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

JENISE M. ORTIZ,

Appellant,

v. Case No. 5D19-1923

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed December 20, 2019

3.850 Appeal from the Circuit Court for Orange County, Keith F. White , Judge.

Robert Wesley, Public Defender, and David L. Redfearn, Assistant Public Defender, Orlando, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee

EDWARDS, J.

Appellant, Jenise M. Ortiz, appeals the postconviction court's denial of her "Successive Motion for Postconviction Relief: to Vacate, Set Aside, or Correct Sentence on Count Two" filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.800(a). She argues that the thirty-year sentence without provision for periodic judicial review she

received as a juvenile when she pled guilty to first-degree arson in 2000, is illegal due to the Eighth Amendment's prohibition against cruel and unusual punishment.[1] She also claims that it is a violation of the Equal Protection Clause to deny periodic judicial review of her thirty-year sentence prior to its completion as would be compelled for more serious crimes by sections 775.082, 921.1401, and 921.1402, Florida Statutes (2017). The postconviction court's denial was based upon an issue not raised by Appellant and its erroneous conclusion that Appellant was barred, by the doctrine of collateral estoppel, from litigating the issues she did raise. We reverse for the postconviction court to entertain Appellant's motion on its merits.

Appellant relies upon *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016), substantively to establish her claim and procedurally to justify filing the motion after the normal two-year deadline, asserting that her motion was filed in accordance with rule 3.850(b)(2) within two years of the *Kelsey* decision, which constituted the pronouncement of a new fundamental constitutional right, which applies retroactively. Essentially, Appellant argues that *Kelsey* expands upon *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012), and *Henry v. State*, 175 So. 3d 675, 679–80 (Fla. 2015), to provide a basis for holding that juveniles who are serving lengthy—although not life-long—prison sentences are entitled by the Eighth Amendment to periodic judicial review to determine whether they can demonstrate sufficient maturation and rehabilitation so as to be entitled to release prior to completion of their original sentences.

[1] She also pled guilty to second-degree murder in the same 2000 proceedings and received a thirty-five year prison sentence. Her postconviction motion as to that sentence resulted in a finding that she actually killed the victim, and would be entitled to judicial review on the murder conviction (Count One) in twenty-five years pursuant to section 921.1402(b), Florida Statutes (2017).

In *State v. Purdy*, 252 So. 3d 723, 726–27 (Fla. 2018), the Florida Supreme Court acknowledged that Florida's post-*Miller* juvenile statutory sentencing scheme provides periodic judicial review only for defined homicide offenses and nonhomicide offenses punishable by life, with no review mechanism provided for lower-level offenses. That potential for disparate treatment seems to be the basis of Appellant's Equal Protection claim. As *Purdy* focused on a certified question regarding statutory interpretation, it did not resolve the Eighth Amendment or Equal Protection issues raised by Appellant in her motion. *Id.* at 725. We express no opinion on the merits or resolution of those issues at this time to allow the postconviction court to consider them on remand.

Appellant previously filed other postconviction motions, but none raised the issues she argues in her current motion. The doctrine of collateral estoppel only precludes a defendant from relitigating the "same issues between the same parties in connection with a different cause of action." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (citing *Clean Water, Inc. v. Dep't of Envtl. Reg.*, 402 So. 2d 456, 458 (Fla. 1st DCA 1981)). This Court has stated the following:

> For the doctrine of collateral estoppel to apply to bar relitigation of an issue, five elements must be present: "(1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated." *Cook v. State*, 921 So. 2d 631, 634 (Fla. 2d DCA 2005). Whether collateral estoppel precludes litigation of an issue is reviewed de novo.

Criner v. State, 138 So. 3d 557, 558 (Fla. 5th DCA 2014).

Applying the de novo standard of review, only one element—number four—is satisfied in determining whether collateral estoppel applies because, given the nature of

the underlying criminal case, Appellant and the State are the same parties. As for the other elements of collateral estoppel, Appellant's prior challenges predate the genesis of juvenile sentencing reform. As only one element out of the five required elements is met, we conclude that the postconviction court erred in determining that Appellant is collaterally estopped from raising this claim.

Accordingly, we reverse the order denying Appellant's motion and remand for the postconviction court to consider and rule on Appellant's motion based upon its merit.

REVERSED AND REMANDED.

ORFINGER and LAMBERT, JJ., concur.