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

ANTHONY JULIAN COLLINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

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

CASE NO. 1D14-4828

Opinion filed April 25, 2016.

An appeal from the Circuit Court for Duval County.
Kevin A. Blazs, Judge.

Nancy A. Daniels, Public Defender, Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, Trisha Meggs Pate, Bureau Chief-Criminal Appeals, Angela R. Hensel, Assistant Attorney General, Tallahassee, for Appellee.

THOMAS, J.

This appeal follows Appellant's resentencing as to one count based on Graham v. Florida, 560 U.S. 48 (2010). Appellant asserts that the lower court erred and he is entitled to resentencing under Graham and its progeny, including the recent juvenile sentencing legislation and Florida Supreme Court decisions. Based on this court's binding precedent, we affirm.

Appellant was convicted of carjacking with a firearm (count 1), attempted second degree murder (count 2), and attempted armed robbery (count 3). He was originally sentenced to 20 years in prison with a minimum mandatory of 10 years as to count 1, life in prison with a minimum mandatory of 25 years as to count 2, and 25 years with a minimum mandatory of 25 years as to count 3. Subsequently, based upon Graham, he was granted resentencing as to count 2.

Appellant was age 16 years 10 months at the time he committed the offenses in this case. Appellant's counsel presented witnesses at resentencing who testified to Appellant obtaining his GED while in prison. Conversely, the State presented evidence that Appellant had received approximately 12 disciplinary reports while in prison. The mother of the victim in count 2 testified at resentencing that her son was 22 years old when Appellant shot him, which paralyzed her son for life. She further informed the court that her son could never have children. Additionally, the victim's mother testified that her son continued to have hospital stays every month due to infections and bed sores.

The lower court ultimately resentenced Appellant in count 2 to 35 years with a minimum mandatory of 25 years, followed by 15 years of probation, to run consecutive to count 1. The amended judgment reflects that count 3 was to still run concurrent with count 2. The court rejected Appellant's arguments that he had to be resentenced again as to all three counts under the 2014 juvenile sentencing

legislation, relying on this court's recent opinion in Lambert v. State, 170 So. 3d 74 (Fla. 1st DCA 2015). The court found that his new aggregate sentence would require him to serve at least 52 years in prison, and his earliest eligibility for release would be at age 66 years 8 months; if serving his full 55-year sentence, he would be released at age 69 years 8 months. The court noted a life expectancy between 73 and 84.4 years, concluding that because his age upon release did not exceed his life expectancy, his aggregate sentences did not constitute a *de facto* life sentence.

We agree that Lambert, as well as this court's more recent opinions in Abrakata v. State, 168 So. 2d 251 (Fla. 1st DCA 2015), and Kelsey v. State, 183 So. 3d 439 (Fla. 1st DCA 2015) (on motion for rehearing), *review granted*, 2015 WL 7720518 (Fla. Nov. 19, 2015), are binding precedent. Thus, we hold that Appellant's aggregate sentence of 55 years does not amount to a *de facto* life sentence.

In light of our binding precedent and the horrific injuries and the excruciating pain and suffering that Appellant's crimes caused the victim, we find the sentence imposed by the trial court here to be legally valid and within that court's proper discretion. Furthermore, because Appellant's sentence is both legal and constitutional, as it is not a *de facto* life sentence, we must respectfully disagree with the concurring opinion, as Appellant is not entitled to resentencing

under sections 775.082(3)(c) and 921.1402(2)(d), Florida Statutes. First, of course, this is because the terms of those relevant provisions clearly exclude retroactive application, which by their terms apply only to offenses committed after July 1, 2014.

In addition, however, even were the clear statutory terms precluding retroactivity to be deemed inapplicable somehow, because Appellant's sentence is not unconstitutional, he cannot be entitled to a retroactive application of these statutes under Article X, section nine of the Florida Constitution. Although the Florida Supreme Court determined that this obstacle had to be disregarded in Horsley v. State, 160 So. 3d 393, 405 (Fla. 2015), when it retroactively applied Chapter 2014-220, Laws of Florida, it did so precisely because the sentence in that case was unconstitutional under the Eighth Amendment to the United States Constitution.

