FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2363

NED WILLIAM WILSON III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

November 20, 2020

ROWE, J.

Ned William Wilson III appeals his twenty-five-year sentence for sexual battery. He contends that the trial court erred when it denied his motion for a downward departure. Because the trial court's discretionary decision to deny a downward departure is not a proper basis for appeal, we dismiss the appeal.

I. Facts and Procedural History

The State charged Wilson with sexual battery and lewd or lascivious battery for molesting his twelve-year-old daughter. The State charged Wilson in a related case with lewd or lascivious conduct for encouraging and enticing his daughter's thirteen-year-old friend to engage in an act involving sexual activity. Wilson

pleaded no contest to sexual battery, with a cap of twenty-five years in state prison, and the State dismissed the second charge. He also pleaded no contest in the related case.

In his consolidated sentencing hearing, Wilson sought a downward departure sentence under section 921.0026(2)(d), Florida Statutes (2019). Wilson asserted that 1) he requires specialized treatment for a mental disorder unrelated to substance abuse or addiction or for a physical disability, and he is amenable to treatment; and 2) he committed the offense in an unsophisticated manner, and it was an isolated incident for which he has shown remorse. In support of his request, Wilson filed a letter he wrote to the trial court, a copy of his military records, a risk assessment conducted by Dr. Rhonda Harrison-Spoerl, and an individual education plan for Wilson's autistic son.

The trial court heard testimony from several of Wilson's family members and friends. They testified that the conduct underlying the charged offenses was out of character for Wilson. They asserted that Wilson was a family man who had a good relationship with his children. They suggested that he should be back home with his family. Wilson's daughter (the victim) and his wife testified that they forgave him and wanted him back home. And Wilson testified that he was sorry and that he did not think of the consequences. He explained that medication he was taking at the time of the offenses may have caused his behavior. He explained that his family needed him back at home to help support his autistic son. He asserted that he was willing to enroll in a sexual-therapy program and would seek therapy for his mental health problems.

Even so, the trial court denied Wilson's motion for downward departure. The court acknowledged Wilson's apologies for his conduct but noted that Wilson blamed his behavior on side effects from his medication and on stress he suffered from caring for his autistic son. The trial court found that the charged conduct was not an isolated event because Wilson's charges involved two separate incidents with different minors. And so the trial court found that Wilson did not satisfy the requirements for a downward departure sentence. The court sentenced Wilson to twenty-five

years in state prison, followed by sex offender probation for life. This timely appeal follows.

II. Analysis

Under Florida's Criminal Punishment Code, a trial court may "impose a sentence up to and including the statutory maximum for any offense, including an offense that is before the court due to a violation of probation or community control." § 921.002(1)(g), Fla. Stat. (2019). And under sections 921.002(3) and 921.0026, a trial court "**may** impose a departure from the lowest permissible sentence based upon circumstances or factors that reasonably justify the mitigation of the sentence." (emphasis supplied). But, if those circumstances or factors are not present, the trial court "is prohibited" from granting a downward departure." § 921.0026(1), Fla. Stat.

In determining whether to grant a downward departure, trial courts have wide discretion. *See Banks v. State*, 732 So. 2d 1065, 1068 (Fla. 1999). But appellate review of a trial court's decision whether to grant a downward departure sentence is far more limited. On the one hand, the Legislature has authorized the State to appeal from an order **granting** such a motion. *See* §§ 921.0026(1), 924.07(1)(i), Fla. Stat.; *see also Hall v. State*, 773 So. 2d 99, 101 (Fla. 1st DCA 2000), *approved*, 823 So. 2d 757, 762 (Fla. 2002).

