FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-498

RAYTAURUS EMON ARMSTRONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Lester Bass, Judge.

October 19, 2020

B.L. THOMAS, J.

Appellant appeals the summary denial of his postconviction motion brought under Florida Rule of Criminal Procedure 3.800(a). We affirm.

Armstrong was convicted of possession of a firearm by a felon during a trial in which he stipulated that he had a prior felony conviction. The trial court sentenced him to eighteen years imprisonment as a habitual felony offender. We affirmed the judgment and sentence on direct appeal, with the mandate issuing on August 21, 2015. *Armstrong v. State*, 171 So. 3d 702 (Fla. 1st DCA 2015).

In March 2019, Armstrong filed the instant motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800. He argued that his eighteen-year habitual felony sentence was illegal because it exceeded the statutory maximum of fifteen years for a second-degree felony. Armstrong asserted that the trial court's decision to "depart from the statutory maximum" was made as the result of a "dangerousness finding required as a condition predicate to habitualization . . . ." Appellant cited to *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and *Brown v. State*, 260 So. 3d 147 (Fla. 2018), and concluded that such a factual finding must be made by a jury.

In January 2020, the lower court summarily denied Appellant's motion. The lower court agreed with the State's response that *Brown* was distinguishable from the present case because *Brown* concerned the application of section 775.082(10), Florida Statutes (2015), which required a factual finding that the defendant presented a "danger to the public." The present case concerned section 775.084, Florida Statutes (2012). The lower court sentenced Armstrong based on the recidivist requirements of the statute which did not require a jury finding.

The trial court here was correct. The lower court was authorized to impose the enhanced punishment of up to thirty years imprisonment, twice the statutory maximum, because of Armstrong's prior felony convictions—not because of any judicial fact-finding. *See* § 775.084(1)(a), (4)(a)2, Fla. Stat. (2012). Recidivist-sentencing enhancement based on prior felony convictions do not require findings of fact. *See Hunter v. State*, 174 So. 3d 1011, 1016–17 (Fla. 1st DCA 2015) (holding that state was not required to prove enhancement factors to jury prior to trial court's imposition of habitual violent felony offender enhancement); *see McBride v. State*, 884 So. 2d 476 (Fla. 4th DCA 2004) (holding that a jury did not need to determine whether defendant had the requisite predicate convictions for habitual felony sentence). Thus, Armstrong's sentence does not violate the Sixth Amendment's right to trial by jury, as the trial court correctly ruled.

AFFIRMED.

OSTERHAUS, J., concurs; BILBREY, J., concurs with opinion.

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

BILBREY, J., concurring.

I concur in the majority opinion. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[*] But section 775.084(4)(e), Florida Statutes (2012), does not permit a judge to increase a habitual felony offender's sentence beyond the statutory maximum. Rather, section 775.084 establishes various classes of defendants with prior convictions for other crimes which the Legislature has determined are deserving of increased punishment if guilty of certain new crimes. Then, section 775.084(4)(e) allows a trial judge to issue a sentence "without regard to this section" when the judge determines "that it is not necessary for the protection of the public to sentence a defendant who meets the criteria for sentencing as a habitual felony offender, a habitual violent felony offender, or a violent career criminal."

While "sentence-elevating facts must be found by a jury, not a judge, and established beyond a reasonable doubt," *Galindez v. State*, 955 So. 2d 517, 519 (Fla. 2007), there is no such requirement for sentence-reducing facts. Trial judges are, for example, permitted to impose a downward departure sentence in certain cases so long as mitigating circumstances are found by the judge. *See* § 921.0026, Fla. Stat. (2019).

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[*] There are exceptions to this requirement when the fact-finding necessary to increase the sentence "inheres in the verdict, the defendant waives the right to a jury finding, or the defendant admits the fact." *Galindez v. State*, 955 So. 2d 517, 519 (Fla. 2007).

To require jury fact-finding here would go beyond the constitutional requirements of *Apprendi* and its progeny and would put us in the realm of jury sentencing. While a few states have jury sentencing in non-capital cases, such a system in my view would be a departure from a Florida trial judge's discretion to exercise leniency or mercy in appropriate cases and could result in more arbitrary and unjust sentences. *See* MaryAnn Grover, *Jury Sentencing in the United States: The Antithesis of the Rule of Law*, 40 MITCHELL HAMLINE LAW JOURNAL OF PUBLIC POLICY AND PRACTICE 23 (2019). I therefore concur in the majority opinion.

William Mallory Kent of Kent & McFarland, Jacksonville, for Appellant.

Ashley Moody, Attorney General, Tallahassee, for Appellee.