IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

AUNDRA R. AKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-5807

Opinion filed November 30, 2012.

An appeal from the Circuit Court for Jefferson County.
Frank E. Sheffield, Judge.

Aundra R. Akins, pro se, Appellant.

Pamela Jo Bondi, Attorney General, Trisha Meggs Pate, Assistant Attorney General, and Joshua Heller, Assistant Attorney General, Tallahassee, for Appellee.

BENTON, C.J.

Aundra R. Akins argues that his life sentence without the possibility of parole for attempted murder is unconstitutional under Graham v. Florida, 130 S. Ct. 2011 (2010), which held that juvenile offenders may not be sentenced to life without the possibility of parole for a nonhomicide crime. Id. at 2030. Because

appellant was 14 when he attempted first-degree murder, appellant's life sentence with no possibility of parole for the attempt is illegal under Graham. Accordingly, we reverse and remand for resentencing.

In 1993, an indictment charged appellant with first-degree murder (count 1), attempted first-degree felony murder (count 2), two counts of attempted robbery with a firearm (counts 3 and 4), and shooting into an occupied vehicle (count 5). Under a plea agreement in 1995, he pleaded guilty to the lesser-included offense of second-degree murder on count 1, and guilty as charged to count 2, in exchange for a sentence cap of 40 years' imprisonment on each count, and dismissal (nolle prosequi) of counts 3, 4 and 5. After his plea, but before sentencing, our supreme court decided State v. Gray, 654 So. 2d 552 (Fla. 1995), which held that the crime of attempted felony murder did not exist. When Gray came down, the parties stipulated to the substitution of attempted first-degree premeditated murder for attempted first-degree felony murder on count 2. Appellant was then convicted and sentenced on counts 1 and 2 to concurrent terms of 27 years in prison.

On direct appeal, the conviction and sentence on count 1 (second-degree murder) were affirmed but appellant's conviction and sentence on count 2 (attempted first-degree premeditated murder) were vacated, on grounds that the indictment charging the non-existent crime of attempted felony murder could not be amended by stipulation to charge attempted premeditated murder. See Akins v.

State, 691 So. 2d 587, 589 (Fla. 1st DCA 1997). On remand, the state filed an information charging appellant with attempted first-degree murder. On August 29, 1997, following his jury trial on remand, the appellant was convicted as charged, and sentenced to a term of natural life, with no possibility of parole.

Later appellant filed a motion pursuant to Florida Rule of Criminal Procedure 3.850, relying on Graham as a basis for filing beyond the two-year limitations period, as well as for relief on the merits. The lower court reached the merits but denied the appellant's motion, holding that Graham does not prohibit a sentence of life imprisonment for a juvenile convicted of a nonhomicide offense if the juvenile has also committed a homicide offense. We reject this view and hold that Graham precludes a life sentence[1] in the present case.

In stating early on in the opinion that "[t]he issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime," id. at 2017-18, the Graham Court clearly identified the question it was deciding. The Court concluded that "those who were below [18] when the offense was committed may not be sentenced to life without

[1] Appellant has not argued that his life sentence is unlawful merely because it exceeds his original twenty-seven-year sentence or merely because it exceeds the forty-year cap originally negotiated. See generally Lafler v. Cooper, 132 S. Ct. 1376, 1384, 1389 (2012). On the other hand, appellant has not had counsel since the direct appeal concluded. See Missouri v. Frye, 132 S. Ct. 1399, 1413 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to advice concerning plea offers that lapse or are rejected).

parole for a nonhomicide crime." Id. at 2030. Appellant falls squarely within the purview of the rule of Graham in that he was sentenced to a term of life without parole for the nonhomicide crime of attempted first-degree murder committed when he was under the age of 18. See McCullum v. State, 60 So. 3d 502, 503-04 (Fla. 1st DCA 2011) (finding that attempted second-degree murder is a nonhomicide offense under Graham), review denied, 67 So. 3d 1050 (Fla. 2011); Manuel v. State, 48 So. 3d 94, 97 (Fla. 2d DCA 2010) (holding that attempted first-degree murder is not a homicide offense under Graham). But see Twyman v. State, 26 A. 3d 215 (Del. July 25, 2011) (Table). Although appellant also committed a homicide, he was sentenced for the homicide, not to life without parole, but to twenty-seven years in prison.

