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

STATE OF FLORIDA,

Appellant,

v. Case No. 5D19-2135

RICHARD MIDKIFF,

Appellee.

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Opinion filed July 2, 2020.

Appeal from the Circuit Court
for Orange County,
Leticia J. Marques, Judge.

Ashley Moody, Attorney General, and Rebecca Rock McGuigan, Assistant Attorney General, Daytona Beach, for Appellant.

Mark M. O'Mara, of O'Mara Law Group, Orlando, for Appellee.

EDWARDS, J.

The State appeals the circuit court's order that granted Richard Midkiff's postconviction motion in which he raised a single issue: seeking specific performance of his plea agreement that, inter alia, called for him to serve between 35 and 55 years in prison followed by 15 years on probation. The postconviction court erred because it considered the resentencing of Midkiff's co-defendant as newly discovered evidence. It

further erred because it granted specific performance of a non-existent contract. Rather than considering Midkiff's actual plea agreement, the court improperly focused upon language contained only in the co-defendant's plea agreement. After granting Midkiff's motion, the postconviction court resentenced Midkiff to time served, resulting in him being released from prison roughly 15 years prematurely. The resentencing of Midkiff's co-defendant did not constitute newly discovered evidence for the purposes of postconviction relief. Additionally, because there was no breach of Midkiff's plea agreement, he was not entitled to any relief. We find no miscarriage of justice in requiring Midkiff to fully serve his negotiated, legally imposed prison sentence. Accordingly, we quash the postconviction court's orders that granted Midkiff's motion and resentenced him, and remand for further proceedings consistent with this opinion.

MIDKIFF'S ROLE IN THE MURDER OF A FAMILY FRIEND

Midkiff was nineteen when he assisted his long-time friend and co-defendant, J. Patrick Swett, who was then seventeen, in the robbery and murder of Earl Waters. Midkiff testified as part of his August 8, 1997 plea colloquy and factual proffer that Waters was a family friend who allowed Midkiff to live with him for a period of time. Midkiff had known Waters for six or seven years when he was approached by Swett, who wanted to rob somebody because Swett said he wanted to fit in with everybody else who was "jacking" people on the street. Swett brought this idea up a couple of times, and they agreed Waters would be a good target, since they believed he would likely have some cash and drugs.

On January 24, 1996, after getting high on drugs and based in part upon the fact that Midkiff was in a bad mood after a fight with his fiancée, they set their plan in motion.

Midkiff supplied Swett with an operable, loaded pistol and drove him to Waters' house with the agreement that Midkiff would wait in the car while Swett pulled off the armed robbery. The robbery did not go as planned, and Swett fatally shot Waters in the chest with the pistol Midkiff provided. Midkiff drove the getaway car as he and Swett fled the scene of the crime. Later, Midkiff got rid of the murder weapon by giving it to another acquaintance.

THE CHARGES MIDKIFF FACED

Midkiff was arrested March 12, 1996, following which the grand jury indicted him for: (1) murder in the first degree; (2) armed robbery; (3) armed burglary; and (4) aggravated assault. On August 8, 1997, Midkiff, represented by his current counsel, Mark O'Mara, entered into a written plea agreement wherein he pled guilty to the reduced charge of second-degree murder and guilty as charged to the other three counts. Midkiff, individually and through counsel, and the State agreed that Midkiff would be sentenced to a prison term between 35 and 55 years with each side reserving the right to argue within that range. The plea deal took the possibility of Midkiff serving a life sentence off the table. Finally, Midkiff's plea agreement required him to testify truthfully in any other case if so requested, which indisputably referred to testifying against his co-defendant, Swett.

The trial court conducted a thorough plea colloquy with Midkiff, who confirmed that those were the only conditions of his plea agreement and that nothing else had been promised to him with regard to his guilty plea. Mr. O'Mara advised the court during the August 8, 1997 plea hearing that he read every word of the written plea form to Midkiff, and that Midkiff had a full understanding of it. The written, signed plea agreement

provided nothing beyond what is set forth above and included the standard language in bold type: "**No one has promised me anything to get me to enter the plea(s) except as stated herein.**" On that form, Midkiff explained that he was entering the guilty pleas "because I believe I am guilty." There was nothing in the written or oral plea regarding what might happen with Swett in the future and how it may concern Midkiff in any way.

