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

RIDGE GABRIEL,

Appellant,

v. Case No. 5D18-3264

STATE OF FLORIDA,

Appellee.

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Opinion filed December 6, 2019

Appeal from the Circuit Court
for Orange County,
Marc L. Lubet, Judge.

James S. Purdy, Public Defender, and
Kevin R. Holtz and Scott G. Hubbard,
Assistant Public Defenders, Daytona
Beach, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Rebecca Rock
McGuigan, Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

Ridge Gabriel appeals his new sentence entered after we reversed his initial sentence and remanded for further proceedings in Gabriel v. State, 248 So. 3d 265 (Fla. 5th DCA 2018). Gabriel raises two issues on appeal. Only one merits discussion. As explained below, we reverse Gabriel's new sentence.

Gabriel was convicted of attempted first-degree murder with a firearm of a law enforcement officer, resisting an officer with violence, attempted robbery with a firearm, and aggravated assault with a firearm. We reversed the attempted first-degree murder conviction because the trial court failed to instruct the jury on an essential element of the crime. See Gabriel, 248 So. 3d at 267–68. We declined to address Gabriel's challenge to the sentences on his remaining convictions, noting that Gabriel's score would change if he was acquitted on the attempted first-degree murder charge. Id. at 268.

On remand, Gabriel was re-sentenced for attempted robbery with a firearm, the primary offense, aggravated assault with a firearm, and resisting an officer with violence.[1] The statutory maximum for attempted robbery with a firearm is fifteen years, and the statutory maximum for both aggravated assault with a firearm and resisting an officer with violence is five years. The State, citing section 921.0024(2), Florida Statutes (2012), insisted that the trial court was required to sentence Gabriel to 107.25 months in prison, the lowest permissible sentence (LPS) for aggravated assault and resisting arrest with violence, because the LPS exceeded the statutory maximum for those offenses. The trial court agreed with the State and re-sentenced Gabriel to fifteen years, with a ten-year minimum mandatory, for attempted robbery with a firearm; 107.25 months, with a three-year minimum mandatory, for aggravated assault; and 107.25 months for resisting an officer with violence—all to run consecutively. As a result, Gabriel's total sentence was approximately thirty-three years.

[1] The attempted first-degree murder charge was stayed pending the outcome of this appeal.

On appeal, Gabriel argues that his sentences for aggravated assault with a firearm and resisting an officer with violence are unlawful because they exceed the statutory maximum for those offenses. He further argues that because section 921.0024(2) is vague, the rule of lenity required the trial court to interpret the law in his favor.[2]

Section 921.0024(2) provides that "[t]he permissible range for sentencing shall be the lowest permissible sentence up to and including the statutory maximum, as defined in s. 775.082, for the primary offense and any additional offenses before the court for sentencing." Applying this language in conjunction with language from the supreme court's opinion in Moore v. State, 882 So. 2d 977 (Fla. 2004), we conclude that the sentencing range for Gabriel was 107.25 months, the LPS, to twenty-five years, the collective statutory maximum sentence.

In Moore, the supreme court explained:

> Under the prior guidelines, the individual offenses were considered interrelated because together they were used to establish the minimum and maximum sentence that could be imposed. To the contrary, however, under the CPC [Criminal Punishment Code (CPC)], together the individual offenses only establish the minimum sentence that may be imposed; a single maximum sentence is not established-each individual offense has its own maximum sentence, namely the statutory maximum for that offense. Under the CPC, multiple offenses are not interrelated as they were previously under the guidelines.

882 So. 2d at 985.

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[2] We note that the Florida Supreme Court rejected, without discussion, the argument that section 921.0024(2) is vague. See Butler v. State, 838 So. 2d 554, 556–57 (Fla. 2003).

As interpreted by Judge Warner in her dissenting opinion in Dennard v. State, 157 So. 3d 1055, 1057–61 (Fla. 4th DCA 2014),[3] the foregoing language from Moore stands for the proposition that "the LPS is the collective total minimum sentence for all offenses, but each has its own statutory maximum. The LPS is not the sentence which must be applied to each offense at sentencing." Dennard, 157 So. 3d at 1060 (Warner, J., dissenting). In the same vein, when applying the provision of section 921.0024(2), which requires the trial court to impose the LPS if it exceeds the statutory maximum sentence, the LPS must exceed the collective statutory maximum, not each individual statutory maximum, before such exception is triggered. See id.

In this case, the statutory maximum sentence is twenty-five years–fifteen plus five plus five. Because the LPS does not exceed twenty-five years, the trial court was not required to impose the LPS, and the sentences should have been capped by their individual statutory maximum sentences. Consequently, Gabriel's sentences for aggravated assault with a firearm and resisting an officer with violence are illegal because they exceed the statutory maximum sentence in contravention of section 921.0024(2).[4]

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[3] Judge Warner reiterated her interpretation in her dissent in Colon v. State, 199 So. 3d 960, 962–64 (Fla. 4th DCA 2016) (Warner, J., dissenting).

[4] Our opinion is not inconsistent with our decision in Hannah v. State, 869 So. 2d 692 (Fla. 5th DCA 2004). In that case, the defendant was convicted of three first-degree felonies. The statutory maximum sentence for each was thirty years in prison. The defendant's LPS was 539.4 months (44.95 years). The defendant was sentenced to twenty-five years in prison to be followed by twenty-five years' probation for each offense to be served concurrently. This Court held that the fifty-year split sentence was illegal because it exceeded the LPS, which becomes the maximum sentence if it exceeds the statutory maximum sentence. Hannah, 869 So. 2d at 692 (citing Butler, 838 So. 2d at 554). In that instance the LPS exceeded the statutory maximum sentence for the primary offense. Section 921.002(1)(c), Florida Statutes, provides that the CPC embodies the principle that "[t]he penalty imposed is commensurate with the severity of the primary offense and the circumstances surrounding the primary offense."

Accordingly, we reverse Gabriel's sentence and remand for re-sentencing consistent with this opinion. We acknowledge that our conclusion conflicts with the second district's opinion in Champagne v. State, 269 So. 3d 629 (Fla. 2d DCA 2019). In Champagne, the second district agreed with the State's interpretation and held that section 921.0024(2) provides that the LPS becomes the mandatory minimum sentence for both primary and additional offenses in the event the LPS exceeds the felony's statutory maximum sentence. While we certify conflict with the second district's decision in Champagne, we join the second district in certifying the following question as one of great public importance:

> IS THE LOWEST PERMISSIBLE SENTENCE AS DEFINED BY AND APPLIED IN SECTION 921.0024(2), FLORIDA STATUTES, AN INDIVIDUAL MINIMUM SENTENCE AND NOT A COLLECTIVE MINIMUM SENTENCE WHERE THERE ARE MULTIPLE CONVICTIONS SUBJECT TO SENTENCING ON A SINGLE SCORESHEET?

AFFIRMED in part; REVERSED in part; REMANDED; CONFLICT CERTIFIED and QUESTION CERTIFIED.

EVANDER, C.J., HARRIS, J., and JACOBUS, B.W., Senior Judge, concur.