Third District Court of Appeal

State of Florida, January Term, A.D. 2008

Opinion filed March 12, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D06-852
Lower Tribunal No. 90-16875

Samuel Geraldo Velez,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Ivan F. Fernandez, Judge.

Bennett H. Brummer, Public Defender, and Harvey J. Sepler, Assistant Public Defender, for appellant.

Bill McCollum, Attorney General, and Douglas J. Glaid, Assistant Attorney General, for appellee.

Before COPE, GREEN, and WELLS, JJ.

COPE, J.

This is an appeal of an order on the motion of defendant-appellant Samuel G. Velez to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a). We affirm.

The defendant maintains that he should have been personally present when the trial court entered an order resentencing him on count one. Under the circumstances of this case, the defendant is incorrect.

At his sentencing in 1991,[1] the court imposed a fifty-year sentence on count one. Velez v. State, 596 So. 2d 1197, 1199 (Fla. 3d DCA 1992). In his rule 3.800(a) motion, the defendant argued, and the trial court agreed, that the fifty-year sentence exceeded the thirty-year legal maximum on count one. The court entered an order reducing the sentence on count one to thirty years.

Under the circumstances of this case, it was not necessary for the defendant to be personally present for this resentencing. That is so because count one was concurrent with count two, on which the defendant is serving a life sentence. The controlling sentence is the life sentence. The reduction of the sentence on count one to the legal maximum, thirty years, was a ministerial act and the defendant was not entitled to be personally present. See Richardson v. Moore, 754 So. 2d 64, 65 (Fla. 3d DCA 2000); Windisch v. State, 709 So. 2d 606, 607 (Fla. 2d DCA 1998).

[1] The crime date on this count was April 27, 1990.

The defendant argues that his conviction on count two should have been for burglary, not armed burglary. He contends that he did not personally possess a firearm during the crime, and that the firearm was possessed by the co-defendant. He states that he was prosecuted as a principal for this crime.

The armed burglary was charged under paragraph 810.02(2)(b), Florida Statutes (1989), which makes the offense a first-degree felony punishable by life where the offender "[i]s armed, or arms himself within such structure . . . with . . . a dangerous weapon." Id.[2] When the weapon enhancement is imposed solely under the burglary statute, the principal theory is applicable and personal possession is not required. See Freeny v. State, 621 So. 2d 505, 506 (Fla. 5th DCA 1993).

[2] The burglary statute states, in part:

> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender:
>
> (a) Makes an assault or battery upon any person.
> (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.

§ 810.02(2), Fla. Stat. (1989).

The defendant relies on Williams v. State, 731 So. 2d 99 (Fla. 3d DCA 1999), but that case is not on point. The defendant in Williams was charged with burglary with an assault under paragraph 810.02(2)(a), Florida Statutes (1997), and the firearm enhancement was sought under section 775.087, Florida Statutes (1997). See Martin v. State, 795 So. 2d 143, 144 (Fla. 3d DCA 2001). Because a firearm enhancement under section 775.087 requires personal possession, see State v. Rodriguez, 602 So. 2d 1270 (Fla. 1992), and in Williams there was no personal possession, it followed that in Williams the firearm enhancement had to be set aside. Williams, 731 So. 2d at 101. The present case differs from Williams because in the present case the weapon enhancement was sought under the burglary statute, not section 775.087.

The remaining points are without merit.

Affirmed.