As of August 8, 1997, the plea agreement was a binding contract between the State and Midkiff. At that time, it appeared that Swett was going to stand trial which might require Midkiff to testify. For that reason, the trial court announced that Midkiff's sentencing would be delayed until the close of Swett's case.

SWETT – THE DESIGNATED LOSER

On October 5, 1998, fourteen months after Midkiff pled guilty, Swett entered into a plea agreement with the State in which Swett pled no contest to second-degree murder, robbery with a firearm, armed burglary, and aggravated assault. Swett's written plea provided that Swett would be sentenced within the range of 35 to 55 years, which was the same range called for in Midkiff's plea agreement. However, Swett's plea agreement included a provision or caveat that Midkiff's did not regarding the proportionality of the two defendants' sentences. Swett became the designated loser, the polar opposite of an intended beneficiary, because no matter what sentence Midkiff ultimately received, Swett's plea agreement stated he was to receive a longer sentence than Midkiff. The plea agreement between Midkiff and the State was not amended following Swett's plea deal being reached.

SENTENCING OF MIDKIFF AND SWETT

Midkiff and Swett were sentenced during the same December 12, 1998 hearing. Midkiff went first and presented the testimony of various character witnesses in addition to his own testimony. Swett's presentation followed. The State then presented testimony and statements from the victim's family. The State sought the maximum of 55 years against both defendants, Midkiff's counsel sought leniency for his client, and Swett's counsel tried to convince the court to sentence him to 15 years in prison followed by 20 years of probation. The State objected to Swett's blatant attempt to renegotiate his plea agreement, and the State reminded the trial court of Swett's designated loser status, i.e., that because he was the shooter, Swett was to receive a longer sentence than Midkiff. The trial court then sentenced Midkiff to 38 years in the Department of Corrections with credit for jail time, followed by 15 years of supervised probation. As agreed between Swett and the State in Swett's plea agreement, the trial court sentenced Swett to six months longer in prison than Midkiff had received, together with the same period of probation that Midkiff was to serve.

SWETT RESENTENCED AND RELEASED

In 2018, Swett filed a motion based upon the *Graham/Miller*[1] line of cases that provided prisoners who were convicted while juveniles, such as Swett, a mandatory judicial review to determine if they had put aside their youthful criminal ways and become sufficiently rehabilitated so that they should be released from prison prior to completing their originally imposed sentences. Swett was successful in his motion and on April 6,

[1] *See Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

2018, he was resentenced to time served, resulting in his release from prison after serving 20 years of his original 38.5-year sentence.

JUVENILE RESENTENCING IS NOT NEWLY DISCOVERED EVIDENCE

Upon learning that Swett had been released from prison, Midkiff filed a motion for postconviction relief on July 23, 2018.[2] Midkiff asserted that he was entitled to seek relief pursuant to Florida Rule of Criminal Procedure 3.850 after the normal two-year deadline expired by claiming that Swett's resentencing pursuant to *Graham/Miller* amounted to newly discovered evidence, giving him additional time pursuant to rule 3.850(b)(1).[3] However, in a recently decided case that was not available to the postconviction court, a similar newly discovered evidence argument was rejected.

In *Archer v. State*, 293 So. 3d 455, 457 (Fla. 2020), the Florida Supreme Court reviewed, inter alia, a claim of newly discovered evidence by a petitioner seeking to vacate his sentence of death. Specifically, the petitioner argued that his co-defendant's release from prison on parole constituted newly discovered evidence because, during his penalty phase, the jury had been told his co-defendant would serve a life sentence. *Id.* The circuit court, in denying this claim, determined the petitioner's allegation was factually incorrect because—similar to the instant case—his co-defendant, "a seventeen-year-old at the time of the crimes, had actually been resentenced due to a change in the law invalidating most life sentences for juvenile offenders." *Id.* (citations omitted). Thus, the

[2] Midkiff claims in his motion that he learned of Swett's resentencing in May 2018.

