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

HERBERT LEON MANAGO, JR.,

Appellant,

v. Case No. 5D20-632

STATE OF FLORIDA,

Appellee.

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Opinion filed February 5, 2021

Appeal from the Circuit Court
for Volusia County,
Matthew M. Foxman, Judge.

Matthew R. McLain, of McLain Law, P.A., Longwood, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

EDWARDS, J.

Appellant, Herbert Leon Manago, Jr., was a juvenile at the time he committed first-degree felony murder in 2004. He originally received a mandatory sentence of life in prison with no possibility of parole for that charge. Based upon changes in juvenile sentencing laws, he petitioned to be and was resentenced. Appellant argues on appeal that the court should have resentenced him, regarding that charge, pursuant to section

775.082(1)(b)2., Florida Statutes (2014), as he requested and that the court erred by sentencing him pursuant to section 775.082(1)(b)1. We agree. We reverse and remand for further proceedings. As to all other issues raised by Appellant, we affirm without need for discussion.

Appellant was seventeen years old when he and three others carjacked a vehicle and shot the driver in the process. Appellant and two co-defendants were charged with first-degree felony murder in connection with the carjacking. The State presented evidence to the jury that Appellant was the shooter. The State argued to the jury and, at the State's request, the jury was instructed that Appellant could be found guilty as the shooter or under the principal theory. The jury returned its verdict, finding Appellant guilty as charged in the indictment of first-degree felony murder and of carjacking with a firearm. The verdict did not specify whether Appellant was the shooter, nor under which theory he was found guilty of first-degree felony murder.

In the years following his original sentencing, the law concerning juvenile sentencing has evolved. Appellant sought resentencing, claiming that his sentence of life without the possibility of parole was illegal for a juvenile. He sought to be resentenced pursuant to section 775.082(1)(b)2., which provides that a juvenile convicted of a capital felony, "who did not actually kill, intend to kill, or attempt to kill the victim," may be sentenced to prison for life or a term of years equivalent to life, but would be entitled to a review of his sentence under section 921.1402(2)(c), Florida Statutes (2014), after fifteen years.

However, the State requested that he be resentenced pursuant to section 775.082(1)(b)1. Section (b)1. provides that a juvenile defendant convicted of a capital

felony, "who actually killed, intended to kill, or attempted to kill the victim," may be sentenced to prison for a term of life, but must be sentenced to imprisonment for at least forty years if the court finds a life sentence inappropriate. A person sentenced under (b)1. would be entitled to a section 921.1402(2)(a) sentence review after twenty-five years.

While Appellant could still be sentenced to life under either section, if he were to be resentenced pursuant to (b)2., he would not face a mandatory minimum of forty years imprisonment and he would be entitled to a sentence review in fifteen rather than twenty-five years.

The Florida Supreme Court in *Williams v. State*, 242 So. 3d 280, 288 (Fla. 2018) held that, in accordance with *Alleyne v. United States*,[1] a defendant is entitled to have a jury, rather than the sentencing judge, determine whether the defendant "actually killed, intended to kill, or attempted to kill the victim." The court in *Williams* also held that an *Alleyne* violation[2] could be subject to a harmless error review. Thus, even if a trial court rather than a jury had made a finding of fact that led to a harsher sentence, *Williams* states that the *Alleyne* violation would be harmless if "the record demonstrates beyond a reasonable doubt that a rational jury would have found the juvenile offender actually killed, intended to kill, or attempted to kill the victim." *Id.* at 290.

Appellant argues that he was entitled to be resentenced under (b)2. rather than (b)1. because there was no finding by a jury that he "actually killed, intended to kill, or

[1] *Alleyne v. United States*, 570 U.S. 99 (2013). *Alleyne* is based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in which the Supreme Court held that the Sixth Amendment requires "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

[2] An "*Alleyne* violation" refers to a situation in which the sentencing court, rather than a jury, makes a finding of fact that increases the penalty for the crime.

attempted to kill the victim." The resentencing court acknowledged that *Williams* required a jury to determine the existence of the (b)1. factors. It noted that because Appellant was charged as either the actual killer or a principal and the verdict form did not identify under which theory he was guilty, there was an inadequate jury finding to sentence him under (b)1.

Rather than simply sentencing Appellant pursuant to (b)2., the resentencing court conducted its own analysis to determine if it could make the requisite findings of fact required under (b)1. In other words, the resentencing court engaged in the type of fact-finding specifically forbidden by both *Alleyne* and *Williams*. It reviewed the court file, including the entire trial transcript, and concluded that the record demonstrated beyond a reasonable doubt that a rational jury would have found that Appellant actually killed the victim. Thus, the resentencing court concluded that its own *Alleyne* violation would constitute harmless error.

Based on the resentencing court's conclusion that a rational jury would have found that Appellant actually killed the victim, Appellant was resentenced pursuant to (b)1. During sentencing, the court engaged in consideration of the factors set out in section 921.1401. The court concluded that a sentence of life imprisonment was appropriate and noted that Appellant would be entitled to a sentence review after twenty-five years of incarceration on the first-degree felony murder conviction. Appellant was also resentenced to a concurrent term of thirty years in prison for carjacking with a firearm with a sentence review after twenty years of incarceration.

We agree with the Third District "that harmless error is the standard that is applicable in the reviewing court; it is not the standard employed by the trial court during

resentencing." *See Green v. State*, 46 Fla. L. Weekly D17 (Fla. 3d DCA Dec. 23, 2020). The resentencing court erred in conducting a harmless error analysis to excuse its own concurrent *Alleyne* violation. "Even if the error could be considered harmless error, however, it is not appropriate for a [trial] court to commit error simply because it might be found to be harmless." *United States v. Salery*, 119 F. Supp. 2d 1268, 1272 n.3 (M.D. Ala. 2000). According to *Williams*, once the resentencing court determined that there was an insufficient jury finding to subject Appellant to sentencing under (b)1., it was compelled to sentence him pursuant to (b)2. *See* 242 So. 3d at 282, 292.

In *Green*, the Third District remanded that similar case "for resentencing pursuant to section 775.082(1)(b)2., or, if requested by the State, to empanel a jury to make the necessary factual determinations." 46 Fla. L. Weekly D17. There is certainly a logical and legal basis for empaneling a jury under certain resentencing scenarios to make factual findings that were not required in the original trial. As noted in *Green*, such a remedy is described as "proper" in *Gaymon v. State*, 288 So. 3d 1087, 1093 (Fla. 2020), which concerns a slightly different factual determination under section 775.082(10).

However, the supreme court in *Williams* specifically considered and rejected the option of empaneling a new jury to make the requisite findings, and clearly chose resentencing pursuant to section 775.082(1)(b)2. as the sole remedy on remand. 242 So. 3d at 292–93. Under *Hoffman v. Jones*, 280 So. 2d 431, 433 (Fla. 1973), we are compelled to follow *Williams*; therefore, we will not include the option of empaneling a jury to make the requisite factual findings on remand. We certify that our decision regarding available remedies on remand expressly and directly conflicts with the decision of the Third District in *Green* on the same question of law.

Accordingly, we reverse the resentencing order and remand with instructions to conduct a de novo resentencing of Appellant for his conviction of first-degree felony murder pursuant to section 775.082(1)(b)2., with consideration of the factors set forth in section 921.1401, and with provision for a fifteen-year sentence review in accordance with section 921.1402(c). We find nothing in the record that requires the resentencing be conducted by a different judge.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS, and CONFLICT CERTIFIED.

EISNAUGLE and TRAVER, JJ., concur.