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IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

KENNETH PURDY,

Respondent.
_____/

Case No. SC17-843

5th DCA No. 5D16-370

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Kenneth Purdy, hereinafter Respondent, was convicted by a jury of first degree felony murder, count I, armed robbery, count II, and armed carjacking, count III, on September 26, 1997. (R50,54-56). On November 6, 1997, Respondent received a life sentence in count I, and two concurrent terms of 112.7 months for the armed robbery and armed carjacking convictions, with a three-year minimum mandatory term in all three counts, to run consecutively with the life sentence imposed in count I. (R259). Respondent's convictions and sentences were *per curiam* affirmed by the Fifth District Court of Appeal on October 27, 1998. Purdy v. State, 725 So. 2d 1137 (Fla. 5th DCA 1998).

Petitioner filed a motion to correct illegal sentence in October of 2012, after Miller v. Alabama, 132 S.Ct. 2455 (2012), was issued. (R73). Finding that it was not retroactive, the trial court denied the motion on April 3, 2014. Id. The Fifth District Court of Appeal *per curiam* affirmed on September 16, 2014. Purdy v. State, 150 So. 3d 1174 (Fla. 5th DCA 2014).

After Falcon v. State, 162 So. 3d 954 (Fla. 2015), was issued, a successive motion for post-conviction relief was filed by counsel on May 21, 2015, and Respondent was resentenced on November 18, 2015, to 40 years incarceration in count I, with no change to counts II and III. (R67-70,72-77,81). At the November

18, 2015, hearing, the judge advised Respondent that they were there on count I, only, and refused to consider the sentences imposed in counts II and III. (R146). As such, the trial court advised it did not have the discretion to modify counts II and III; i.e., to make them concurrent, rather than consecutive. (R147). No appeal was taken from the resentencing of only count I.

Through counsel, Respondent filed an application for judicial review on November 19, 2015, pursuant to section 921.1402, Florida Statutes. (R78-80). On December 18, 2015, the trial court conducted a judicial review hearing pursuant to sections 921.1402(2)(c) and (6), Florida Statutes, and modified the sentence in count I to a time-served sentence of 20 years, six months, and 13 days with no gain time permitted, followed by 10 years probation. (R174-75).

At the hearing, Respondent argued that the "sentencing scheme" meant that the Legislature intended for a juvenile to be released once he had matured and rehabilitated. (R156-57). Respondent contended that the original sentencing court did not sentence Respondent to the maximum on counts II and III; as such, Respondent sought a ten-year probationary term on all three counts. (R157-58).

The State disagreed, pointing out that the new statute applies to count I, but not counts II and III. (R158-59). The prosecutor argued that if the Legislature intended for the statute to apply to all juvenile crimes, it could have provided that it did, but based on the plain language of the statute, it did not. (R159-62). Further, Respondent did not receive a life sentence in counts II and III, but nine years, which is not even a *de facto* life sentence. (R164-65). Moreover, Respondent's motion for post-conviction relief for resentencing after Falcon addressed only count I. (R165). The State also argued that the new juvenile sentencing statutes provided no procedural vehicle for review of non-homicide sentences less than 20 years in length. Id. And, even if Respondent had included counts II and III in his motion, the State would have challenged any modification of those sentences, arguing that the court did not have jurisdiction, and that even under the new sentencing statute, Respondent did not receive a *de facto* life sentence on counts II and III. Id. The prosecutor further noted that they were there for review of the sentence in count I, and not for resentencing. (R166,167). The judge disagreed with the State's argument that there was no vehicle to modify the sentences on counts II and III, contending that such a vehicle had been proposed by the defense, but the only vehicle mentioned by the

court was for the court to apply gain time credit earned on count I to counts II and III. (R158-59,166-67).

Before the close of the hearing, the judge advised Respondent that he had 30 days to appeal, and Respondent asked if it was the court's intent that Respondent serve the nine years on counts II and III. (R176-77). The trial court advised that he did not believe he had jurisdiction over counts II and III. (R177). Respondent asked if the fact that the trial court imposed a time-served sentence meant that the court was unwilling to modify the sentence to ten years so that Respondent could be released immediately, and the judge advised that was the court's intent. (R177). The sentencing paperwork reflects that the sentences imposed on counts II and III were not modified. (R82,90,100,101). A corrected probation order was filed on December 22, 2015, *nunc pro tunc*, December 18, 2015, in count I. (R100-106).

