FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1752

ANTHONY R. GRIEGO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CORRECTED PAGES: pg 4 & 5
CORRECTIONS ARE UNDERLINED IN RED
MAILED: April 24, 2020
BY: FTA

On appeal from the Circuit Court for Santa Rosa County.
J. Scott Duncan, Judge.

April 23, 2020

B.L. THOMAS, J.

On February 11, 2008, the Appellant entered an open plea of guilty to DUI manslaughter (count I), leaving the scene of a crash involving death (count II), resisting an officer without violence (count III), and careless driving (civil infraction). On April 23, 2008, at a sentencing hearing, the trial court imposed the following sentence: thirteen years in prison for count I, eight years in prison followed by ten years of probation for count II, and two hundred and seventy days in prison for count III. The trial court ordered counts I and II to be served consecutively, while count III was to run concurrently to count I. A direct appeal was filed with this Court. This Court reviewed and affirmed per curiam the Appellant's convictions and sentences. *See Griego v.*

State, 29 So. 3d 1121 (Fla. 1st DCA 2010). The Mandate was issued on March 23, 2010.

The Appellant has an extensive postconviction history. On June 1, 2015, he filed an appeal of an order denying a rule 3.850 motion, in which he asserted ineffective assistance of trial counsel, which this Court affirmed per curiam. *See Griego v. State*, 207 So. 3d 224 (Fla. 1st DCA 2016). On May 8, 2017, the Appellant then filed an appeal of an order denying a rule 3.800(a) motion, wherein he alleged that his written order of probation conflicted with the oral pronouncement of his sentence, that the trial court improperly retained jurisdiction throughout his probationary sentence, and that his sentence constituted cruel and unusual punishment. This Court affirmed the trial court's ruling per curiam. *See Griego v. State*, 228 So. 3d 555 (Fla. 1st DCA 2017). On August 7, 2017, Appellant also filed a petition for a writ of habeas corpus in this Court that raised a claim of manifest injustice, which this Court denied on the merits. *See Griego v. State*, 232 So. 3d 982 (Fla. 1st DCA 2017). This Court granted the Appellant a belated appeal of a May 2, 2018, order denying an "amended second or successive motion for postconviction relief." In that appeal, the Appellant argued that his convictions should be overturned pursuant to *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016). This Court reviewed the Appellant's argument and affirmed the trial court's ruling per curiam. *See Griego v. State*, 258 So. 3d 389 (Fla. 1st DCA 2018).

On February 21, 2019, the Appellant filed the instant successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850(a)(6). The Appellant raised a single claim, requesting relief based upon a "substantial change in circumstances concerning new facts and testimony." The Appellant based his argument on the fact that paragraph 6 of his plea agreement states, "I hereby waive or give up any right to request a modification of my sentence within the limits of this agreement absent a substantial change in circumstances occurring after sentencing." He contended that the substantial change was a notarized affidavit brought forth by the father of the victim. In this affidavit, which was dated July 6, 2018, the victim's father requested clemency on behalf of the Appellant and felt that he had served a sufficient prison sentence and that his

sentence should be reduced to time served. This affidavit was attached to the Appellant's motion.

The trial court found that this relief was not properly brought in a rule 3.850 motion, and instead construed it as a rule 3.800(c) motion for reduction or modification of sentence, since the Appellant was requesting the trial court reduce his sentence to time served based on the victim's father's affidavit. It then denied the motion as untimely, as motions for modification or reduction of sentences brought under rule 3.800(c) must be brought within sixty days of the date a defendant's sentences becoming final. *See* Fla. R. Crim. P. 3.800(c).

In his pro se brief, the Appellant argues the trial court erred in construing the motion as a 3.800(c) motion, contending that he was trying to enforce paragraph 6 of his sentence recommendation. In support of his argument, he cites to *Dellofano v. State*, 946 So. 2d 127, 129 (Fla. 5th DCA 2007) (Lawson, J., concurring specially) (observing that "[t]here is no provision in the Florida Rules of Criminal Procedure for a 'motion to enforce plea agreement.' Therefore, the only avenue available for an appellant to pursue his or her postconviction claim below is a motion filed pursuant to Florida Rule of Criminal Procedure 3.850.") However, *Dellofano* is distinguishable from the Appellant's situation, as *Dellofano* dealt with a negotiated plea agreement where the defendant's gain time was improperly revoked in violation of that plea agreement, and here the Appellant entered into an open plea. *See Id.*

Further, while the Appellant argues that he is seeking enforcement of paragraph 6, under his requested relief, he specifically requested the trial court set the matter for an evidentiary hearing where he could call for witnesses and present other evidence for the purposes of reducing his sentence or otherwise modifying it. The ultimate nature of the relief he is requesting is a reduction or a modification of his sentence, which is a matter that falls under rule 3.800(c), not rule 3.850(a)(6). To that end, the trial court did not err in construing the motion as a rule 3.800(c), and as the Appellant's sentences became final on March 23, 2010, the trial court lost jurisdiction to consider such

motions once sixty days from that date had passed. Therefore, the trial court did not err in denying the motion.

In view of the above, we, therefore, AFFIRM.

