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

KEVIN E. WILMOT,

Appellant,

v. Case No. 5D21-1032

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed July 2, 2021

3.800 Appeal from the Circuit Court for Volusia County,
Dennis Craig, Judge.

Kevin E. Wilmot, Blountstown, pro se.

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

PER CURIAM.

Kevin Wilmot appeals the postconviction court's summary denial of his Florida Rule of Criminal Procedure 3.800(a) motion to correct an illegal

sentence in Volusia County Circuit Court Case No. 2000-35019-CFAES. We affirm the postconviction court's order and caution Wilmot that abusive, repetitive, malicious, or frivolous filings directed to Volusia County Circuit Court Case No. 2000-35019-CFAES may result in sanctions such as a bar on pro se filings in this court and referral to prison officials for disciplinary proceedings, which may include forfeiture of gain time. *See State v. Spencer*, 751 So. 2d 47 (Fla. 1999); § 944.279(1), Fla. Stat. (2020).

AFFIRMED; WARNING ISSUED.

EDWARDS and EISNAUGLE, JJ., concur.
LAMBERT, C.J., concurs and concurs specially, with opinion.

LAMBERT, C.J., concurring specially. 5D21-1032

Wilmot was convicted of burglary of a dwelling with battery, attempted sexual battery, and aggravated battery upon a pregnant person after a trial that was held just over twenty years ago. These crimes occurred during a single criminal episode and involved the same victim. The trial court sentenced Wilmot as a Prison Releasee Reoffender ("PRR") to serve life in prison for the burglary of a dwelling with battery conviction and to fifteen years in prison on his other two convictions, with the sentences to be served consecutively. Wilmot's direct appeal of his convictions and sentences was affirmed without opinion. *Wilmot v. State*, 806 So. 2d 502 (Fla. 5th DCA 2002).

Wilmot argued in his instant rule 3.800(a) motion that his life sentence for the burglary of a dwelling with battery conviction "is unlawful where the sentence [has been] unconstitutionally enhanced." Wilmot explained that the one battery that he committed was "enhanced" to an aggravated battery solely because the victim was a pregnant person, thus, the battery was "used up," and it was therefore unlawful for the trial court to "use" it a second time to enhance the crime of burglary of a dwelling to the crime of burglary of a dwelling with battery for which he was convicted. Wilmot extrapolated that,

due to this error, his life sentence for burglary of a dwelling with battery[1] was resultingly "unlawfully enhanced" and, thus, illegal, asserting that the only lawful sentence that could have been imposed for his burglary conviction was no more than fifteen years' imprisonment.[2]

The postconviction court denied Wilmot's motion as successive for having unsuccessfully raised this same argument in a prior rule 3.800(a) proceeding. It then alternatively denied the motion because "double jeopardy claims are not cognizable in a motion to correct an illegal sentence." *See Rodriguez v. State*, 295 So. 3d 849, 849–50 (Fla. 5th DCA 2020). The court also recognized that "there is no statutory or constitutional bar to the entry of convictions for both aggravated battery and burglary with a battery

[1] Burglary of a dwelling with a battery is a first-degree felony punishable by up to life in prison. *See* § 810.02(2)(a), Fla. Stat. (2000) ("Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . if, in the course of committing the offense, the offender . . . [m]akes an assault or battery upon any person . . . .").

[2] Burglary of a dwelling is a second-degree felony. *See* § 810.02(3)(a), Fla. Stat. (2000) ("Burglary is a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084, if, in the course of committing the offense, the offender does not make an assault or battery and is not and does not become armed with a dangerous weapon or explosive, and the offender enters or remains in a . . . [d]welling, and there is another person in the dwelling at the time the offender enters or remains . . . ."). A second-degree felony is punishable by up to fifteen years in prison. *See* § 775.082(3)(c), Fla. Stat. (2000).

arising out of the same criminal episode." *See State v. Reardon*, 763 So. 2d 418, 419 (Fla. 5th DCA 2000).

Wilmot argues on appeal that the postconviction court erred because "its interpretation of [his] motion [as a double jeopardy claim] is completely wrong" and that a "manifest injustice" occurred when he was sentenced in 2001 to serve life in prison for this conviction. The postconviction court did not err.

Setting aside for a moment that, on its face, Wilmot's motion is meritless because, as indicated,[3] a life sentence for a burglary of a dwelling with a battery conviction is entirely permissible, and, in Wilmot's case, was required,[4] Wilmot provided no citations of authority as to how, substantively, the "two enhancements" that he complains of caused this sentence to be "unconstitutional and illegal." Giving Wilmot a generous benefit of the doubt that his argument was based on this court's opinion in *Crawford v. State*, 662 So. 2d 1016, 1017 (Fla. 5th DCA 1995) (holding on direct appeal that the battery that the defendant committed in the burglarized dwelling could not be used both to enhance the nature of the burglary offense to a first-degree

[3] *See supra* footnote 1.

[4] As a PRR, Wilmot was required under section 775.082(9)(a)3.a., Florida Statutes (2000), to be sentenced to serve life in prison for his burglary of a dwelling with battery conviction.

felony and to support the separate aggravated battery conviction), it necessarily fails because *Crawford*'s viability was short-lived.

Five years after this court issued *Crawford*, we receded from that decision in *Reardon*.[5] *See* 763 So. 2d at 418–19. There, we concluded that the defendant's convictions for aggravated battery and burglary with a battery, which both arose from the same battery, did not violate the constitutional prohibition against double jeopardy, nor was there any statutory proscription under section 775.021(4)(b), Florida Statutes (1997), against these dual convictions and sentences. *Id.* at 419–20. In fact, in *Reardon*, we specifically recognized that "the [Florida] Legislature clearly intended to separately punish burglary as enhanced and battery as enhanced." *Id.* at 419. Thus, Wilmot's present argument was actually rejected by our court prior to his 2001 trial.

Accordingly, I concur with the majority's affirmance and have written in

[5] Moreover, even if *Crawford* was still valid precedent, Wilmot would not have been entitled to the relief that he requested in his motion. Without addressing whether Wilmot could even pursue this type of claim in a rule 3.800(a) proceeding, at best, his lesser conviction for the aggravated battery of a pregnant person would have been vacated, but his burglary of a dwelling with battery conviction, and his concomitant life sentence required as a PRR, would have remained unaffected. *See Crawford*, 662 So. 2d at 1018 (reversing appellant's separate conviction for aggravated battery and remanding for resentencing for the first-degree burglary with a battery).

an effort to make clear to Wilmot that he is not entitled to relief and that it is time for him to end his repeated, meritless attacks on his convictions and sentences.[6] To that end, I specifically agree with the majority's issuance of the "*Spencer*" warning that sanctions will be forthcoming if Wilmot's pro se filings here continue.

[6] Wilmot's separate incantation of having suffered a "manifest injustice," an all-too-frequently-raised claim by defendants who have been unsuccessful in their earlier postconviction proceedings, is meaningless and merits no further discussion.