A petition for writ of habeas corpus filed December 23, 2015, was denied on January 19, 2016, in that the trial court found the State's arguments well taken. (R234-38). A copy of the December 18, 2015, hearing transcript was attached. (R240-53). The State had filed a written response to the petition for writ of habeas corpus on January 7, 2016, explaining in great detail that the clear intent of the judicial review hearing was to

impose a time-served sentence on count I, and to leave the consecutive sentences in counts II and III alone. (R179-82). The State included a copy of the December 18, 2015, hearing transcript; the amended judgment and sentence and probation order entered on December 18, 2015; and an email sent by the prosecutor to the Department of Corrections on December 23, 2015. (R187-215,216-32,233).

On December 30, 2015, Respondent filed through counsel a motion to correct illegal sentence and motion to modify sentence pursuant to Florida Rules of Criminal Procedure 3.800(b)(1) and (c) challenging the modified sentence imposed in count I. (R107-11). The motion to correct illegal sentence was summarily denied on January 19, 2016. (R254-58; 259-65). The trial court reiterated in its January 19, 2016, order that it had clarified during the December 18, 2015, hearing that the court was not willing to modify the sentence in a manner that would allow Respondent to be released the day of the judicial review hearing. (R256).

Respondent appealed and, on January 27, 2017, the Fifth District Court of Appeal issued an opinion holding that the trial court should have considered counts II and III during the judicial review of count I as part of an aggregate 49 year 4.7 month sentence. Purdy v. State, 42 Fla. L. Weekly D272 (Fla. 5th

DCA Jan. 27, 2017). The State timely filed a motion for rehearing, clarification, or request for certified question arguing that the Fifth District Court of Appeal commingled subsections of section 921.1402, Florida Statutes, that apply only to homicide/Miller convictions with the subsection that applies only to non-homicide/Graham convictions. The State further argued that the 2014 juvenile sentencing legislation treats homicide and non-homicide convictions differently. The State also asked the district court to certify a question of great public importance in light of the fact that this opinion was the first in Florida to require a trial court to aggregate both homicide and non-homicide convictions for purposes of judicial review, and an aggregation is not provided for by the plain language of section 921.1402, Florida Statutes. The State suggested the following query:

> IS A JUVENILE OFFENDER WHO OBTAINS JUDICIAL REVIEW FOR A HOMICIDE OFFENSE ALSO ENTITLED TO JUDICIAL REVIEW OF A FIFTEEN YEAR OR LESS SENTENCE FOR A CONTEMPORANEOUSLY COMMITTED NON-HOMICIDE CONVICTION WHERE THE SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT AND THERE IS NO STATUTORY AUTHORITY FOR REVIEW OF IT?

The Fifth District Court of Appeal denied the motion for rehearing, but certified the following question of great public importance:

> WHEN A JUVENILE OFFENDER IS ENTITLED TO A SENTENCE REVIEW HEARING, IS THE TRIAL COURT REQUIRED TO REVIEW THE AGGREGATE SENTENCE THAT THE JUVENILE OFFENDER IS SERVING FROM THE SAME SENTENCING PROCEEDING IN DETERMINING WHETHER TO MODIFY THE OFFENDER'S SENTENCE BASED UPON DEMONSTRATED MATURITY AND REHABILITATION?

Purdy v. State, 42 Fla. L. Weekly D967 (Fla. 5th DCA Apr. 28, 2017). Judge Berger proposed a different certified question of great public importance:

> IS A JUVENILE OFFENDER WHO OBTAINS JUDICIAL REVIEW FOR A HOMICIDE OFFENSE ALSO ENTITLED TO JUDICIAL REVIEW OF A FIFTEEN-YEAR-OR-LESS SENTENCE FOR A CONTEMPORANEOUSLY COMMITTED NON-HOMICIDE CONVICTION WHERE THE SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT AND THERE IS NO STATUTORY AUTHORITY TO REVIEW IT?

Id.

This Court accepted jurisdiction. Briefing on the merits follows.

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erroneously requires aggregation of homicide and non-homicide sentences of less than fifteen years for purposes of judicial review, where the sentence does not violate the Eighth Amendment and there is no statutory authority to review the non-homicide sentences.