AFFIRMED.

WOLF, J., concurs; MAKAR, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring in result.

In August 2007, an intoxicated twenty-one-year-old Anthony R. Griego recklessly drove a van that struck and killed seventeen-year-old Gerran Clayton Copeland, resulting in charges of DUI manslaughter, leaving the scene of a crash involving death, and resisting an officer without violence. At his April 2008 sentencing hearing, Griego accepted responsibility for all the charges against him and pled guilty, resulting in a net sentence of twenty-one years of imprisonment.[*]

Over the next ten years, Griego was in constant contact with the Copeland family, expressing his regret for his actions and remembering to recognize the days of Gerran's birth and death, which resulted in a remarkable letter dated July 2018 from

[*] He was sentenced to 13 years' imprisonment on the DUI manslaughter charge to be served consecutively with 8 years in prison (and 10 years of probation) on the leaving the scene of a crash charge; he was sentenced to 270 days in prison for the resisting an officer charge to be served concurrently with the DUI manslaughter charge.

Gerran's father, Gregory Copeland, seeking Griego's early release from prison (*see* Appendix).

Based on Mr. Copeland's letter, Griego sought to effectuate a modification of his sentence via a motion under Rule 3.850, Florida Rules of Criminal Procedure, which is not a proper basis for relief under these circumstances, as the panel opinion concludes. Mr. Copeland's letter, though recent and revelatory, is not the type of "newly discovered facts" for which relief may be available under Rule 3.850. Nor is it relevant to enforcement of the terms of the plea deal that Griego entered. To the extent it is considered a motion to modify sentence under Rule 3.800, it is untimely. Mr. Copeland's constitutional rights as a victim are implicated in the process, as Griego points out, *see* article I, § 16, Fla. Const., but nothing in that constitutional provision provides a mechanism for early release based on the change of heart of a victim's family member as to an offender's punishment.

Griego's avenue for relief, if any, is via the grace of executive branch clemency. *See* Art. IV, § 8, Fla. Const. ("the Governor may, by executive order . . . with the approval of two members of the cabinet, . . . commute punishment . . . "); § 940.01, Fla. Stat. (same); *see also Bentley v. State*, 501 So. 2d 600, 603 (Fla. 1987) (noting that criminal defendant's "only recourse is to seek clemency from the governor" pursuant to his constitutional powers").

Appendix

TO WHOM IT MAY CONCERN 6 Ju1y 2018
FROM: Gregory Copeland
Subject: Anthony Griego (Inmate P36771)
RE: Request for Early Release Consideration

On the night of August 19, 2007, Anthony Griego made the horrible decision to drink and drive with devastating and deadly results. He hit and killed my 17-year -old son Gerran Copeland, taking him away forever. I realize Florida has laws including minimum serve times in an effort to protect its citizens from poor

decisions. I also painfully appreciate the need for deterrence for others who might make a similar decision.

After careful consideration, I'm of the belief Anthony has served sufficient prison time and should be considered for the earliest release possible. My number one reason for this position is what Anthony did during the course of his trial immediately following taking Gerran's life. He plead guilty and assumed responsibility for his actions. He could have attempted to use the fact it was very dark, with no street lights, the fact my son did not have lights on his bicycle and was wearing non -reflective dark clothing. He could have contested Gerran's exact location in the road, which side of the fog line he was on. He could have used the fact a road imperfection which caused driver's (myself included) to veer towards the ditch was at the impact point. This road imperfection was the result of a major storm on 1 April 2005, the day I retired from the Air Force is why I remember so well, which washed away part of the road. The state/county did not adequately repair the road for the two years leading up to the crash. Soon after the crash the road was repaired. It was in fact a significant hazard and my son was hit right at the spot of that road imperfection. He could have questioned the emotional state of my son at the time of the crash and placed doubts on the victim. He didn't do any of that. He simply, without any promise of leniency, owned his actions. This was a twofold benefit for my family. First, he didn't put us through the anguish of a trial centered around trying to mitigate or blame shift. Second, his ownership of his actions helps me know he understands a need for different actions and decisions once he returns to society. Both these are crucial to my request for early release consideration.

Additionally, Anthony has been in contact with our family constantly over the past decade he's been incarcerated. Always remembering to write around the anniversary of Gerran's death and his birthday, February 9th, 1990. While some might believe this disingenuous, and self-serving, I totally disagree. Because he chose not to put us through a trial (his best opportunity to potentially lessen his sentence) I can only believe 10 years of faithfully letting us know he is truly sorry for his decision is genuine.

Again, I fully understand the need for significant punishment for a serious and devastating offense as Anthony's. I am convinced the punishment he has served to date has served and satisfied the needs of the people of Florida, my family, and most importantly Anthony. My hope is our system would set an eye towards restoring Anthony to society based on the facts provided in this letter. Justice has been served and now we need to rehabilitate and restore.

With Hope for the future,
Gregory C. Copeland
(Father of Gerran Copeland)

Anthony R. Griego, pro se, Appellant.

Ashley Moody, Attorney General, and Thomas H. Duffy, Assistant Attorney General, Tallahassee, for Appellee.