[3] "There is no provision in the Florida Rules of Criminal Procedure for a 'motion to enforce plea agreement.'" *Dellofano v. State*, 946 So. 2d 127, 129 (Fla. 5th DCA 2007) (Lawson, J., concurring). However, rule 3.850 has repeatedly been utilized as the procedural vehicle for asserting such claims. *See, e.g.*, *Hall v. State*, 913 So. 2d 712, 713 (Fla. 1st DCA 2005).

circuit court had "explained that this resentencing 'for purely legal reasons' had no bearing on [the petitioner's] culpability and therefore would not probably result in a less severe sentence for [the petitioner]." *Id.* The Florida Supreme Court held that "if [the co-defendant] was resentenced pursuant to *Miller*, . . . the circuit court's ruling was legally correct." *Id.*; *see also Farina v. State*, 937 So. 2d 612, 620 (Fla. 2006) (finding that an attempt by a defendant sentenced to death to introduce his co-defendant's life sentence did not meet the threshold for relevant mitigating evidence because "[t]he reason [his co-defendant] did not receive the death penalty . . . had nothing to do with the circumstances of the crime or the presence or absence of aggravating or mitigating factors," but was rather for a "purely legal" basis, viz, his co-defendant was only sixteen years old at the time of the crime). Thus, procedurally, Midkiff's motion was time-barred. There are also compelling substantive reasons, discussed below, as to why it was error to have granted Midkiff's motion.

MIDKIFF'S MOTION FOR SPECIFIC PERFORMANCE

In his motion for postconviction relief, Midkiff asserted that Swett's resentencing constituted a breach of his plea agreement with the State, resulting in the supposed need to resentence Midkiff in order to correct what he claimed had become an illegal sentence. Midkiff made it clear that he was raising a single issue in this motion: the right to specific performance of his plea agreement. In his motion, Midkiff stated that he did not wish to and was unwilling to withdraw his plea.

PLEA AGREEMENTS ARE ENFORCEABLE CONTRACTS

"A plea agreement is a contract and the rules of contract law are applicable to plea agreements." *Obara v. State*, 958 So. 2d 1019, 1022 (Fla. 5th DCA 2007) (quoting *Garcia*

v. State, 722 So. 2d 905, 907 (Fla. 3d DCA 1998)). "A trial court's interpretation of a contract is reviewed de novo." *19650 NE 18th Ave., LLC v. Presidential Estates Homeowners Ass'n*, 103 So. 3d 191, 194 (Fla. 3d DCA 2012) (citation omitted).

According to contract law, there was no breach of Midkiff's plea agreement with the State. The plea agreement called for him to be sentenced to a prison term somewhere in the range of 35 to 55 years, and he was sentenced to 38 years. There was no reference in Midkiff's plea agreement to his co-defendant, and there was absolutely nothing in Midkiff's plea agreement suggesting that his sentence would be proportionately related to that of Swett, which is not surprising because when Midkiff pled guilty, Swett appeared to be heading towards trial and had not reached any sentencing agreement.

As noted above, Swett and the State reached a plea agreement over a year after Midkiff and the State did. Swett and the State were bound by the terms and conditions of Swett's plea agreement; however, nothing in Swett's agreement affected Midkiff's plea agreement. Thus, the fact that Swett's plea agreement provided that his sentence would be longer than Midkiff's did not directly or indirectly, intentionally or unintentionally, have any impact on Midkiff, which negates any argument by Midkiff that he was an intended third party beneficiary of Swett's plea deal.