ARGUMENT

POINT ONE (RESTATED)

A JUVENILE OFFENDER WHO OBTAINS JUDICIAL REVIEW FOR A HOMICIDE OFFENSE IS NOT ENTITLED TO JUDICIAL REVIEW OF A FIFTEEN-YEAR-OR-LESS SENTENCE FOR A CONTEMPORANEOUSLY COMMITTED NON-HOMICIDE CONVICTION WHERE THE SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT AND THERE IS NO STATUTORY AUTHORITY TO REVIEW THE NON-HOMICIDE SENTENCES.

The State is challenging the Fifth District Court of Appeal's decision requiring aggregation of homicide and non-homicide sentences of less than fifteen years for purposes of judicial review, even though the sentence does not violate the Eighth Amendment and there is no statutory authority to review the non-homicide sentences. Notwithstanding that the issue of aggregation was not preserved in the trial court, see Purdy v. State, 42 Fla. L. Weekly D272, 273-74 (Fla. 5th DCA Jan. 27, 2017) (Berger, J., dissenting), this Court should reverse.

A certified question that is one of statutory interpretation is a pure question of law that is reviewed by this Court *de novo*. Wright v. City of Miami Gardens, 200 So. 3d 765, 770 (Fla. 2016). Legislative intent is the most important factor in interpreting a statute. See Knowles v. Beverly Enters.-Fla., Inc., 898 So. 2d 1, 5 (Fla. 2004)("It is well settled that legislative intent is the polestar that guides a

court's statutory construction analysis."). Legislative intent is determined primarily from the plain meaning of the statutory language in the text of the statute. See Shelby Mut. Ins. Co. v. Smith, 556 So. 2d 393, 395 (Fla. 1990). If it is clear and unambiguous, a court shall proceed no further and apply the provisions as written. See Foley v. State, 50 So. 2d 179, 184 (Fla. 1951). Also, statutory interpretation is a "holistic endeavor," United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988). Thus, a court "'will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute....'" Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194, 15 L.Ed. 595 (1856)).

The 2014 juvenile sentencing legislation at issue here, by its plain language, addresses homicide/Miller and non-homicide/Graham sentences separately. Moreover, the legislation provides more protection for juveniles being sentenced for homicide and life felonies than is required by the Eighth Amendment as set forth by the guidelines established in either Miller or Graham.[1]

[1] The Florida Constitution requires Florida courts to construe the prohibition against "cruel and unusual punishment" in

In Miller v. Alabama, 132 S. Ct. 2455 (2012), the United States Supreme Court held that the Eighth Amendment requires an individualized sentencing hearing for juvenile offenders who are convicted of homicide offenses, and it is given effect through a "hearing where 'youth and its attendant characteristics' are considered as sentencing factors," since such a hearing "is necessary to separate those juveniles who may be sentenced to life without parole from those who may not." Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016) (quoting Miller, 132 S. Ct. at 2460) (internal citation omitted). And, in Montgomery, the United States Supreme Court explained that their finding that Miller applies retroactively does not require the states "to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a Miller violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." Montgomery, 136 S. Ct. at 736. Thus, Miller requires either an individualized sentencing hearing before a juvenile convicted of a homicide offense can be sentenced to a life sentence *without the possibility of parole*, or the juvenile must be provided with the possibility of parole.

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conformity with decisions of the United States Supreme Court. Art. I, § 17, Fla. Const.

Graham v. Florida, 560 U.S. 48 (2010), on the other hand, in forbidding mandatory life sentences for juveniles convicted of non-homicide offenses, explained that "if [a state] imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." Id. at 81. Moreover, "a State need not guarantee eventual freedom" for a juvenile, so long as it provides a "meaningful opportunity to demonstrate maturity and rehabilitation[.]" Id. at 75. Thus, an individualized hearing is not required before imposing a life sentence, just a meaningful opportunity to obtain release.

Here, in Florida, the Legislature crafted legislation in 2014 which provides for separate judicial review entitlements that distinguish between homicide and non-homicide convictions and sentences.[2] Under sections 921.1402(2)(a)-(c), Florida Statutes, a juvenile convicted of a homicide offense shall receive a judicial review in 25 or 15 years depending upon whether he or she actually killed, intended to kill, or attempted to kill the victim. On the other hand, a juvenile convicted of a non-homicide life felony or a first degree felony punishable by life who receives a sentence of more than 20 years

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[2] The 2014 juvenile sentencing legislation also requires individualized sentencing hearings for juveniles covered by this legislation, i.e., those convicted of homicide offenses and for life felonies, before a trial court may impose a life sentence. §§ 775.082(1)(b), & 921.1401, Fla. Stat. (2014).

is entitled to a review pursuant to section 921.1402(2)(d), Florida Statutes, in 20 years, and a second review ten years later if the juvenile is not resentenced at the first review. Accordingly, the plain language of the 2014 legislation treats homicide and non-homicide sentences separately in response to the differing strictures of Miller and Graham, respectively, and does not provide for the sentences to be aggregated for purposes of judicial review.