On the other hand, no statute authorizes a defendant to appeal from an order **denying** a motion for a downward departure. Even so, a defendant may appeal a sentence under some circumstances. Section 924.06(1)(d) allows a defendant to appeal a sentence that is illegal. Section 924.06(1)(e) allows a defendant to appeal a sentence that exceeds the statutory maximum penalty. And section 921.002(1)(h) allows a defendant to appeal a sentence that is below the lowest permissible sentence under the Criminal Punishment Code. A defendant may also appeal from a trial court's blanket refusal to exercise its discretion in sentencing. *See Pressley v. State*, 73 So. 3d 834 (Fla. 1st DCA 2011) (holding that trial judge's policy against consideration of a lawful sentence violated the defendant's due process rights); *see also Ayala v. Scott*, 224 So. 3d 755, 758–59 (Fla. 2017) (holding that "trial judges may not

'refuse to exercise discretion'") (citing *Barrow v. State*, 27 So. 3d 211, 218 (Fla. 4th DCA 2010), *approved*, 91 So. 3d 826 (Fla. 2012)).

But no statute settles the question presented here—if the trial court has not refused to exercise its discretion, and the sentence is not illegal, not below the lowest permissible sentence, and does not exceed the statutory maximum, can a defendant appeal an order denying a motion for a downward departure sentence? Florida's district courts are split on the answer.

At first, the Second and Fourth Districts held that a defendant could not appeal an order denying a motion for a downward departure sentence. *See Patterson v. State*, 796 So. 2d 572, 574 (Fla. 2d DCA 2001) ("The current statutory scheme does not give this court the power to review on direct appeal a trial court's discretionary decision to deny a downward departure."); *Jorquera v. State*, 868 So. 2d 1250, 1253 (Fla. 4th DCA 2004) ("The current statutory scheme does not give this court the power to review a trial court's discretionary decision to deny a downward departure."). The holdings in those cases acknowledged that section 924.06 authorizes a defendant to appeal a sentence only in limited circumstances—and nothing in that statute allows appeal of a trial court's discretionary decision not to grant a downward departure. The Third District followed *Patterson* and *Jorquera* in *Wyden v. State*, 958 So. 2d 540 (Fla. 3d DCA 2007), and held that the court lacked "even the authority to consider the trial court's failure to downward depart." *Id*. at 540.

But a few years later, the Second and Fourth Districts reconsidered the question and held that a defendant can appeal from an order denying a motion for downward departure. In *Barnhill v. State*, 140 So. 3d 1055, 1059–60 (Fla. 2d DCA 2014), the Second District receded from its earlier decision in *Patterson*. It did so after concluding that its own later decisions and supreme court decisions construing *Banks v. State*, 732 So. 2d 1065 (Fla. 1999), had effectively overruled *Patterson*. *See Barnhill*, 140 So. 3d at 1059–60. The court explained that amendments to the appellate rules had expanded the scope of appellate review to include unlawful sentences:

> The Criminal Appeal Reform Act of 1996 caused many discussions about the extent of appellate jurisdiction and scope of review in criminal cases. Following the Criminal Appeal Reform Act, the State sometimes argued that a defendant could not challenge a sentence except "on the ground that it is illegal" or if the sentence was "imposed outside the range permitted by the guidelines authorized by chapter 921." Ch. 96–248, § 5, at 955; § 924.06(d), (e), Fla. Stat. As reflected in the 1996 court commentary to the amendments to Florida Rule of Appellate Procedure 9.140, the rules of procedure expanded the scope of review on appeal to include "unlawful" sentences. At the time *Patterson* was written, there was doubt about whether the rule of procedure could expand upon the statute. However, since that time there have been innumerable reported cases correcting sentencing errors that rendered a sentence unlawful but not completely illegal. The scope-of-review discussion in *Patterson* simply is not in line with current precedent. Accordingly, we hereby recede from that portion of our decision in *Patterson*.

Barnhill, 140 So. 3d at 1060.