The life sentence appellant received was solely for the attempt, a nonhomicide offense. Cf. Washington v. State, 37 Fla. L. Weekly D154 (Fla. 2d DCA Jan. 18, 2012) (sentences reversed and case remanded for resentencing where a juvenile offender received life sentences for both homicide and nonhomicide offenses).[2] Since parole is not a possibility, appellant's sentence runs afoul of the

[2] In Washington v. State, 37 Fla. L. Weekly D154 (Fla. 2d DCA Jan. 18, 2012), the court declined to rule out a life sentence for a nonhomicide offense imposed simultaneously with a life sentence for an accompanying homicide, saying of Graham:

> We are not required to reverse these sentences under the Supreme Court's holding in Graham v. Florida, 130 S. Ct. 2011 (2010). Employing a categorical approach, the

> Supreme Court in Graham held that life without possibility of parole was a cruel and unusual punishment for all juvenile offenders who commit nonhomicide offenses. Graham, 130 S. Ct. at 2030. In so holding, it noted an exception for juveniles who commit nonhomicide offenses in conjunction with homicide offenses. See id. at 2023. Because the homicide offense can be an aggravating factor in the sentencing of the nonhomicide offense, the Supreme Court indicated that a life sentence without possibility of parole for a nonhomicide offense could be constitutional if it accompanied an authorized sentence of life without possibility of parole for a homicide offense. See id.

Id. at D155 (footnote omitted). In arriving at this conclusion, the Second District explicitly relied on the following passage from Graham:

> Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished in part for the homicide when the judge makes the sentencing determination. The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.

Graham, 130 S. Ct. at 2023. The Second District described the language it quoted from Graham in the Washington decision as dicta. See Washington v. State, 37 Fla. L. Weekly at D155 n.1.

We agree that the language from Graham quoted in Washington is not controlling. This language has no application here. As we read Graham, the Supreme Court mentions this "different situation" for the limited purpose of rebutting Florida's contention in Graham that a nationwide study supporting the notion that juvenile offenders serving life without parole are rare was flawed because it failed to count juvenile offenders who, convicted of both homicide and nonhomicide offenses, received life sentences for the nonhomicide offenses as well as for the homicides. Id. at 2023. Read in context, the passage from Graham the Second District quotes explains the adoption of, but does not purport to qualify, what the Graham opinion itself calls a categorical rule.

rule laid down in Graham. The Court does say that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Graham, 130 S.Ct. at 2034. But we do not take this as a renunciation of the rule stated elsewhere in Graham that juveniles may not constitutionally be punished for nonhomicide crimes by life imprisonment with no possibility of parole. We see nothing in Graham that would permit imposing life sentences without parole for nonhomicide offenses, even if the juvenile has committed a homicide in some earlier episode or, as here, was earlier sentenced to a term of years for a homicide.

Reversed and remanded.

LEWIS, J., CONCURS; ROWE, J., DISSENTS WITH OPINION.

ROWE, J., dissenting.

I respectfully dissent. Because appellant was convicted of the offense of second degree murder, an offense he committed simultaneously with the nonhomicide offense for which he seeks resentencing, he is not entitled to relief under Graham v. Florida, 130 S.Ct. 2011 (2010).

The Supreme Court in Graham announced a categorical ban precluding the imposition of life-without-parole sentences on juveniles convicted of non-homicide crimes.

> This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.

Id. at 2030 (emphasis added). Thus, in explaining the limitations of the categorical ban announced in Graham, the Supreme Court provided a bright-line test, dividing juveniles convicted of non-homicide offenses from juveniles convicted of homicide offenses. This conclusion is supported by the Supreme Court's characterization of Graham in its recent decision in Miller v. Alabama, 132 S.Ct. 2455 (2012):

> To be sure, Graham's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based both on moral culpability and consequential harm . . . . Graham's . . . categorical bar relates only to nonhomicide offenses.

Id. at 2465.

The majority acknowledges that the Supreme Court in Graham expressed that "[j]uvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide" and that "[t]he instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense." Id. at 2023 (emphasis added). However, the majority characterizes the foregoing language as mere dicta.

I respectfully disagree with the majority and would apply Graham as written. The Graham majority limited the categorical ban against life-without-parole sentences to cases involving juveniles who have not committed murder. Id. at 2017-18, 2030, 2033. The holding in Graham does not offer relief to juvenile offenders who commit nonhomicide offenses in conjunction with homicide offenses. Id. Here, because appellant committed the offense of second-degree murder simultaneously with the nonhomicide offense of attempted first degree murder, the holding in Graham does not bar his sentence for life without the possibility of parole. I would therefore affirm the trial court's order denying the appellant's post-conviction motion seeking resentencing under Graham. Further, I would decline the invitation to expand the holding of Graham beyond the "clear line" established in that case. Id. at 2030. If the Supreme Court intends for the

categorical ban announced in Graham to extend to juvenile offenders convicted of homicide offenses, it will have to say so. See Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012) (declining to extend the holding in Graham to a juvenile who received an aggregate 89-year sentence for multiple non-homicide offenses); Henry v. State, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012) (declining to extend the holding in Graham to a juvenile who received a lengthy term-of-years sentence for nonhomicide offenses); Walle v. State, 2D11-1393, WL 4465555 (Fla. 2d DCA 2012, Sept. 28, 2012) (declining to extend the holding in Graham to a juvenile who received sentences totaling sixty-five years for multiple non-homicide offenses).