Any anomaly this may create, as pointed out by the dissent[3], is for our Legislature to correct and not the courts. See, e.g., Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1994) ("It has also been accurately stated that courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.") (quoting from American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

Finally, the authority relied upon by the Fifth District Court of Appeal does not dictate otherwise, i.e., that the plain language of the 2014 juvenile sentencing legislation treats homicide and non-homicide sentences differently and provides no

[3] Berger, J. concurred, in part, and dissented.

vehicle for homicide and non-homicide sentences to be aggregated for purposes of judicial review. See Kelsey v. State, 206 So. 3d 5 (Fla. 2016) (defendant entitled to resentencing under the 2014 legislation which provides for judicial review for non-homicide offenses where sentence imposed is more than 20 years); Tyson v. State, 199 So. 3d 1087 (Fla. 5th DCA 2016) (resentencing for non-homicide offenses); and Thomas v. State, 135 So. 3d 590 (Fla. 1st DCA 2014), quashed, Thomas v. State, 177 So. 3d 1275 (Fla. 2015) (remanded for resentencing in conformance with 2014 legislation after defendant resentenced pursuant to Washington v. State, 103 So. 3d 917 (Fla. 1st DCA 2012)).

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests this Honorable Court reverse the Fifth District Court of Appeal's decision erroneously requiring the aggregation of homicide and non-homicide convictions for purposes of judicial review where the sentence does not violate the Eighth Amendment and such aggregation is not authorized or intended by the plain language of the 2014 juvenile sentencing legislation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Merits Brief of Petitioner has been furnished via Email to counsel for Respondent, Matthew R. McLain, Esq., (Brownstone, P.A., 201 North New York Ave., Suite 200, Winter Park, FL) at matthew@brownstonelaw.com this 15th day of June 2017.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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2017 WL 384094

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District Court of Appeal of Florida,
Fifth District.

Kenneth PURDY, Appellant,
v.
STATE of Florida, Appellee.

Case No. 5D16–370
|
Opinion filed January 27, 2017
|
Rehearing Denied April 28, 2017

Synopsis

Background: Following successful motion for postconviction relief under *Miller v. Alabama* and resentencing to 40 years for murder, defendant filed application for sentence review. The Circuit Court, Orange County, Mark S. Blechman, J., modified murder sentence to time served followed by probation, but found it lacked jurisdiction to modify prison sentences for robbery and armed carjacking convictions. Defendant appealed.

Holdings: The District Court of Appeal, Lambert, J., held that:

[1] court was required to consider entire aggregate 49 year prison sentence, rather than just sentence for murder conviction;

[2] Court would strike as surplusage any language from sentencing documents regarding gain time; and

[3] three-year minimum mandatory provisions of sentences for armed robbery and armed carjacking convictions had to run concurrently.

Remanded with directions.

Berger, J., concurred in part and dissented in part with opinion.

West Headnotes (5)

[1] Infants
Sentencing of Minors as Adults

During juvenile offender sentence review, court was required to consider entire aggregate 49 year prison sentence, rather than just 40 year sentence for murder conviction. Fla. Stat. Ann. § 921.1402(7).

Cases that cite this headnote

[2] Infants
Sentencing of Minors as Adults

When a juvenile offender is entitled to a sentence review hearing under *Miller v. Alabama*, the trial court is required to review the aggregate sentence the juvenile offender is serving in determining whether to modify the offender's sentence based upon demonstrated maturity and rehabilitation.

Cases that cite this headnote

[3] Prisons
Particular issues and applications

Court would strike as surplusage any language from sentencing documents regarding gain time, as trial court lacked authority to regulate gain time.

Cases that cite this headnote

[4] Prisons
Right to Credits;Eligibility and Entitlement

The authority to regulate gain time resides with the Department of Corrections; if, in sentencing, a court attempts to bar or grant gain time, such language is treated as surplusage or stricken.

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Cases that cite this headnote

[5] **Sentencing and Punishment**
Offenses Committed in One Transaction, Episode, or Course of Conduct

Three-year minimum mandatory provisions of sentences for armed robbery and armed carjacking convictions had to run concurrently and not consecutively to each other.

