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

MAURICE MARTINEZ SMITH,

Appellant,

v. Case No. 5D19-770

STATE OF FLORIDA,

Appellee.

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Opinion filed September 25, 2020

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

O.H. Eaton, Jr., Assistant Regional Counsel, Office of Criminal Conflict & Civil Regional Counsel, 5th District, Casselberry, for Appellant.

Maurice Martinez Smith, Clermont, pro se.

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

LAMBERT, J.

Maurice Martinez Smith appeals the judgments and sentences imposed by the trial court following his open, nolo contendere plea to one count of sale of a controlled substance in each of his two cases below. Smith's court-appointed counsel filed what is

commonly referred to as an *Anders*[1] Brief in this court, representing that after a thorough search of the record, counsel could not find a justiciable appellate issue worthy of presentation to the court. Following our independent examination of the record to discover any errors apparent on its face, *see State v. Causey*, 503 So. 2d 321, 322 (Fla. 1987) (holding that "pursuant to *Anders*, in order to assure indigents fair and meaningful appellate review, the appellate court must examine the record to the extent necessary to discover any errors apparent on the face of the record"), we directed counsel for both parties to file supplemental briefs to address whether the trial judge may have committed fundamental error during sentencing. For the following reasons, we vacate the sentences imposed and remand for resentencing before a different judge. We affirm Smith's convictions without further discussion.

The facts here are fairly unremarkable. Smith had been prescribed oxycodone for work-related back pain. Smith, who would later testify at his sentencing hearing that his family had been going through some financial difficulties, twice sold five of his oxycodone pills for $100 to an individual who turned out to be a confidential informant working for the St. Johns County Sheriff's Office.

Smith readily acknowledged his culpability for these crimes. However, due to the trial judge's questionable blanket policy of accepting no plea negotiations in cases involving the sale of opioids,[2] Smith and the State were precluded from attempting to

[1] *Anders v. California*, 386 U.S. 738 (1967).

[2] We are familiar with the trial judge's policy, as it has been previously raised in other appeals before our court. As specifically explained in a six-page memorandum provided to the State Attorney and the Public Defender offices, the judge, in an apparent effort to address the opioid epidemic personally, established a general policy where he would no longer accept negotiated pleas in any case in which a defendant was charged

negotiate a resolution to the cases. Instead, Smith tendered an open plea to the charges. Although his Criminal Punishment Code Scoresheet showed a lowest permissible sentence of 20.55 months in prison, Smith had not been convicted of a felony for many years. At the sentencing hearing, Smith requested that he be sentenced to serve 20.55 months' imprisonment in each case, but that his sentences be run concurrently. The State responded, recommending that Smith be sentenced to concurrent five-year prison sentences.

Prior to imposing sentence, the trial judge and Smith had the following conversation:

> THE COURT: Unless you're living under a rock you've obviously heard about people overdosing from heroin on a regular basis these days. It was over 70,000 people last year. You are familiar with that, right?
>
> [SMITH]: Yes, sir. I've heard of it, yes, sir.
>
> THE COURT: Okay. The way that often happens is, not always, but people get hurt, they -- the doctors prescribed pills, often over prescribe pills –
>
> [SMITH]: Yes, sir.
>
> THE COURT: -- eventually the doctors cut them off and then they got to get their pills from somewhere else so they start buying pills on the street, maybe someone who's buying pills from a friend, then they can't get the pills from their friend anymore so they start going to heroin and then the heroin gets mixed with something else and the next thing you know they're dead. It happens every day in every community across the United States. What you did is what leads to that.

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with selling, manufacturing, delivering, or trafficking in heroin or opioids because, in his view, plea bargains deprive the public of "transparency" as to how these cases are resolved. The judge, however, made an exception to his policy in that he would permit negotiated pleas in these cases where a defendant agreed to provide substantial assistance to law enforcement.

> [SMITH]: Yes, sir, I understand.
>
> THE COURT: What – you're giving the pills to somebody who's telling you that they got a problem and they can't get the pills from their doctor, that's what leads to people dying.

The judge then sentenced Smith to concurrent prison terms in excess of the State's recommendation, albeit within the statutory limit for each crime.

