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

ANGEL COLON,

Appellant,

v. Case No. 5D16-1789

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed February 28, 2020

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

James S. Purdy, Public Defender, and Andrew Mich, Assistant Public Defender, Daytona Beach, for Appellant.

Ashely Moody, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

LAMBERT, J.

ON REMAND FROM THE FLORIDA SUPREME COURT

In an uncontested disposition order,[1] the Florida Supreme Court quashed our decision in *Colon v. State*, 211 So. 3d 355 (Fla. 5th DCA 2017), and remanded the case

[1] *Colon v. State*, 44 Fla. L. Weekly S251 (Fla. Nov. 19, 2019).

back to this court for reconsideration upon application of the court's decision in *Williams v. State*, 242 So. 3d 280 (Fla. 2018). We withdrew our prior opinion and mandate and ordered supplemental briefing from the parties, which we have now received.[2] After applying the court's decision in *Williams*, and for the reasons that we explain below, we affirm Colon's sentence.

PROCEDURAL BACKGROUND—

Angel Colon was convicted in 1997 following trial of the crime of first-degree murder committed when he was a juvenile. Colon was sentenced to serve life in prison with no opportunity for parole, and his conviction and sentence were affirmed on direct appeal. *Colon v. State*, 705 So. 2d 912 (Fla. 5th DCA 1998). In 2013, Colon filed a motion under Florida Rule of Criminal Procedure 3.800(a) contending that, in light of the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012), his life-without-parole prison sentence as a juvenile homicide offender was illegal and unconstitutional.

The trial court agreed, granted Colon's motion, and vacated his sentence. The court then scheduled Colon for resentencing under Florida's then-new juvenile sentencing laws codified at sections 775.082(1)(b), 921.1401, and 921.1402, Florida Statutes (2016). Prior to the resentencing hearing, Colon moved to declare a portion of section 775.082 unconstitutional because, in pertinent part, this statute directed that the trial court, rather

[2] In his concurring opinion to the disposition order, Chief Justice Canady, joined by Justices Polston and Lawson, wrote that "the Court has never considered on the basis of full briefing by the parties the issue of remedy addressed in *Williams v. State*, 242 So. 3d 280 (Fla. 2018). In my view, that issue will be ripe for reconsideration when it is properly presented to the Court." *Colon*, 44 Fla. L. Weekly S251. Based upon the Chief Justice's observation, we directed that the supplemental briefing address this issue.

than the jury, make written findings as to whether the juvenile killed, intended to kill, or attempted to kill the victim. This factual finding was significant for purposes of Colon's resentencing because under section 775.082(1)(b)1., a juvenile who had been convicted under section 782.04 of committing a capital felony before having attained eighteen years of age and who was found to have actually killed, intended to kill, or attempted to kill the victim was required to be sentenced to prison for at least forty years with a judicial review hearing after twenty-five years under section 921.1402(2)(a). However, a juvenile convicted of the same capital felony, but who was found to not have actually killed, intended to kill, or attempted to kill the victim faced no mandatory minimum prison sentence and, if his or her prison sentence exceeded fifteen years, was entitled to a judicial review hearing after fifteen years. *See* §§ 775.082(1)(b)2., 921.1402(2)(c), Fla. Stat. (2016). Colon requested that a jury be empaneled to make the factual finding of whether or not he actually killed, intended to kill, or attempted to kill the victim.

The court denied Colon's motion to find section 775.082 unconstitutional and to empanel a jury. It thereafter resentenced Colon to serve fifty years' imprisonment, with a review hearing after twenty-five years, based on its factual finding that Colon did actually kill or intend to kill the victim.[3]

Colon's direct appeal of this sentence was affirmed. *Colon v. State*, 211 So. 3d 355 (Fla. 5th DCA 2017).[4] However, in our opinion, we certified a question of great public importance to the Florida Supreme Court that we had just certified to the court in our

[3] We commend the court, which did not preside over Colon's trial in 1997, for its detailed and thorough order.