Cases that cite this headnote

Appeal from the Circuit Court for Orange County, Mark S. Blechman, Judge.

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Opinion

LAMBERT, J.

***1** The primary issue that we address in this appeal is whether the trial court erred when, during a juvenile offender's sentence review hearing held pursuant to section 921.1402, Florida Statutes (2015), it failed to consider Appellant's aggregate prison sentence and instead just modified one individual sentence. To adequately answer this question, we first provide a brief history of the proceedings below.

In 1997, following a jury trial, Appellant was convicted of felony first-degree murder, armed robbery, and armed carjacking. Appellant was a juvenile at the time that he committed these crimes. The trial court sentenced Appellant to serve life in prison without the possibility of parole for the murder conviction and two separate 112.7–month prison sentences for the armed robbery and armed carjacking convictions. The court ordered the 112.7–month prison sentences to run concurrently with each other but consecutively to the life sentence.[1] We affirmed Appellant's convictions and sentences on direct appeal without opinion. *Purdy v. State*, 725 So.2d 1137 (Fla. 5th DCA 1998).

Over the ensuing years, Appellant filed several motions seeking postconviction relief. These motions were denied by the lower court, and the denial orders were affirmed on appeal by this court.[2] Nevertheless, on May 21, 2015, Appellant filed a successive motion for postconviction relief based upon the United States Supreme Court's opinion in *Miller v. Alabama*, —— U.S. ——, 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012), where the Court held that a sentencing scheme that mandates a life sentence without the possibility of parole for a juvenile offender who commits a homicide violates the Eighth Amendment of the United States Constitution. Appellant argued that although his life sentence was final long before *Miller* was released, he is now entitled to relief from this sentence because the Florida Supreme Court recently held that *Miller* was to be applied retroactively. *See Falcon v. State*, 162 So.3d 954, 962–63 (Fla. 2015). The postconviction court agreed, summarily granted the motion, and set the matter for resentencing.[3]

On November 18, 2015, the court held the resentencing hearing. At this hearing, Appellant's counsel requested that a "credit time served" sentence be imposed, suggesting to the court that it could craft a "sentencing scheme" that would allow Appellant to be immediately released. The State countered that Appellant should be resentenced to serve fifty years in prison for the murder conviction. Pertinent to this appeal, the State also advised the court that it would need to address at this hearing or at the subsequent review hearing whether Appellant was also entitled to be resentenced on his previously imposed consecutive sentences for the armed robbery and armed carjacking.

***2** The court, after considering the factors set forth in section 921.1401(2)(a)–(j), Florida Statutes (2015), resentenced Appellant to serve forty years in prison for the murder conviction, with appropriate jail credit and prison credit awarded, but did not separately provide for a sentence review hearing in this new sentence. The court declined to hold the review hearing that day, advising Appellant that he would first need to file the necessary paperwork requesting the review hearing and,

that at this later hearing, the court would determine whether "[Appellant] can be released." [4] Additionally, the court did not modify Appellant's sentences for the armed robbery or armed carjacking convictions, concluding that it did not have the discretion or authority to do so. As a result, Appellant's total or aggregate sentence was now 49 years, 4.7 months (the modified 40–year sentence for the murder conviction, followed by the 112.7–month sentences for the robbery and carjacking convictions, which remained concurrent to each other, but consecutive to the sentence for murder).

Consistent with the court's direction, the following day, Appellant filed an application for sentence review pursuant to sections 921.1402(2) and (4), Florida Statutes (2015). In his application, Appellant asserted that the court had the authority at this review hearing to modify his sentences for the robbery and carjacking convictions in addition to modifying his forty-year sentence for the murder conviction, based on the court's authority to correct an unconstitutional sentencing scheme. Alternatively, Appellant suggested that the court could modify his sentence for the murder in such a fashion to effectuate his "immediate release to society."

On December 18, 2015, the court conducted the sentence review hearing. After receiving brief testimony from Appellant, together with argument from counsel, the court specifically found Appellant to have been rehabilitated and that it reasonably believed Appellant to be fit to reenter society. Appellant's counsel reminded the court that in his application for the review hearing, counsel had indicated to the court that it had the authority at this review hearing to modify Appellant's entire sentencing scheme and not just the modified forty-year sentence for the murder. Alternatively, counsel suggested that the court could modify Appellant's forty-year sentence down to a ten-year prison sentence, arguing that because Appellant had been in custody for over twenty years, the additional time Appellant had already served could be applied towards his remaining 112.7–month prison sentences for the armed robbery and armed kidnapping convictions, thereby allowing Appellant to be immediately released from prison.

