

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

DAKOTA MANUCY CONSTANTIN,

Appellant,

v.

Case No. 5D19-328

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed July 24, 2020

Appeal from the Circuit Court
for St. Johns County,
Howard M. Maltz, Judge.

Wayne F. Henderson, St. Augustine,
for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Carmen F. Corrente,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

AFFIRMED. *See Paul v. State*, 277 So. 3d 232, 239-40 (Fla. 1st DCA 2019)
(recognizing that sentencing court could consider misconduct where allegation was not
unsubstantiated but based on evidence); *Barlow v. State*, 238 So. 3d 416, 417 (Fla. 1st
DCA 2018) (recognizing that even if sentencing court had considered conduct that was

uncharged, this would not have been error because, inter alia, “[the conduct] . . . was not unsubstantiated”).

GROSSHANS and SASSO, JJ., concur.

COHEN, J., dissents with opinion.

COHEN, J., dissenting.

Dakota Constantin (“Constantin”) appeals from the judgment and sentence entered after he pled no contest to possession with intent to sell cannabis while armed and tampering with evidence.¹ He raises two points on appeal, only one of which merits discussion. Constantin argues that the trial court committed fundamental error by considering improper sentencing factors. I agree and would reverse and remand for resentencing before a different judge.

This case involves a number of criminal defendants, some of whom were juveniles at the time of the incident, including Constantin. It is undisputed that Sarah Itani and Kahlil Cooke arranged a meeting with Race Arthur to purportedly purchase marijuana from Arthur. In actuality, Itani and Cooke, along with two other individuals, Dalton Faulkner and Gerald Evans, intended to rob Arthur.² Evans was armed with a handgun, while Cooke had brass knuckles supplied by Faulkner.

Constantin, who was Arthur’s cousin, accompanied him to the drug deal, and both were armed. It is undisputed that Arthur arranged the deal, possessed the drugs, and was going to receive the proceeds from the transaction. Upon arrival, while Itani pretended to inspect the merchandise, Cooke and Evans, wearing masks, approached and began

¹ §§ 893.13(1)(a)2., 775.087(1), 918.13, Fla. Stat. (2018). The tampering with evidence charge stemmed from disposing of the firearm.

² Cooke appears to have been the mastermind of the robbery plan.

beating Constantin and Arthur. During the struggle, gunshots were exchanged by both sides, which resulted in Constantin and Arthur shooting and killing Cooke.³

The State charged the parties in two distinct groups. The first group consisted of Constantin and Arthur, who were charged with possession with intent to sell cannabis while armed and tampering with evidence, second and third-degree felonies, respectively. The second group included those who conspired to rob Arthur.⁴ Each individual within that group was charged with varying levels of second-degree felony murder in addition to several forms of robbery. Those charges ranged from life felonies to second-degree felonies, and each person within the second group faced sentences upwards to life imprisonment. All parties entered no contest pleas.⁵

Itani, Arthur, and Constantin were sentenced on the same day. Itani was sentenced first. The trial court commented that it hoped that people who thought marijuana was “not a big deal” would pay attention to the case, because what “seemed initially like a simple marijuana drug transaction ended up with one person dead and a bunch of young people going to spend a lot of their time in prison and their lives ruined as well.” Itani received a sentence of twelve years in the Department of Corrections.

³ The autopsy revealed the cause of death was injuries from two different projectiles.

⁴ The group was unaware that Constantin would be present.

⁵ Faulkner, who was an adult, entered into a negotiated plea with the State. His second-degree felony murder charge was dropped in return for a plea to robbery and tampering with evidence with a sentence of six years in the Department of Corrections, followed by nine years of probation. Evans entered into a negotiated plea as charged for a fifteen-year sentence. Itani pled no contest to a sentence range of ten to twenty years. Arthur and Constantin entered “open” pleas to the court with no agreed-upon sentence.

The sentencing of Arthur and Constantin followed. During their sentencing, the State conceded that it could not charge either Arthur or Constantin with Cooke's death because it had insufficient evidence to do so. The State noted:

As you know, the current state of the law is that it must be disproven that it was not self-defense. And in this particular case the way the circumstances of these facts and evidence fell out it was impossible to disprove that this was self-defense.

The deceased individual and his friends were committing a forcible felony on these young men, which by the state of the law provides a presumption that they were in fear of their life and was justified in using deadly force. The evidence in this case also showed that the two bullets that struck the deceased's body entered into his side, not in the front, not in the back. There was no clarity. It made it very—and it was—it was—we strongly considered those charges, but as an officer of the court we can't bring charges unless we can prove it, and in this particular case that was the reason we charged the case the way we did. And it's brought a lot of consternation to a lot of individuals, and rightfully so, and I understand that, and would feel the same way if I was in their position as well, but, again, I'm an officer of the court. Our office is—we are made up of officers of the court that can only pursue cases where there is evidence.

Despite that acknowledgement and the significant differences in how the two groups were charged, the State took the position that all the participants should be treated the same: that if Arthur and Constantin had not agreed to do a drug deal, "this wouldn't have happened."

The trial court's comments in sentencing Arthur and Constantin were consistent with the State's position. In sentencing Arthur, the trial court remarked:

The bottom line here is you brought a gun to a drug deal. You were engaged in a drug deal. You could have made the decision to not engage in a drug deal. You could have made the decision to not bring a gun to a drug deal. Had you made either of those decisions, you wouldn't be standing here facing

the serious charges that you're facing today and the decedent in this case would still be alive.

