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

ADAM JAMES PINE,

Appellant,

v.

Case No. 5D20-2460
LT Case No. 2019-CF-000830-A

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed December 30, 2021

Appeal from the Circuit Court
for Citrus County,
Richard A. Howard, Judge.

Matthew J. Metz, Public Defender, and
Darnelle Paige Lawshe, Assistant Public
Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Roberts J. Bradford, Jr.,
Assistant Attorney General, Daytona Beach,
for Appellee.

WOZNIAK, J.

Adam James Pine appeals his judgment of conviction and sentence for showing obscene material to a minor. We affirm without further

discussion the judgment of conviction but reverse Pine's sentence and remand for a jury to determine whether sentencing Pine to a nonstate prison sentence poses a danger to the public pursuant to section 775.082, Florida Statutes (2019). This partial reversal is necessary because the jury in the sentencing proceeding was incorrectly instructed to determine whether Pine himself—as opposed to a nonstate prison sentence—could present a danger to the public. The jury's finding that Pine could present a danger to the public provided the basis, pursuant to section 775.082(10), Florida Statutes, for the sentencing court to impose a five-year state prison sentence rather than a nonstate prison sentence for which Pine otherwise qualified.

Pine was charged with two counts of showing obscene material to a minor under sections 847.0133 and 847.001, Florida Statutes (2019). The jury found Pine guilty as to one count and not guilty as to the other. Pursuant to the State's request that the trial be bifurcated for sentencing purposes, a separate sentencing proceeding ensued. Because Pine had fewer than twenty-two sentence points, section 775.082(10) was critical to the sentencing process and provides in pertinent part:

> If a defendant is sentenced for an offense committed on or after July 1, 2009, which is a third degree felony but not a forcible felony as defined in s. 776.08, and excluding any third degree felony violation under chapter 810, and if the total sentence points pursuant to s. 921.0024 are 22 points or fewer, the court must sentence the offender to a nonstate prison sanction.

> However, if the court makes written findings that a nonstate prison sanction could present a danger to the public, the court may sentence the offender to a state correctional facility pursuant to this section.

§ 775.082(10), Fla. Stat. (emphasis added). Pursuant thereto, if the jury found that a nonstate prison sentence could present a danger to the public, Pine could be sentenced to a state correctional facility even though his sentence points qualified him only for a nonstate prison sanction.[1]

The parties disagreed as to the proper jury instruction to use during this proceeding. The jury instruction offered by the State and used by the trial court, over Pine's objection, instructed the jury to determine whether *Pine*, rather than the *nonstate prison sentence*, posed a danger to the public:

> Since you have found the Defendant guilty of Showing Obscene Material to a Minor, you must then answer the following question:
>
> 1. The Defendant could present a danger to the public?
>
> _____ Yes
> _____ No

[1] Despite section 775.082(10)'s directive that the court make written findings as to dangerousness, both sides and the trial court agreed that the jury should make the dangerousness finding, which comports with case law recognizing the constitutional issues involved if the court makes the finding as opposed to the jury. *Brown v. State*, 260 So. 3d 147, 151 (Fla. 2018) ("In order for a court to impose any sentence above a nonstate prison sanction when section 775.082(10) applies, a jury must make the dangerousness finding."); *Lamberson v. State*, 317 So. 3d 286, 288–89 (Fla. 2d DCA 2021) (recognizing the unconstitutionality of having the court make the special finding under section 775.082(10) rather than the jury).

Pine argues, as he did below, that the jury should have been instructed to determine whether a *nonstate prison sentence*, and not Pine himself, posed a danger to the public. We agree.

The plain language of section 775.082(10) unambiguously required the jury to consider whether the nonstate prison sentence, not Pine himself, would be a danger to the public. *See Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (observing that in interpreting statutes, Florida courts "follow the 'supremacy-of-text principle'—namely, the principle that '[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means'"). While the difference between the two may seem negligible at first glance, there exist sentencing options other than state prison which could limit the danger a defendant might pose to the public. *Ryerson v. State*, 189 So. 3d 1047, 1048 (Fla. 4th DCA 2016) (listing possible alternatives to a state prison sentence, including probation, community control, or imprisonment in the county jail for not more than a year). Further, this Court has held that any danger to the public found by the jury must be specifically related to the nonstate prison sentence. *Riordan v. State*, 275 So. 3d 226, 228 (Fla. 5th

DCA 2019) ("The court 'must make findings to establish a nexus between sentencing an offender to a nonstate prison sanction and the resulting danger that a nonstate prison sanction could present to the public.'" (quoting *Reed v. State*, 192 So. 3d 641, 648 (Fla. 2d DCA 2016))). Consequently, the instruction offered by Pine was correct, and the trial court erred in denying the requested instruction.

We affirm the judgment of conviction but reverse the sentence and remand to the trial court for resentencing with the instruction that a jury be empaneled to determine whether sentencing Pine to a nonstate prison sentence poses a danger to the public pursuant to section 775.082(10). *See Stewart v. State*, 558 So. 2d 416, 420 (Fla. 1990) (holding that when a trial court reversibly errs in denying a request for a jury instruction, a new sentencing proceeding is necessary).

AFFIRMED in part, REVERSED in part, REMANDED for further proceedings.

EVANDER and WALLIS, JJ., concur.