The court first calculated that, at the time of the review hearing, Appellant had been in custody on this case for a total of twenty years, six months, and thirteen days. It then modified Appellant's sentence on the murder conviction to this amount of time served, to be followed by ten years of probation. However, the court again concluded that it lacked jurisdiction to consider modifying the 112.7–month prison sentences for the armed robbery and armed carjacking convictions. [5]

***3** In *Tyson v. State*, 199 So.3d 1087 (Fla. 5th DCA 2016), we recently held that a juvenile offender who was sentenced to serve thirty years in prison on one count, to be followed by fifteen years in prison on a second count, received an unconstitutional sentence because the aggregate sentence did not provide for a review hearing after the juvenile offender served twenty years in prison. 199 So.3d at 1087–89. Additionally, in *Thomas v. State*, 135 So.3d 590 (Fla. 1st DCA 2014), a juvenile homicide offender initially received a life sentence for first-degree murder and was resentenced, following *Miller*, to a term of forty years in prison for the murder and a concurrent thirty years in prison for an armed robbery conviction with no provision for a sentence review hearing. 135 So.3d at 590–91. The First District affirmed the concurrent sentences, *id.* but the Florida Supreme Court, in a brief, unanimous opinion, quashed the decision of the First District and remanded the case for resentencing in conformance with the framework established in the 2014 juvenile sentencing laws now codified in sections 775.082, 921.1401, and 921.1402 of the Florida Statutes. *Thomas v. State*, 177 So.3d 1275 (Fla. 2015).

More recently, in *Kelsey v. State*, 41 Fla. L. Weekly S600, — So.3d ——, 2016 WL 7159099 (Fla. Dec. 8, 2016), the Florida Supreme Court reiterated that the constitutionality of a juvenile offender's sentence is not based on the length of the sentence, but rather, it is dependent upon whether the sentence provided the offender with a meaningful opportunity for early release based on maturation and rehabilitation. 41 Fla. L. Weekly at S602, — So.3d at ——. The defendant in *Kelsey*, a juvenile nonhomicide offender, had initially received two life sentences, but following the United States Supreme Court's opinion in *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), [6] the defendant was resentenced to concurrent forty-five-year prison sentences, but without a sentence review hearing. *Id.* at S600–01, —So.3d at ——. The First District affirmed the new sentences, concluding that the forty-five-year prison term did not constitute a de facto life sentence in violation of *Graham*. *Kelsey v. State*, 183 So.3d 439 (Fla. 1st DCA 2015). However, the supreme court remanded for

resentencing, concluding that, consistent with its decision in *Henry v. State*, 175 So.3d 675 (Fla. 2015), all juvenile offenders whose sentences met the standard defined by the Legislature in chapter 2014–220, Laws of Florida, which includes any sentence longer than twenty years, are entitled to judicial review, not simply those term-of-years sentences that are "de facto life." *Kelsey*, 41 Fla. L. Weekly at S600–03, —— So.3d at ——.

[1] **[2]** Based on these cases, we conclude that when a juvenile offender is entitled to a sentence review hearing, the trial court is required to review the aggregate sentence the juvenile offender is serving in determining whether to modify the offender's sentence based upon demonstrated maturity and rehabilitation. We therefore hold that the lower court erred in failing to consider Appellant's aggregate 49–year, 4.7–month prison sentence at the review hearing and remand for the trial court to conduct a second review hearing to address whether to modify this sentence. If the court determines at this hearing that Appellant has been rehabilitated and is reasonably believed to be fit to reenter society, the court shall modify the aggregate sentence. *See* § 921.1402(7), Fla. Stat. (2015).