It is one thing to assert self-defense, and I appreciate the State clearing up why they did not charge Mr. Arthur and [Constantin] with felony murder. I understand the current state of the law with regards to self-defense does make it difficult for the State in facts like this to bring that type of charge. But it's one thing to engage in self-defense and shoot somebody when you're engaging in lawful activities. It's another thing to engage in self-defense and shoot somebody when you are not engaged in lawful activities. You were not engaged in lawful activities. You were engaged in a drug deal. As a result of your actions, somebody's dead.⁶

When sentencing Constantin, the trial court repeated its comments from Itani's sentencing that it wished other juveniles who thought "marijuana [was] not a big deal" could see what happened in the case. The court then told Constantin:

I cannot, again, lose sight of the fact that somebody's dead, that somebody is dead as a result of a drug deal that you participated in. Wasn't your weed, you weren't going to get the money, but you knew a drug deal was going to happen. I mean, you testified to that. That's no mystery.

You knew a drug deal was going to happen, you took a gun there, and because of that drug deal that you and your cousin were involved in, because of bringing a gun, and because of the conduct of the folks on the other side of this drug deal that went bad, there's somebody dead today, and dead in part because of the bullets that you fired and dead in part because of the bullet that your cousin fired and dead in part because of the conduct of the decedent and—his cohorts as well. So I take all that into consideration when I impose sentence in this case.

Constantin, who was seventeen years old at the time of the offense, had no prior criminal history. The Department of Juvenile Justice recommended a probationary sentence and the State of Florida Pre-Sentence Investigation recommended a youthful

⁶ Arthur was sentenced to twelve years in the Department of Corrections.

offender sentence followed by community control. Constantin's sentencing guideline scoresheet called for a non-state prison sentence. Despite these recommendations, the trial court sentenced Constantin to ten years on the first count and five years on the second count in the Department of Corrections, with the sentences to run concurrently.

On appeal, Constantin argues that the trial court improperly considered an uncharged, unsubstantiated allegation in imposing a ten-year sentence. He acknowledges that he failed to contemporaneously object to the trial court's comments. As a result, this Court may consider the error only if it is fundamental. Jackson v. State, 983 So. 2d 562, 574 (Fla. 2008).

Appellate courts review claims that a sentence was based on consideration of improper factors under the de novo standard. Kenner v. State, 208 So. 3d 271, 277 (Fla. 5th DCA 2016). Although appellate courts generally may not review a sentence that is within statutory limits under the Criminal Punishment Code, "an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence." Berben v. State, 268 So. 3d 235, 237 (Fla. 5th DCA 2019) (citing Kenner, 208 So. 3d at 277). One such impermissible factor is a trial court's consideration of uncharged, unsubstantiated crimes or misconduct. Nusspickel v. State, 966 So. 2d 441, 445 (Fla. 2d DCA 2007) ("Unsubstantiated allegations of misconduct or speculation that the defendant probably committed other crimes may not be relied upon by a trial court in imposing sentence."). "[W]hen a trial court relies on impermissible factors in sentencing a defendant, the court violates the defendant's due process rights, committing fundamental error." Berben, 268 So. 3d at 237 (alteration in original) (quoting N.D.W. v. State, 235 So. 3d 1001, 1002 (Fla. 2d DCA 2017)).

There is no need to speculate or guess whether the trial court, in sentencing Constantin on a drug-related charge, punished Constantin for uncharged conduct. During the course of the sentencing, the trial court made repeated references to Cooke's death and held both Arthur and Constantin responsible, despite neither being charged in his death. The similarity in sentences imposed between the two groups only serves to substantiate Constantin's claim that the trial court considered and punished Constantin for Cooke's death in imposing sentence.

Additionally, the trial court ignored the State's concession that it could not disprove that Constantin had acted in self-defense. Although Constantin's use of force during the drug transaction could have been a relevant factor in determining whether he lawfully used deadly force, see § 76.012(2), Fla. Stat. (2018), the State acknowledged that it could not charge Constantin due to the circumstances of the incident. The State explained to the trial court that it had "strongly considered" charging Constantin with Cooke's death but decided not to because it would have been "impossible" to overcome the presumption that Constantin had used lawful force.

The Legislature created the offense of possession of cannabis with intent to sell while armed. It determined the points to be used in sentencing that offense. The Legislature specifically factored in the bringing of a gun to a drug deal, a fact prominently mentioned by the trial court. The State was well aware of those elements. It admitted having considered bringing more serious charges against Constantin, and acknowledged there was insufficient evidence to do so. It is disingenuous for the State to decline to charge Constantin with Cooke's death either directly or as a principal, and then argue that Constantin should receive the same sentence as those charged with Cooke's death.

In summation, when the trial court sentenced Constantin, it improperly considered the uncharged death of Cooke and whether Constantin had engaged in lawful self-defense, which infringed on his due process rights. See Tharp v. State, 273 So. 3d 269, 271 (Fla. 2d DCA 2019) (stating that improper considerations of subsequent uncharged conduct in sentencing violates defendant's due process rights); see also Berben, 268 So. 3d at 237.

Accordingly, I would reverse and remand for resentencing before a different judge.⁷

⁷ I recognize that an earlier panel of this Court rejected similar arguments made by Arthur. Arthur v. State, 294 So. 3d 314 (Fla. 5th DCA 2020). In my view, that case was decided incorrectly.