make the requisite findings, and clearly chose resentencing pursuant to section 775.082(1)(b)2. as the sole remedy on remand. 242 So. 3d at 292–93. Under *Hoffman v. Jones*, 280 So. 2d 431, 433 (Fla. 1973), we are compelled to follow *Williams*; therefore, we will not include the option of empaneling a jury to make the requisite factual findings on remand. We certify that our decision regarding available remedies on remand expressly and directly conflicts with the decision of the Third District in *Green* on the same question of law.

Accordingly, we reverse the resentencing order and remand with instructions to conduct a de novo resentencing of Appellant for his conviction of first-degree felony murder pursuant to section 775.082(1)(b)2., with consideration of the factors set forth in section 921.1401, and with provision for a fifteen-year sentence review in accordance with section 921.1402(c). We find nothing in the record that requires the resentencing be conducted by a different judge.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS, and CONFLICT CERTIFIED.

EISNAUGLE and TRAVER, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

HERBERT LEON MANAGO, JR.,

Appellant,

v. Case No. 5D20-632

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed June 4, 2021

Appeal from the Circuit Court for Volusia County, Matthew M. Foxman, Judge.

Matthew R. McLain, of McLain Law, P.A., Longwood, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

EDWARDS, J.

Relying on *Green v. State,* 46 Fla. L. Weekly D17 (Fla. 3d DCA Dec. 23, 2020), the State argues, as grounds for rehearing, that this Court should have conducted a harmless error analysis which, the State asserts, would have

demonstrated that the *Alleyne*[1] error in this case was harmless and required this Court to affirm the resentencing order.

The State is mistaken. In fact, we already conducted a harmless error review, as required by section 924.33, Florida Statutes (2020), but we decline to use the analysis from *Green* because our case does not involve traditional *Alleyne* error. In our view, the Third District's harmless error analysis in *Green* was neither required nor authorized given the decision in *Williams v. State*, 242 So. 3d 280 (Fla. 2018). The issue, and thus the error, presented to us in this case was whether the resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation. There was no doubt the resentencing court was aware that *Williams* required that Appellant be resentenced pursuant to section 775.082(1)(b)2., Florida Statutes (2014), because the jury had not been called upon to make the requisite factual findings.[2]

The resentencing court was also aware the Florida Supreme Court in *Williams* held, as a matter of first impression, that an *Alleyne* violation could constitute harmless error. However, that language in *Williams* referred only to an appellate court conducting a harmless error review. Nothing in *Williams* suggests

[1] *Alleyne v. United States*, 570 U.S. 99 (2013).

[2] This is not a "pipeline case" in which resentencing occurred prior to the release of the Florida Supreme Court's decision in *Williams*.

that a resentencing court can conduct its own harmless error analysis of its concurrent *Alleyne* violation. As the Third District in *Green* and we in our original opinion noted, harmless error reviews are only conducted by appellate courts.

With this error as our focus, we cannot conclude the error was harmless beyond a reasonable doubt. Indeed, the State properly conceded that point at oral argument.

REHEARING DENIED.

EISNAUGLE and TRAVER, JJ., concur.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this **fifteenth** day of July 2021 to:

Matthew R. McLain
2170 West State Road
Suite 216
Longwood, Florida 32779
matthew@mclainlaw.com

Counsel for Respondent

/s/ Kevin A. Golembiewski
Deputy Solicitor General