[3] **[4]** Appellant has raised two other issues in this appeal. In his second issue, Appellant argues that the court erred in finding that he was not eligible for gain time on the sentence imposed for the first-degree murder at the review hearing. We note that "[t]he authority to regulate gain time resides with the Department of Corrections." *Miller v. State*, 882 So.2d 480, 481 (Fla. 5th DCA 2004) (citing *Moore v. Pearson*, 789 So.2d 316 (Fla. 2001)). "If, in sentencing, a court attempts to bar or grant gain time, such language has been treated as surplusage or stricken." *Id.* (citing *Singletary v. Coronado*, 673 So.2d 924 (Fla. 2d DCA 1996); *Shupe v. State*, 516 So.2d 73 (Fla. 5th DCA 1987)). We therefore strike as surplusage any language from the recently entered sentencing documents regarding gain time. [7]

***4** **[5]** In his third issue, Appellant asserts that the three-year minimum mandatory provisions of his sentences for armed robbery and armed carjacking should not run consecutively. Based on the facts of this case and as correctly conceded by the State, the three-year minimum mandatory sentence provisions of Appellant's convictions for armed robbery and armed carjacking must run concurrently and not consecutively to each other. Because there was conflicting language in separate, contemporaneously rendered sentencing documents on this issue when Appellant was first sentenced, the trial court is directed to clarify and correct the judgment and sentences on remand.

REMANDED, with directions.

ORFINGER, J., concurs.

BERGER, J., concurs in part, and dissents in part, with opinion.

BERGER, J., concurring, in part, and dissenting.
I agree with the majority that the authority to regulate gain time resides with the Department of Corrections. I also agree that the three-year minimum mandatory sentences imposed on counts two and three for armed robbery and armed carjacking, must run concurrently with each other. However, I disagree with the majority view that, pursuant to section 921.1402, Florida Statutes (2015), Appellant is entitled to a sentence review on counts two and three.

When Appellant was resentenced pursuant to section 921.1401, Florida Statutes (2015), to serve forty years in prison on his conviction for first-degree felony murder, his sentence was no longer unconstitutional under Miller v. Alabama, —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Nevertheless, he was entitled to, and did, receive a sentence review hearing on this charge pursuant to section 921.1402(2)(c). See § 775.082(1)(b) 2., Fla. Stat. (2015).

Notably, Appellant did not seek resentencing on counts two and three in his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 and Miller. At the hearing on the postconviction motion, Appellant raised the issue of determining the applicable sentencing guidelines as to counts two and three, which the trial court declined to address, but Appellant did not raise any issues concerning his aggregate sentence. At the conclusion of the hearing, Appellant requested clarification on the trial court's ruling, but he did not object or argue to the contrary when the trial court stated that it did not believe it had discretion to modify or change Appellant's sentence on counts two and three. Moreover, when the sentences imposed in counts two and three were left undisturbed on resentencing, Appellant did not appeal the trial court's decision to leave those sentences intact.

Subsequently, during the judicial review hearing under section 921.1402(2)(c), Appellant did not object when the trial court indicated it did not have jurisdiction to resentence him on those counts. During the judicial review hearing, and in his motion to correct his sentence under Florida Rule of Criminal Procedure 3.800(b), Appellant did no more than argue that he was entitled to immediate release based on his rehabilitation and fitness to reenter society and seek to reduce the first-degree felony murder sentence to ten years so that the sentences for counts two and three, running consecutive to the first-degree felony murder sentence, had already been completed. Appellant made no arguments concerning the aggregate length of his sentences. In fact, it was the State, not Appellant, who raised the issue of the trial court's lack of jurisdiction to review the sentences in counts two and three under section 921.1402(1). As such, the sentences in counts two and three are not subject to review. See Fla. R. App. P. 9.140(e); Jackson v. State, 983 So.2d 562, 574 (Fla. 2008); Bertolotti v. Dugger, 514 So.2d 1095, 1096 (Fla. 1987) ("In order to preserve an issue for appellate review, the specific legal argument or ground upon which it is based must be presented to the trial court." (citing Tillman v. State, 471 So.2d 32 (Fla. 1985))). Even if they were, a 112.7 month sentence does not trigger a sentence review hearing under section 921.1402(2). See Barnes v. State, 175 So.3d 380, 382 n.1 (Fla. 5th DCA 2015) ("The statutory provisions governing juvenile sentencing do not apply to the defendant's five-year sentence for count twenty and his one-year sentence for count twenty-one; thus, resentencing on these counts is not necessary.").

***5** I recognize that leaving the sentences in counts two and three intact creates an anomaly in light of the trial court's conclusion that Appellant is rehabilitated and fit to reenter society. Nevertheless, I believe the glitch is one that requires a legislative fix, not a judicial one. See Ortiz v. State, 188 So.3d 113, 116 n.4 (Fla. 1st DCA 2016) (recognizing the anomaly that the Appellant will receive a sentence review under section 921.1402(2)(a) for his first-degree murder conviction but not for home invasion robbery while armed with a firearm). Accordingly, I dissent.