Here, no mandatory life sentence has been imposed, and neither is Appellant's sentence equivalent to a life sentence; thus, the rationale of Henry v. State, 175 So. 3d 675 (Fla. 2015) (holding that juvenile's 90-year sentence is unconstitutional and is thus entitled to resentencing under ch. 2014-220, Laws of Florida, and Horsley), is not applicable here. As a result, there is neither a legal nor a policy rationale for speculating whether Appellant should be entitled to further sentencing relief.

Article X, section nine of the Florida Constitution, commonly referred to as the "Savings Clause," provides: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This provision of organic law prohibits the Legislature from retroactively reducing or mitigating the punishment for a crime "previously committed." In fact, the Florida Supreme Court has recognized that under this constitutional limitation, the Legislature cannot retroactively expand a substantive defense to a criminal prosecution. Smiley v. State, 966 So. 2d 330, 336-37 (Fla. 2007) (holding that statutory provision regarding "stand your ground" defense could not be applied to cases pending at time of statutory adoption). Although it is correct that the Savings Clause was not followed in Horsley, this was only because the life sentence there conflicted with the higher authority of the Eighth Amendment to the United States Constitution, as interpreted by the United States Supreme Court:

> Here, however, the statute in effect at the time of the crime is unconstitutional under Miller [v. Alabama, 132 S. Ct. 2455 (2012)] and the federal constitution, so it cannot, in any event, be enforced. The 'Savings Clause' therefore does not apply.
>
> Even if this state constitutional provision were to apply, though, the requirements of the federal constitution must trump those of our state constitution. *See,* U.S. Const. art. IV, cl. 2.

Horsley, 160 So. 3d at 406.

Our discussion of Horsley does not disregard binding precedent of the Florida Supreme Court, but simply notes that the decision in Horsley addresses an

unconstitutional sentence where a remedy was not available. Appellant's **current** sentence is both lawful and constitutional, as both the majority and concurring opinions recognize. While the concurring opinion would expand the decision in Horsley to apply here, we think such a result would contravene the clear statutory language prohibiting retroactive application of the statutes, and the Florida Constitution provision prohibiting the Legislature from retroactive application of a more lenient sentence to a previously imposed lawful sentence. To apply the more lenient statute here by judicial decision would violate Florida's strict separation of powers, contrary to article II, section three of the Florida Constitution, and in any event, such a result is barred by article X, section nine of the Florida Constitution. Thus, we affirm Appellant's sentence as consistent with our binding precedent.

AFFIRMED.

KELSEY, J., CONCURS; BILBREY, J., SPECIALLY CONCURRING WITH OPINION.

BILBREY, J., specially concurring.

In this juvenile resentencing case following Graham v. Florida, 560 U.S. 48 (2010), the majority opinion affirms based on our recent cases Lambert v. State, 170 So. 3d 74 (Fla. 1st DCA 2015); Abrakata v. State, 168 So. 3d 251 (Fla. 1st DCA 2015); and Kelsey v. State, 183 So. 3d 439 (Fla. 1st DCA 2015), rev. granted, __ So. 3d__, 2015 WL 7720518 (Fla. Nov. 19, 2015). I agree that the term of years sentence Appellant received for count 2, attempted second degree murder, on resentencing in September 2014 did not amount to a de facto life sentence and therefore was constitutional under these cases interpreting Graham.

I write with regard to the issue whether Appellant is entitled to the benefit of a review of his sentence for count 2 after 20 years pursuant to the revisions to sections 775.082(3)(c) and 921.1402(2)(d), Florida Statutes (2014), as provided by Chapter 2014-220, Laws of Florida. Both the Appellant and the State raise the issue of sentence review in their briefs, but both parties seem to believe the availability of sentence review is tied to whether the term of years sentence is unconstitutional. Based on our precedent in Lambert, Abrakata, and Kelsey, I can see why the parties have this misunderstanding. While I would affirm the term of years sentence based on these cases, I would do so without prejudice to the Appellant filing another motion under rule 3.850(a)(1) & (h), Florida Rules of

Criminal Procedure,[1] attacking the sentence for count 2, because the sentence does not provide for sentence review.

In 2007, Appellant was sentenced to life in prison with a minimum mandatory of 25 years for attempted second degree murder which left the victim grievously injured. Following the decision in Graham and successful postconviction motions, Appellant was resentenced in September 2014 on this count to 35 years with a mandatory minimum term of 25 years.

