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

LESTER STAPLETON,

Appellant,

v. Case No. 5D18-3291

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed October 25, 2019

Appeal from the Circuit Court
for Orange County,
A. James Craner, Judge.

James S. Purdy, Public Defender, and M. Alexander Williams, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, J.

Lester Stapleton appeals the judgment and sentence imposed by the court following his trial. The sole issue that he raises on appeal is that the trial court erred in denying his Florida Rule of Criminal Procedure 3.800(b)(2) motion to correct sentencing error pending appeal. Stapleton argues that the recent revision to article X, section 9, of the Florida Constitution, commonly known as the "Savings Clause," removed the previous

bar on retroactive application of an amended sentencing statute. Stapleton argues that the revised Savings Clause requires him to be sentenced under the current version of section 775.087(2), Florida Statutes (2019), also referred to as the "10-20-Life" statute, because the appeal of his conviction was pending when both the revised Savings Clause and amended sentencing statute went into effect. Because the date of the commission of the crime dictates which punishment statute applies, the trial court did not err in denying Stapleton's motion and we affirm.

The State charged Stapleton with attempted first-degree murder with a firearm and aggravated assault with a firearm, stemming from an incident on February 23, 2016, when Stapleton pointed and discharged a gun towards the victim. The following day, Florida's Governor approved a bill which amended section 775.087, removing aggravated assault from the list of convictions carrying a minimum mandatory for use of a firearm. See ch. 2016–7, § 1, Laws of Fla. The amended statute took effect on July 1, 2016.

Following his trial, Stapleton's jury returned a verdict on October 10, 2018, finding him guilty of assault, a lesser-included offense, and aggravated assault with a firearm with a special finding that he discharged a firearm. At his sentencing hearing, Stapleton's counsel advised the court that at the time of the offense, section 775.087(2), Florida Statutes (2016), included aggravated assault with a firearm as an enumerated offense, requiring a twenty-year mandatory sentence. The trial court adjudicated Stapleton guilty of aggravated assault with a firearm and sentenced him to twenty years in prison as a

mandatory minimum sanction.[1] Stapleton appealed his judgment and sentence on October 18, 2018.

During the pendency of Stapleton's direct appeal, Florida voters approved Amendment 11 to the Florida Constitution, which amended the Savings Clause. The pre-amended Savings Clause stated, "[r]epeal of a criminal statute shall not affect prosecution for any crime previously committed." Art. X, § 9, Fla. Const. The amended Savings Clause states, "[r]epeal of a criminal statute shall not affect prosecution for any crime committed before such repeal." Art. X, § 9, Fla. Const. The new provision became effective on January 8, 2019. See Jimenez v. Jones, 261 So. 3d 502, 504 (Fla. 2018).

In February 2019, Stapleton filed a motion to correct sentencing error, arguing that because his direct appeal was pending when the Savings Clause was amended, he was entitled to receive the benefit of that amendment, as the Florida Constitution supersedes Florida Statutes. Specifically, Stapleton argued that by removing the words "amendment," "punishment," and "previously," and adding "before such repeal," the Savings Clause no longer contains the authority to prohibit retroactive application of amendments to sentencing statutes. Stapleton essentially argued that the amendment *requires* trial courts to apply an amended criminal statute retroactively to cases with pending appeals.

The trial court denied the motion without a hearing, finding that the version of the statute under which Stapleton was to be sentenced was the version in effect on the day he committed the crime. The court concluded that Stapleton was not entitled to retroactive

[1] The court entered a judgment of acquittal as to the assault conviction based on double jeopardy.

application of the amendment because his offense was committed prior to the date the amendment to section 775.087(2) became effective.

Whether section 775.087, Florida Statutes (2016), applies to Stapleton's sentence is a question of law this Court reviews de novo. See Smiley v. State, 966 So. 2d 330, 333 (Fla. 2007). Prior to its recent amendment, the Savings Clause prohibited the Legislature not only from making the repeal of a statute retroactive, but also from making an amendment to a criminal statute applicable to pending prosecutions or sentences. Jimenez, 261 So. 3d at 503–04. The recent amendment removed that prohibition, meaning that there is no longer any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to pending prosecutions or sentences. Id. However, nothing in the Florida Constitution *requires* the Legislature to do so, and the repeal of the prohibition does not require that it do so. Id.

Moreover, the Legislature did not attempt to apply section 775.087 retroactively. Effective June 7, 2019, section 775.022, Florida Statutes (2019), in relevant part, provides:

> (1) It is the intent of the Legislature that:
>
> (a) This section preclude the application of the common law doctrine of abatement to a reenactment or an amendment of a criminal statute; and
>
> (b) An act of the Legislature reenacting or amending a criminal statute not be considered a repeal or an implied repeal of such statute for purposes of s. 9, Art. X of the State Constitution.
>
> (2) As used in this section, the term "criminal statute" means a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.

> (3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:
>
> (a) The prior operation of the statute or a prosecution or enforcement thereunder.
>
> (b) A violation of the statute based on any act or omission occurring before the effective date of the act.

§ 775.022, Fla. Stat. (2019). Thus, neither the amended Savings Clause nor the amended version of section 775.087 requires that the trial court apply a new version of a sentencing statute that was amended during a pending appeal.

Additionally, Florida courts have consistently held that, based on article X, section 9, the criminal statute in effect *at the time of the crime* governs the sentence an offender receives for the commission of that crime. See Horsley v. State, 160 So. 3d 393, 406 (Fla. 2015); State v. Reininger, 254 So. 3d 996, 999 (Fla. 4th DCA 2018); Sheaffers v. State, 243 So. 3d 518, 519–20 (Fla. 1st DCA 2018).

The prohibition on retroactive application of statutes applies to statutes that effect *substantive* changes in the law rather than changes in the law that are merely procedural or remedial. Grice v. State, 967 So.2d 957, 960 (Fla. 1st DCA 2007). Changes to statutes affecting the sentencing for a criminal offense are substantive changes. Id. (describing a change as procedural "rather than of substance" because "[i]t does not relate to the elements of an offense *or the punishment therefor*" (emphasis added)). Therefore, it is well-settled that retroactive application of a sentencing statute is unconstitutional. Reininger, 254 So. 3d at 999.

There is no question that the version of section 775.087 in effect on the date that Stapleton committed his offense, February 2016, included aggravated assault as an

enumerated offense for which a twenty-year minimum mandatory sentence was required because Stapleton was found to have possessed and discharged a firearm during the commission of the enumerated offense. See § 775.087(2)(a), Fla. Stat. (2016). There is also no question that by the time Stapleton was convicted and sentenced, October 2018, for the crime, the offense of aggravated assault was removed from the list of enumerated offenses. § 775.087(2)(a), Fla. Stat. (2017). Despite such removal, the trial court was required to sentence Stapleton under the pre-amended statute and therefore, Stapleton's motion to correct sentencing error was properly denied.

AFFIRMED.

COHEN and LAMBERT, JJ., concur.