FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1953

MARIO DECARLOS BALDWIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Escambia County.
Jennie Kinsey, Judge.

June 3, 2020

ON MOTION FOR REHEARING

PER CURIAM.

We deny the State's motion for rehearing, but on our own motion withdraw our January 22, 2020, opinion, and substitute this opinion in its place. We deny the State's motion for rehearing en banc as moot. For the reasons set forth below, we affirm the trial court's decision to reconsider its prior order granting Appellant Mario Baldwin resentencing. We also certify conflict with other district courts.

Baldwin committed various offenses just before his eighteenth birthday. In case 1989 CL 1531B, Baldwin was charged with sexual battery, armed robbery, and possession of a firearm by a convicted felon. In 1989 CF 1577B, Baldwin was charged with

sexual battery, armed robbery, kidnapping, and possession of a firearm by a convicted felon. Following a plea agreement, Baldwin was sentenced to an overall 25-year prison sentence in the first case and an overall 40-year prison sentence in the second case. In 1998, the trial court granted Baldwin's motion for clarification of sentence and made it clear that the sentences in these two cases, as well as the sentences for various additional offenses committed as an adult, were to run consecutively to each other.

In October 2016, Baldwin filed a postconviction motion challenging the legality of his sentences. That motion did not state whether it was filed pursuant to rule 3.800 or 3.850, Florida Rules of Criminal Procedure, but did contain a certification from Baldwin citing rule 3.850(n). That motion was dismissed by the trial court in November 2016 because Baldwin had previously been barred by the trial court from pro se filings. Nonetheless, in that same order the trial court reviewed the merits of Baldwin's October 2016 motion as if it were properly filed under rule 3.850. The trial court concluded that Baldwin's sentence was lawful since he was not serving a de facto life sentence. The trial court cited *Kelsey v. State*, 183 So. 3d 439 (Fla. 1st DCA 2015) (*Kelsey I*), and other cases from this court.

In December 2016, Baldwin filed a motion for rehearing. The trial court, in an April 2017 order, found that Baldwin's motion for rehearing was untimely under rule 3.850(j). But because *Kelsey I* had been recently overruled by the Florida Supreme Court in *Kelsey v. State*, 206 So. 3d 5 (Fla. 2016) (*Kelsey II*), the trial court treated Baldwin's December 2016 motion as a motion to correct illegal sentence under rule 3.800. In that April 2017 order, the trial court ordered the State to show cause why Baldwin was not entitled to resentencing pursuant to *Kelsey II*. In response, the State conceded that Baldwin was entitled to resentencing. In June 2017, the trial court ordered that Baldwin was entitled to resentencing pursuant to *Kelsey II* and the sentencing procedures in chapter 2014-220, Laws of Florida.

In August 2018, with resentencing still pending, the State filed an addendum and withdrew its concession to resentencing based on our then recent case *Hart v. State*, 255 So. 3d 921 (Fla.

1st DCA 2018). The State argued that Baldwin could earn up to 21.3 years of gain time on his combined 65-year sentence, resulting in his being 61.37 years old at the time of release from prison. The State further alleged that based on Baldwin's anticipated life expectancy he would have 16.37 years of expected life outside prison. Therefore, the State argued, Baldwin's aggregate sentence did not amount to a de facto life sentence and provided him a meaningful opportunity for release from prison. The trial court conducted a hearing and at the conclusion of that hearing rescinded its order granting resentencing. Here, Baldwin appeals that order rescinding the order granting resentencing.

We initially agreed with Baldwin, and our brief previous opinion reversed the trial court's order rescinding the prior resentencing order, citing *Simmons v. State*, 274 So. 3d 468 (Fla. 1st DCA 2019). *Simmons* has now been overruled by this court sitting en banc. *Rogers v. State*, 45 Fla. L. Weekly D1069, 2020 WL 2091121 (Fla. 1st DCA May 1, 2020) (en banc). Our holding in *Rogers* is directly applicable here. Because Baldwin's motion was premised on rule 3.800 and he had not been resentenced, "the trial court retained jurisdiction to reconsider its original ruling." *Rogers,* 45 Fla. L. Weekly at D1072, 2020 WL 2091121, *8. *See also Morgan v. State*, 45 Fla. L. Weekly D791a, 2020 WL 1646798 (Fla. 2d DCA Apr. 3, 2020) (holding trial court retained jurisdiction to rescind prior order granting resentencing since the order under rule 3.800 granting resentencing was not an appealable final order). The trial court was correct that pursuant to *Hart*, Baldwin's sentence was not a de facto life sentence.

As in *Rogers*, we certify conflict with *Jones v. State*, 279 So. 3d 172 (Fla. 4th DCA 2019), and *Magill v. State*, 287 So. 3d 1262 (Fla. 5th DCA 2019).

AFFIRMED; CONFLICT CERTIFIED.

MAKAR, BILBREY, and JAY, JJ., concur.

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

Andy Thomas, Public Defender, and Justin F. Karpf, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Sharon S. Traxler, Assistant Attorney General, Tallahassee, for Appellee.