At the time Appellant was resentenced, the post-Graham revisions to sections 775.082 and 921.1402, Florida Statutes, were in effect, having become law as of July 1, 2014. Section 775.082(3)(c) provides for a review after 20 years per section 921.1402(2)(d) of "a person who is sentenced to a term of imprisonment of more than 20 years." But section 921.1402(2)(d) applies to "a juvenile offender" and "juvenile offender" is defined in section 921.1402(1), as someone sentenced for an offense committed on or after July 1, 2014. Since Appellant was sentenced for a crime committed before July 1, 2014, a question arises as to whether he gets the benefit of the sentence review provided in section 921.1402(2)(d).

On the issue of statutory interpretation, the first determination is whether

[1] A timely rule 3.850 motion can be used to raise a claim that a sentence is unconstitutional under Graham. See Allen v. State, 176 So. 3d 1014 (Fla. 5th DCA 2015).

"person" under section 775.082(3)(c), Florida Statutes (2014), is more expansive than "juvenile offender" under section 921.1402(2)(d). If permitted to make this determination, I would hold that section 775.082(3)(c) should be applied to expand the class entitled to review under section 921.1402(2)(d). To hold otherwise would make the last sentence of section 775.082(3)(c) surplusage in violation of well-settled rules of statutory construction. See Hechtman v. Nations Title Ins. of New York, 840 So. 2d 993, 996 (Fla. 2003) ("[S]ignificance and effect must be given to every word, phrase, sentence, and part of the statute if possible.").

If the meaning of section 775.082(3)(c) were still thought to be ambiguous after applying other established rules of statutory construction, I would then apply the rule of lenity to Appellant and anyone resentenced under section 775.082(3)(c) pursuant to Graham, even if the resentencing was for an offense committed before July 1, 2014, so as to allow for the benefit of a sentence review under section 921.1402(2)(d). See § 775.021(1), Fla. Stat. (2014); Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008) ("[A]ny ambiguity or situation in which statutory language is susceptible to differing constructions *must* be resolved in favor of the person charged with an offense.").

Furthermore, if the rules of statutory construction applied to sections 775.082(3)(c) and 921.1402 were unable to resolve the issue of whether Appellant is entitled to a sentence review, I would then look to Article I, Section 17 of the

Florida Constitution and the Eighth Amendment of the United States Constitution.[2]

I believe the constitutional requirements of Graham prohibit:

> [T]he state trial courts from sentencing juvenile nonhomicide offenders to prison terms that ensure these offenders will be imprisoned without obtaining a meaningful opportunity to obtain future **early** release during their natural lives based on their demonstrated maturity and rehabilitation.

Henry, 175 So. 3d at 680 (emphasis added). The possibility of a few years of gain time accruing before the end of an offender's life expectancy is not in my view a meaningful opportunity for early release as required by Graham.[3]

In Henry the Florida Supreme Court unanimously stated:

> [W]e conclude that the Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future.

175 So. 3d at 680. I believe this statement mandates on Eighth Amendment grounds the application of section 921.1402(2)(d), even if my statutory interpretation concerns above are wrong. In Horsley v. State, 160 So. 3d 393, 405 (Fla. 2015), the Florida Supreme Court retroactively applied Chapter 2014-220,

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[2] Article I, Section 17 of the Florida Constitution requires us to construe the prohibition against cruel and unusual punishment in conformity with the Eighth Amendment to the United States Constitution.

[3] It should be emphasized that the only issue under consideration is a meaningful **opportunity** for early release, **not entitlement** to release. The trial courts are given broad discretion under section 921.1402(6), Florida Statutes, to consider "any factor" deemed appropriate. The opinion of a victim and the culpability of a defendant are among the factors that a trial court can consider. § 921.1402(6)(c) & (d), Fla. Stat.

Laws of Florida, "on all those juvenile offenders whose offenses were committed prior to that date but whose sentences are nevertheless unconstitutional under Miller." It makes no sense to me that nonhomicide offenders would be entitled to less Eighth Amendment protection when resentenced under Graham than homicide offenders are when resentenced under Miller. See Kelsey, 183 So. 3d at 444-47 (Benton, J., dissenting).

This Court's recent precedent is distinguishable from Appellant's situation, at least with regard to any statutory entitlement to sentence review. In Abrakata and Lambert there were no Graham violations at any time in the sentencing of those defendants. They were not resentenced under the Chapter 2014-220, Laws of Florida, revisions, so they were not entitled to the sentence review added by section 921.1402.