SPECIFIC ENFORCEMENT OF NON-EXISTENT CONTRACT

There was no contract that provided for Midkiff to serve less time than Swett. Swett's designated loser status did not alter Midkiff's sentence. Thus, the postconviction court specifically enforced a non-existent contract when it granted Midkiff's motion. In so doing, the court attempted to rewrite the plea agreement; clearly, the court had no authority to do that. "When a contract is clear and unambiguous, the court is not at liberty

to give the contract 'any meaning beyond that expressed.' Further, when the language is clear and unambiguous, it must be construed to mean 'just what the language therein implies and nothing more.'" *Obara*, 958 So. 2d at 1022 (quoting *Walgreen Co. v. Habitat Dev. Corp.*, 655 So. 2d 164, 165 (Fla. 3d DCA 1995)). "[A] true ambiguity does not exist merely because a document can possibly be interpreted in more than one manner. Further, when a document's language is clear, a court cannot indulge in construction or interpretation of its plain meaning." *Lambert v. Berkley S. Condo. Ass'n*, 680 So. 2d 588, 590 (Fla. 4th DCA 1996) (citations omitted).

Midkiff's plea agreement became a binding, enforceable contract when it was reduced to writing and accepted in open court. At that point, no matter what became of Swett, Midkiff would be serving a prison term between 35 and 55 years. Even if Swett had never been tried for these crimes, Midkiff would be serving a prison sentence between 35 and 55 years. Likewise, if Swett had gone to trial and been acquitted, Midkiff would still be facing 35 to 55 years in prison. Thus, the postconviction court further erred in considering parol evidence in the form of discussions that may have taken place near the time of sentencing, nearly 18 months after Midkiff's plea agreement became a binding contract. Furthermore, the specific discussions were always that Swett would serve more time than Midkiff, and not that Midkiff would serve less time than Swett. Those conversations or comments are completely consistent with the designated loser aspect of Swett's plea agreement and have no bearing on Midkiff's deal. Therefore, when Swett was resentenced pursuant to *Graham/Miller* and released from prison sooner than Midkiff, there was no breach of Midkiff's plea agreement as he would have continued serving a

sentence within the agreed-upon parameters, but for the contested ruling that released him from prison.[4]

NO MISCARRIAGE OF JUSTICE

Midkiff asserted and the postconviction court found that requiring Midkiff to remain imprisoned after Swett was set free amounted to a miscarriage of justice; however, there is no competent substantial evidence supporting that conclusion. According to his written plea agreement, Midkiff pled guilty because he believed he was guilty. As part of the plea colloquy, he laid out for the court how he provided the murder weapon to Swett and actively participated in arranging for Swett to commit the armed robbery of Midkiff's family friend. All parties agreed that a sentence within the range of 35 to 55 years would be appropriate for that crime, and he was sentenced accordingly. The victim's family voiced their feelings: that releasing Swett before completing his prison sentence deprived them of justice. However, there is nothing in the record to suggest that requiring Midkiff to fully serve his agreed-upon sentence is a miscarriage of justice.[5]

CONCLUSION

As the resentencing of Swett did not amount to newly discovered evidence, the postconviction court erred in considering and granting Midkiff's postconviction motion, as

[4] Nor does *Dellofano*, 946 So. 2d at 128–29, apply here, as it involved the Department of Corrections revoking the defendant's gain time which had the effect of significantly lengthening the sentence called for in the defendant's written plea agreement. It is undisputed that Midkiff was sentenced as agreed and was actually serving the agreed-upon sentence.

[5] Midkiff apparently has petitioned the governor's office to have his sentence commuted based upon what is described as the remarkably favorable way in which he has served his prison sentence by engaging in self-improvement and both assisting and inspiring other inmates and their families. This opinion should not be construed as commenting on the merits of Midkiff's petition for commutation.

it was time-barred under rule 3.850. The postconviction court further erred in granting Midkiff's motion for specific performance because there was no breach of Midkiff's plea agreement, nor did Midkiff's plea agreement include the provision which the trial court found justified resentencing and releasing Midkiff. Accordingly, we quash the orders granting Midkiff's motion and resentencing him. We remand this matter to the postconviction court with instructions to reinstate Midkiff's original sentence and to order his return to the custody of the Department of Corrections.

REVERSED and REMANDED with INSTRUCTIONS.

LAMBERT and GROSSHANS, JJ., concur.