Having concluded that a defendant may appeal from an unlawful sentence, the Second District reexamined *Banks* and held that *Banks* provided not only the procedure for the trial court to apply when considering whether to depart downwardly,[*] but also the standard of review to be applied by an appellate court reviewing the trial court's decision on appeal. *Barnhill*, 140 So. 3d at 1060. The trial court's decision on the first prong "will be sustained on review if the court applied the right rule of law and if competent substantial evidence supports its ruling." *Id.* And the

[*] *Banks* established a two-part test for the trial court to apply when considering whether to grant a motion for a downward departure sentence. *See Banks*, 732 So. 2d at 1067. First, the trial court must determine whether there is a valid, statutory, legal ground to depart, and whether the defendant has proven that ground by a preponderance of the evidence. If so, the court must then make a discretionary decision under the totality of circumstances on whether it should depart. *See id.*

trial court's decision on the second prong "will be sustained on review absent an abuse of discretion." *Id*. The court then applied its reasoning to the order denying Barnhill's request for a downward departure and held that the trial court failed to properly apply the two-part *Banks* test. *See Barnhill*, 140 So. 3d at 1061–62. The court reversed Barnhill's sentence and remanded for the trial court to conduct a hearing to consider the totality of circumstances based on evidence presented. *See id*.

Later that same year, persuaded by the reasoning in the *Barnhill* decision, the Fourth District receded from its decisions in *Jorquera v. State,* 868 So. 2d 1250 (Fla. 4th DCA 2004), and *Marshall v. State*, 978 So. 2d 279 (Fla. 4th DCA 2008). *See Fogarty v. State*, 158 So. 3d 669, 671 (Fla. 4th DCA 2014). In *Fogarty*, the Fourth District concluded that a defendant may appeal from an order denying a downward departure sentence, and it held that the appellate court must apply the standards of review set forth in *Banks*. *See Fogarty,* 158 So. 3d at 670–71. The Fourth District explained its reasons for receding from its earlier decisions and its understanding of *Banks*:

> [T]he supreme court did allow for appellate review of both steps of the procedure for downward departure, albeit using different standards of review. The first step is reviewable for legal error and competent substantial evidence. The second step as to whether to downwardly depart is reviewable for an abuse of discretion. *But see Patrizi v. State*, 31 So. 3d 229, 231 (Fla. 1st DCA 2010) (appellate court may review only instances of legal error in defining or applying trial court's discretionary authority). For these reasons, we recede from *Jorquera* and *Marshall*.

Fogarty, 158 So. 3d at 671.

The Fifth District was next to follow *Barnhill* and hold that a defendant may appeal from an order denying a requested downward departure. *Kiley v. State*, 273 So. 3d 193, 194 (Fla. 5th DCA 2019). The court explained:

> We acknowledge that previously, in *Little v. State*, 152 So. 3d 770, 771–72 (Fla. 5th DCA 2014), we had stated that an appellate court lacks the authority to review a trial court's discretionary decision to deny a requested downward departure sentence. This statement, however, was not essential to the decision in that case and, being mere dicta, was of no precedential value. *See State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation*, 276 So. 2d 823, 826 (Fla. 1973) (recognizing that a statement in a district court of appeal opinion that was not essential to the decision of the court is obiter dictum and without force as precedent).

Kiley, 273 So. 3d at 194 n.2.

The Third District has not followed *Barnhill* or receded from its earlier decision in *Wyden*, holding that appellate review is not available when a trial court denies a motion for a downward departure. But it has recognized an exception to the general rule when the trial court considers a defendant's lack of remorse. *See Lawton v. State*, 207 So. 3d 359, 361 (Fla. 3d DCA 2016).

But despite the holdings in the other district courts, this Court has maintained that appellate review is generally not available when a trial court denies a request for a downward departure. We first reached that conclusion in *Stancliff v. State,* 996 So. 2d 259, 260 (Fla. 1st DCA 2008). There, the Court considered the limited grounds available for a defendant to take an appeal under section 924.06. The Court noted that there was no statute authorizing "a defendant [to] challenge a sentence imposed under the CPC when the sentence falls within the CPC sentencing range." *Id*. at 259–60. Thus, the Court held that "the statutory scheme does not give the appellate courts the authority to review a trial court's decision to deny a request for a downward departure sentence." *Id*. at 260.