In Kelsey there had been a resentencing following Graham. The appellant there asked our Court to direct that he again be resentenced because, although he was resentenced following Graham, he was not provided "the new sentence review mechanism of sections 921.1401 and 921.1402, Florida Statutes." Kelsey, 183 So. 3d at 439. But the appellant in Kelsey was disqualified from any sentence review "because his previous convictions for another separate armed robbery and conspiracy to commit armed robbery disentitle him to relief." Id. citing § 921.1402(2)(a), Fla. Stat. (2014).

Finally, the majority opinion claims that Article X, Section 9 of the Florida Constitution, commonly known as the "Savings Clause" precludes the retroactive application of sentence review since Appellant's current 35 year sentence for count 2, attempted murder, is not unconstitutional under our precedent. I respectfully submit that the majority reads Horsley too narrowly in reaching this conclusion. As the unanimous Florida Supreme Court stated in Horsley:

> As this Court has previously acknowledged, the purpose of the "Savings Clause" is to require the statute in effect at the time of the crime to govern the sentence an offender receives for the commission of that crime. See Castle v. State, 330 So. 2d 10, 11 (Fla. 1976). Here, however, the statute in effect at the time of the crime is unconstitutional under Miller and the federal constitution, so it cannot, in any event, be enforced. The "Savings Clause" therefore does not apply.

160 So. 3d at 406.

In rejecting the "Savings Clause," in Horsley the Court emphasized that the remedy for Florida's unconstitutional scheme could not be cobbled out of the law as it existed prior to the enactment of Chapter 2014-220. Id. at 405-06. As the Court in Horsley explained:

> Even if this state constitutional provision were to apply, though, the requirements of the federal constitution must trump those of our state constitution. See U.S. Const. art. VI, cl. 2. In other words, fashioning a remedy that complies with the Eighth Amendment must take precedence over a state constitutional provision that would prevent this Court from effectuating that remedy. The "Savings Clause" thus does not preclude the application of chapter 2014–220, Laws of Florida, under these unique circumstances.

Id. at 406.[4]

Just as in Horsley, the statute in effect at the time of Appellant's **initial** sentence which allowed for and resulted in a life sentence for count 2 was unconstitutional. § 782.04(2), Fla. Stat. (2005). Therefore, just as in Horsley, the appropriate remedy for the unconstitutional life sentence was a constitutional, term of years sentence — which, following our precedent, the trial court imposed upon resentencing — **and** the meaningful opportunity for early release as mandated by Graham and Henry. So far, Appellant has only received half the remedy to which he is entitled for his **initial** unconstitutional life sentence issued under an unconstitutional statute.[5]

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[4] The majority opinion contends that by imposing a constitutional term of years sentence, the holding in Horsley has been complied with. I respectfully disagree and note that while we are free to call into question a decision of the Florida Supreme Court, we are not free to ignore it. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); see also Johnson v. Johnson, 284 So. 2d 231 (Fla. 2d DCA 1973) ("We receive the statutory law from the legislature and its interpretation from our Supreme Court, agreeing with some, disagreeing with some, following all, because our bondage to law is the price of our freedom."). Likewise the Florida Supreme Court was mandated to follow the United States Supreme Court decisions in Graham and Miller, no matter what the Florida justices thought about the wisdom of the decisions. See Marshall v. Crosby, 911 So. 2d 1129 (Fla. 2005); Art. I, § 17, Fla. Const.

[5] Thus, I submit that it is incorrect to say in this case that "Although it is correct that the Savings Clause was not followed in Horsley, this was only because the life sentence there conflicted with the higher authority of the Eighth Amendment to the United States Constitution." (Majority at 5). Appellant's initial sentence **was** a case which violated the Eighth Amendment. Thus, he was entitled to the full remedy afforded by Chapter 2014-220 per Horsley. By arguing that Appellant is

Whether on statutory or constitutional grounds, I would make it clear that Appellant has the right to seek sentence review in the trial court, our affirmance of his term of years sentence notwithstanding.

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entitled to only a part of the remedy, the majority would restore at least part of a sentencing scheme (the inability to obtain early release from a term of years sentence) which has been deemed unconstitutional by the United States Supreme Court in Graham.