[4] Colon's appellate counsel filed what is commonly referred to as an *Anders* brief. *See Anders v. California*, 386 U.S. 738 (1967).

opinion in the case of *Williams v. State*, 211 So. 3d 1070 (Fla. 5th DCA 2017), released two weeks earlier. In *Williams*, we faced the same question that we did here, namely, whether the trial court or the jury makes the factual finding under section 775.082 as to whether the juvenile homicide offender actually killed, intended to kill, or attempted to kill the victim. The appellant in *Williams* had argued that pursuant to the United States Supreme Court's holding in *Alleyne v. United States*, 570 U.S. 99, 102 (2013), "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury," the provision in section 775.082(1)(b) that states the trial court, and not the jury, is to make the factual finding as to whether the juvenile homicide offender actually killed, attempted to kill, or intended to kill the victim, is unconstitutional. *Williams*, 211 So. 3d at 1071. Williams reasoned that because such a finding would "aggravate the legally prescribed range of allowable sentences," under *Alleyne*, the jury must make this determination. *Id.*

In our decision, we observed that while Williams's argument appeared to have merit, the Florida Supreme Court in *Falcon v. State*, 162 So. 3d 954, 963 (Fla. 2015), had directed the trial court to make the finding under section 775.082 whether the juvenile actually killed, intended to kill, or attempted to kill the victim. *Williams*, 211 So. 3d at 1073. Thus, in light of *Falcon*, we found that the trial court did not err in denying Williams's motion to empanel a jury to make this factual finding. *Id.* However, because it appeared to us that in *Falcon*, the Florida Supreme Court did not have the opportunity to address the applicability of the decision in *Alleyne*, we certified the following question to the court as one of great public importance:

> DOES *ALLEYNE v. UNITED STATES,* 133 S. CT. 2151, 186 L. Ed. 2d 314 (2013), REQUIRE THE JURY AND NOT THE

> TRIAL COURT TO MAKE THE FACTUAL FINDING UNDER SECTION 775.082(1)(b), FLORIDA STATUTES (2016), AS TO WHETHER A JUVENILE OFFENDER ACTUALLY KILLED, INTENDED TO KILL, OR ATTEMPTED TO KILL THE VICTIM?

Id. As previously mentioned, two weeks later, we certified this identical question in *Colon*. *See* 211 So. 3d at 355.

The supreme court accepted jurisdiction and quashed our decision in *Williams*. *Williams*, 242 So. 3d at 294. It answered the certified question in the affirmative, specifically holding that *Alleyne* requires that a jury must make the factual finding under the statute as to whether a juvenile offender actually killed, intended to kill, or attempted to kill the victim. *Id.* 293–94.[5] The court further held that, as a matter of first impression, an *Alleyne* violation can be considered harmless, but, for the error to be harmless, the record must demonstrate beyond a reasonable doubt that, given the opportunity, a rational jury would have found that the juvenile offender actually killed, intended to kill, or attempted to kill the victim. *Id.* at 290 (citing *Galindez v. State*, 955 So. 2d 517, 523 (Fla. 2007)). Finally, the majority of the court held that when there is a non-harmless *Alleyne* violation, the remedy is to resentence the juvenile offender pursuant to section 775.082(1)(b)2., the applicable provision when there is a finding that the juvenile offender did not actually kill, intend to kill, or attempt to kill the victim. *Id.* at 292.

Returning to the instant appeal, having reconsidered this case upon the various holdings made by the Florida Supreme Court in *Williams*, and having considered the

[5] The court also noted that it receded from its decision in *Falcon* "to the extent it concludes this determination is to be made by a trial court." *Williams*, 242 So. 3d at 288 n.7.

additional briefing from the parties, we now conclude that, as alternatively argued by the State, the *Alleyne* error that occurred in this case when the trial court, instead of the jury, made the factual finding that Colon actually killed or intended to kill the victim was harmless beyond a reasonable doubt.[6]

HARMLESS ERROR ANALYSIS—

The victim in this case was Kizzie McRae. She was shot at close range one morning while she slept on the couch in her residence. The State presented evidence at trial that showed that Colon, who was living with McRae at the time, had purposely set his alarm clock to arise that morning to shoot McRae prior to her waking. Colon was indicted on one count of committing premeditated first-degree murder by shooting McRae with a firearm and was the sole defendant indicted.