This Court reaffirmed the view it expressed in *Stancliff* on the availability of appellate review for an order denying a downward departure in *Patrizi v. State*, 31 So. 3d 229, 231 (Fla. 1st DCA 2010). At the same time, the Court acknowledged an exception to the general rule exists when the trial court denies a downward departure based on a "misconception about its discretion in

sentencing." *Id*. at 231 (quoting *Hines v. State*, 817 So. 2d 964 (Fla. 2d DCA 2002), and *McCorvey v. State*, 872 So. 2d 395 (Fla. 1st DCA 2004)). In that limited circumstance, an appellate court may review the trial court's decision not to depart downwardly. *See Childers v. State*, 171 So. 3d 170, 173 (Fla. 1st DCA 2015).

For example, in *Childers,* this Court reviewed a trial court's order denying a motion for downward departure. *See id.* at 174. There, the trial court did not "see that [it] had a legally permissible reason to downward depart from the guidelines." *Id.* at 172. Because it was unclear whether the court rejected the downward departure based on a misconception as to its authority to depart or based on a finding that Childers failed to present sufficient evidence to support a departure sentence, this Court reversed. *See id.*

But outside a trial court's misconception about its discretion in sentencing or a blanket refusal to exercise that discretion, this Court has adhered to the holding in *Patrizi* and declined to exercise jurisdiction to review orders denying a motion for downward departure. We believe that is the better view. The Legislature has authorized the State to appeal from an order granting a downward departure sentence. But the Legislature has provided no authority for a defendant to appeal from an order denying a downward departure motion.

In reaching this conclusion, we disagree with the decisions from the Second, Fourth, and Fifth Districts and their application of the holding in *Banks*. In *Banks*, the State appealed the trial court's order granting a motion for a downward departure sentence. In addressing whether the trial court erred in granting the motion for downward departure, the supreme court applied its established two-part test. But unlike *Banks*, the courts in *Barnhill*, *Fogarty*, and *Kiley* were not reviewing trial court orders **granting** motions for a downward departure; instead, they dealt with orders **denying** motions for a downward departure. Those courts applied the two-part test even though the supreme court has never extended *Banks* to provide review of an order denying a downward departure. This is a critical distinction. Thus, absent legislative authority or a clear indication from the Florida Supreme Court that this review is available under the Florida

Rules of Appellate Procedure, we conclude that a defendant may not appeal an order denying a motion for a downward departure—unless the trial court misapprehends its discretion to depart or refuses to exercise that discretion as a matter of policy.

III. Application to Wilson's Downward Departure Request

Here, there is no suggestion that the trial court misunderstood its discretion in sentencing or that the trial court had a blanket policy to refuse to exercise that discretion. After considering the evidence supporting Wilson's motion for downward departure, the court found that Wilson's conduct did not involve an isolated event because two separate victims were involved at different times. And so, the trial court found that a downward departure was not appropriate.

Because the trial court understood its discretion to grant a downward departure sentence, *Patrizi* controls and we lack authority to review the trial court's decision not to grant Wilson's motion for a downward departure.

IV. Conclusion

Because our decision on the availability of appellate review for orders denying downward departure sentences conflicts with the Second District's decision in *Barnhill v. State*, 140 So. 3d 1055, 1060 (Fla. 2d DCA 2014); the Fourth District's decision in *Fogarty v. State*, 158 So. 3d 669, 671 (Fla. 4th DCA 2014); and the Fifth District's decision in *Kiley v. State*, 273 So. 3d 193, 194 (Fla. 5th DCA 2019), we certify conflict with those decisions.

DISMISSED; CONFLICT CERTIFIED.

ROBERTS and KELSEY, JJ., concur.

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

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