IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

February 15, 2012

JIREH KLEPPINGER, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D09-481

BY ORDER OF THE COURT:

Upon consideration of Appellant's motion for rehearing, rehearing is granted and this court's opinion dated July 16, 2010, is withdrawn. The attached opinion is substituted therefor.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

JAMES R. BIRKHOLD, CLERK

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JIREH KLEPPINGER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D09-481

Opinion filed February 15, 2012.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Sarasota County; Charles E. Roberts, Judge.

Sonya M. Rudenstine, Gainesville, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Diana K. Bock, Assistant Attorney General, Tampa, for Appellee.

CASANUEVA, Judge.

In 2006, Jireh Kleppinger moved, pursuant to Florida Rule of Criminal Procedure 3.800(a), to correct an allegedly illegal departure sentence that the trial court imposed in 1997 for crimes he committed in 1996. He argues that the sentence imposed was in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely

v. Washington, 542 U.S. 296 (2004); on an alternative ground, he added an argument for similar relief based on Graham v. Florida, 130 S.Ct. 2011 (2010). The postconviction court denied his motion. We conclude that neither Apprendi nor Blakely affords him relief but Graham does. We reverse for resentencing.

Background

In December 1996 seventeen-year-old Jireh Kleppinger escaped from jail while awaiting prosecution on minor charges. During the escape, he and a cohort severely injured a jail deputy by choking him, beating him with a fire extinguisher, then locking him in a cell. The State charged Mr. Kleppinger with (1) attempted second-degree murder of a law enforcement officer, a second-degree felony; (2) escape, a second-degree felony; (3) kidnapping of a law enforcement officer, a first-degree felony punishable by life; and (4) depriving a law enforcement officer of the means of communication, a third-degree felony. At trial, the jury found him guilty on all four counts as charged. In November 1997 the trial court departed from the guidelines by adopting the reasons put forth by the State, imposing the statutory maximum for each count, and further ordered that the four sentences be served consecutively: fifteen years in prison each for the attempted second-degree murder and escape convictions; a term of "natural life" in prison, i.e., without the possibility of release, for the kidnapping conviction; and five years in prison for the conviction of depriving the officer of his means of communication. On June 26, 2000, while his direct appeal was pending, the Supreme Court issued its Apprendi opinion. This court subsequently affirmed his convictions and sentences, remanding only for correction of two scrivener's errors in the written judgment. Kleppinger v. State, 779 So. 2d 472 (Fla. 2d DCA 2000). Mr. Kleppinger's direct appeal was final on November 27, 2000, when the mandate issued.

The Guidelines Departure Sentence vis-à-vis Apprendi and Blakely

In his rule 3.800(a) motion, Mr. Kleppinger does not name a particular sentence of the four he received that is illegal, only that the trial court departed from the guidelines based on the grounds suggested by the State rather than factors found by the jury beyond a reasonable doubt. Thus he claims that this was a judicial finding of departure reasons by a preponderance of the evidence in violation of Apprendi. See 530 U.S. at 489-90. In his initial brief, Mr. Kleppinger argues only a violation of Apprendi in the sentence of natural life for the kidnapping conviction. Kidnapping is a felony of the first degree punishable by life. § 787.01(1)(a)(2), Fla. Stat. (Supp. 1996). He claims that Apprendi applies to his sentence because his sentence was not final when Apprendi issued. Mr. Kleppinger further argues that the Supreme Court's subsequent clarification of Apprendi in Blakely did nothing to change the conclusion that his departure sentence is illegal under Apprendi.

In its order, the postconviction court admitted that Apprendi applied to Mr. Kleppinger's sentences because his direct appeal was not yet final when the Supreme Court issued Apprendi. But nevertheless the postconviction court denied him relief, explaining that because the life sentence for kidnapping was within the statutory maximum, Apprendi was not violated. This is the correct conclusion. See 530 U.S. at 490 ("Other 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." (emphasis added)).

We reject Mr. Kleppinger's further argument that Blakely should be applied retroactively to afford him relief. See Boardman v. State, 69 So. 3d 367 (Fla. 2d DCA 2011) (holding that a sentence that does not exceed the statutory maximum applicable

to the crime does not violate Apprendi and a defendant is not entitled to the benefit of Blakely when his sentence became final before Blakely was issued). Mr. Kleppinger's situation mirrors the defendant's in Boardman and requires the same result, i.e., that neither Apprendi nor Blakely affords him relief on his natural life sentence for kidnapping.

The postconviction court did not err in summarily denying Mr. Kleppinger's rule 3.800(a) motion on his asserted grounds of Apprendi and Blakely.

The "Natural Life" Sentence for Kidnapping

We initially affirmed the postconviction court's denial without a written opinion. But, for reasons not relevant here, we recalled the mandate in the instant appeal and allowed supplemental briefing to address the applicability of Graham, 130 S.Ct. 2011. In his supplemental brief, Mr. Kleppinger argues that Graham entitles him relief from the sentence he received for his kidnapping conviction, a term of "natural life." Mr. Kleppinger's argument on this point has merit.

In Graham, the Supreme Court held that the Eighth Amendment to the United States Constitution prohibits imposition of a life without parole sentence on a juvenile offender who did not commit a homicide and that the State must give a juvenile nonhomicide offender sentenced to life without parole a meaningful opportunity to obtain release. Id. at 2030, 2032-33; see also Manuel v. State, 48 So. 3d 94, 96-97 (Fla. 2d DCA 2010). At the time Mr. Kleppinger kidnapped the jail deputy, he was a juvenile, the kidnapping crime was not a homicide, and the trial court sentenced him to a term of natural life for the kidnapping conviction. Thus he fits squarely under the rubric of Graham and Manuel and his sentence for the kidnapping conviction constitutes a violation of the Eighth Amendment.

Conclusion

The postconviction court correctly denied relief grounded upon Apprendi and Blakely. However, Mr. Kleppinger's life sentence was rendered unconstitutional by the decision in Graham. Accordingly, we vacate his life sentence and remand for resentencing on the kidnapping count only. Because resentencing is "a de novo proceeding in which the decisional law effective at the time of resentencing applies," Mr. Kleppinger's new sentence must comport not only with Graham, but also with Apprendi and Blakely. State v. Fleming, 61 So. 3d 399, 400 (Fla. 2011).

Reversed and remanded for resentencing in accordance with this opinion.

KELLY and CRENSHAW, JJ., Concur.