ON MOTION FOR REHEARING, CLARIFICATION, AND REQUEST TO CERTIFY QUESTION

PER CURIAM.

The State of Florida's motion for rehearing or clarification is denied. The State has also requested that we certify to the Florida Supreme Court a proposed question as one of great public importance. We decline to certify the State's question; instead we certify the following question to the court as one of great public importance:

> WHEN A JUVENILE OFFENDER IS ENTITLED TO A SENTENCE REVIEW HEARING, IS THE TRIAL COURT REQUIRED TO REVIEW THE AGGREGATE SENTENCE THAT THE JUVENILE OFFENDER IS SERVING FROM THE SAME SENTENCING PROCEEDING IN DETERMINING WHETHER TO MODIFY THE OFFENDER'S SENTENCE BASED UPON DEMONSTRATED MATURITY AND REHABILITATION?

ORFINGER and LAMBERT, JJ., concur.

BERGER, J., concurs in part and dissents in part, with opinion.

BERGER, J., concurring in part, dissenting in part.

I disagree with the decision to deny rehearing, but I agree we should certify a question of great public importance. With that said, I do not believe the question presented by the majority adequately frames the issue in this case. Instead, I would certify the following question proposed by the State of Florida:

> IS A JUVENILE OFFENDER WHO OBTAINS JUDICIAL REVIEW FOR A HOMICIDE OFFENSE ALSO ENTITLED TO JUDICIAL REVIEW OF A FIFTEEN-YEAR-OR-LESS SENTENCE FOR A CONTEMPORANEOUSLY COMMITTED NON-HOMICIDE CONVICTION WHERE THE SENTENCE DOES NOT VIOLATE THE EIGHTH

AMENDMENT AND THERE IS NO STATUTORY AUTHORITY TO REVIEW IT?

All Citations

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Footnotes

1 Each sentence also included a three-year minimum mandatory provision based upon the jury making a specific finding on each count that Appellant was in actual possession of a firearm when he committed these crimes.

2 *Purdy v. State*, 158 So.3d 605 (Fla. 5th DCA 2015); *Purdy v. State*, 43 So.3d 708 (Fla. 5th DCA 2010); *Purdy v. State*, 907 So.2d 545 (Fla. 5th DCA 2005); *Purdy v. State*, 773 So.2d 560 (Fla. 5th DCA 2000).

3 In *Horsley v. State*, 160 So.3d 393, 395–96 (Fla. 2015), the court held that a juvenile offender whose earlier sentence was found to be unconstitutional should be resentenced in light of the juvenile sentencing legislation enacted by the Legislature in 2014, now codified in sections 775.082, 921.1401–.1402, Florida Statutes (2015).

4 Based on the court's factual findings at the resentencing hearing, Appellant, having already served more than twenty years of his prison sentence, was entitled to a review hearing. *See* §§ 775.082(1)(b) 2.; 921.1402 (2)(c), Fla. Stat. (2015).

5 Prior to filing this appeal, Appellant filed a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(1) to correct illegal sentence, arguing, among other things, that as a result of finding him to be rehabilitated and reasonably believing that he is fit to reenter society, the trial court was required under section 921.1402, Florida Statutes (2015), to immediately release him from prison on at least five years of probation. While the motion could have been more precisely stated, Appellant argued that the present aggregate sentence he is now serving, which requires him to remain in prison to serve his sentences for robbery and carjacking despite being found rehabilitated and fit to reenter society, is illegal. The trial court denied the motion.

6 In *Graham*, the United States Supreme Court held that the Eighth Amendment forbids a sentence of life without parole for a juvenile offender who did not commit a homicide. 560 U.S. at 74, 130 S.Ct. 2011.

7 In Appellant's aforementioned motion to correct illegal sentence, he also asserted that the trial court lacked authority to comment on gain time and asked that such language in the order be stricken. As to the merits of his claim, we note that subsequent to the lower court's resentencing, Appellant pursued his administrative remedies through the Department of Corrections ("DOC") regarding the denial of his claim for gain time on his sentence. After the DOC denied relief, Appellant then filed a petition seeking habeas corpus relief with the circuit court, challenging the DOC's adverse determination as to his request for gain time. The circuit court denied his petition. Appellant thereafter filed a petition for writ of certiorari with our court regarding the denial of his habeas corpus petition, which was denied by this court without elaboration in case number 5D16–897.

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