While appellate courts typically may not review a sentence that does not exceed statutory limits, "an exception exists when the trial court considers constitutionally impermissible factors in imposing a sentence." *Kenner v. State*, 208 So. 3d 271, 277 (Fla. 5th DCA 2016) (citing *Nawaz v. State*, 28 So. 3d 122, 124 (Fla. 1st DCA 2010)); *see also Shelko v. State*, 268 So. 3d 1003, 1005 (Fla. 5th DCA 2019) ("A trial court commits fundamental error when it considers constitutionally impermissible factors when imposing sentence." (citing *Yisrael v. State*, 65 So. 3d 1177, 1177 (Fla. 1st DCA 2011))). The above exchange led us to order additional briefing to address whether the trial judge committed fundamental error because it appeared that Smith's sentences were based, in large part, on factors wholly unrelated to any evidence contained in the record.

As observed by Smith's appellate counsel in one of his briefs, "one would think that such a minor drug transaction would be treated for what it is, and not as an opportunity to make an example of [Smith] in order to strike a blow in the war on drugs." Here, Smith was sentenced by a trial judge who was clearly focused on the ubiquity of an opioid crisis such that, in his view, Smith's sale of five oxycodone pills in each case would lead to a domino effect of heroin use by purchasers of the drug and their eventual deaths. Notably, none of the factors described in the trial court's comments prior to sentencing were supported by record evidence or raised by either party in the underlying

proceedings. Commendably, the State did not attempt to thereafter bootstrap its sentencing recommendation based on the court's comments.

One of the underlying principles of the judicial system is that the presiding judge must be fair, neutral, and impartial to all parties in reaching a just resolution based on the facts of the specific case. *See Williams v. State*, 143 So. 2d 484, 488 (Fla. 1962) (observing that litigants have the right to have their cases heard in a "[calm] and dispassionate environment before an impartial judge and have their rights adjudicated in a fair and just manner"). In those circumstances when a trial judge permits his or her emotions to guide the judge away from this bedrock foundation of neutrality and impartiality, an appellate court must reverse. *See Barnhill v. State*, 140 So. 3d 1055, 1061 (Fla. 2d DCA 2014) (en banc) (noting that "trial judges are required to rise above the disturbing nature of . . . [the] crimes and to provide every defendant a fair opportunity to be heard by an impartial judge who will consider only the evidence presented to the court within that case" (citing *Williams*, 143 So. 2d at 488)).

In *Barnhill*, the Second District Court, in a unanimous en banc decision, concluded that the trial court committed fundamental error when, following the defendant's open, guilty plea in a possession of child pornography case, it imposed a sentence based largely upon its stated concern of the "epidemic" of the "child pornography phenomenon" and the "50/50" likelihood of child pornographers having "hands-on [contact]," instead of sentencing the defendant based on the specific facts and circumstances of the case. *Id.* at 1057–58. The court held that the trial court fundamentally erred in lumping together the defendant with all similarly-charged defendants, irrespective of the testimony that the defendant presented at sentencing. *Id.* at 1061. It observed:

> [E]ven to the most casual observer, it could not be believed that Barnhill received a hearing in a dispassionate environment before a fair and impartial judge. Rather, the transcript reflects the trial judge here was deeply concerned not by the facts specific to Barnhill's case but by the general nature of the crimes involved and the potential for defendants charged with these crimes to progress into crimes involving "hands-on" contact with children.

*Id.*

It is clear that, much like in *Barnhill*, Smith did not receive a hearing in a dispassionate environment before an impartial judge. The sentences were not based on the facts specific to Smith's case. Rather, the judge focused almost entirely on the general nature of the crimes involved, which the judge, by his own written policy, had singled out for different treatment, together with the judge's professed belief, based on information from outside of the record, that Smith's actions, if not checked, will progressively lead to deadly or lethal consequences. When a trial judge appears to rely upon impermissible factors in sentencing, the State bears the burden of showing from the record as a whole that the judge did not do so. *Mosley v. State*, 198 So. 3d 58, 60 (Fla. 2d DCA 2015) (citing *Nusspickel v. State*, 966 So. 2d 441, 444–45 (Fla. 2d DCA 2007)). The State has not met its burden. Accordingly, we reverse Smith's sentences and remand for Smith to be resentenced by a different judge.

CONVICTIONS AFFIRMED; SENTENCES VACATED; REMANDED FOR RESENTENCING BEFORE A DIFFERENT JUDGE.

EDWARDS and TRAVER, JJ., concur.