The State's evidence at trial showed that when Colon was arrested, he was found asleep with a .380 semiautomatic firearm under his pillow and that this firearm was the same firearm that killed McRae. The State also presented testimony from McRae's father that he had previously seen Colon in possession of what appeared to be the same firearm. Additionally, during the criminal episode that resulted in McRae's death, jewelry, guns, money, cocaine, and a vehicle were taken from her residence. These items were later found in Colon's possession several days after the murder.

The State made no argument at trial that there was another shooter who could have caused McRae's death. To the contrary, the State's trial evidence was that Colon

[6] As a result, the possibility of readdressing the appropriate remedy for a non-harmless *Alleyne* violation, raised by Chief Justice Canady in his brief concurring opinion, *see Colon*, 44 Fla. L. Weekly S251, is moot.

was the only shooter, primarily because he had confessed to law enforcement that he shot McRae. The State also presented testimony at trial from multiple witnesses, other than law enforcement officers, to whom Colon had also admitted to shooting McRae.

The jury returned its verdict finding Colon guilty of murder in the first-degree "as charged in the indictment." It also found, in a separate special verdict, that Colon "did use, carry or display a firearm in the commission of this offense."

We are unable to agree with the State's first argument that, by these verdicts, the jury in fact found that Colon had actually killed the victim and, thus, there was no *Alleyne* violation. Several factors support our conclusion. First, at trial, the court had separately instructed the jury to consider Colon's guilt on the alternative theory of first-degree felony murder. This instruction explained to the jury that it could find Colon guilty of felony murder if the State had proven beyond a reasonable doubt that McRae's death occurred as a consequence of Colon either engaging in or attempting to commit a robbery or while Colon or an accomplice were escaping from the immediate scene of a robbery.

Next, the court provided a principals instruction to the jury that it could find Colon guilty of first-degree felony murder if the State had proven beyond a reasonable doubt that Colon actually killed McRae or that McRae was killed by a person other than Colon, but that both Colon and the person who killed McRae were principals in the commission of the robbery. Third, while the jury found Colon guilty of first-degree murder, the general verdict form did not provide the jury with the option to differentiate between whether Colon was guilty of premeditated or first-degree felony murder. Lastly, we note that under similar circumstances, the court in *Williams* concluded that an *Alleyne* violation had occurred. 242 So. 3d at 289.

Assuming the *Alleyne* violation, because section 775.082(1)(b)1. requires a factual determination as to whether the juvenile offender actually killed, intended to kill, or attempted to kill the victim, and not if a premeditated murder was committed, *see Brown v. State*, 277 So. 3d 616, 622 (Fla. 3d DCA 2018), we next address whether the *Alleyne* error here was harmless. As previously indicated, this requires us to determine whether the record demonstrates beyond a reasonable doubt that, given the opportunity, a rational jury would have found that the juvenile offender actually killed, intended to kill, or attempted to kill the victim. *See Williams*, 242 So. 3d at 290.

Based on Colon's multiple admissions to several persons, including law enforcement, that he shot the victim, coupled with Colon being in possession of the murder weapon when arrested, no other person having been charged with the murder, nor there being any competent evidence at trial that anyone other than Colon was present at the time McRae was murdered, we conclude that had a rational jury been given the opportunity, it would have found, beyond a reasonable doubt, that Colon actually killed McRae with a firearm. Accordingly, the *Alleyne* violation here is harmless.

AFFIRMED.

EVANDER, C.J., and TRAVER, J., concur.