FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2651

MATTHEW J. DETTLE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Alachua County.
Mark W. Moseley, Judge.

August 20, 2021

PER CURIAM.

Appellant raises a double jeopardy challenge under *Lee v. State*, 258 So. 3d 1297 (Fla. 2018), to his 2014 convictions for traveling to meet a minor for the purpose of engaging in an illegal act and improper use of computer services. The ruling in *Lee* does not apply retroactively to cases such as Appellant's that were already final when *Lee* was decided. *See State v. Glenn*, 558 So. 2d 4 (Fla. 1990); *Witt v. State*, 387 So. 2d 922 (Fla. 1980).

AFFIRMED.

LEWIS and LONG, JJ., concur; MAKAR, J., concurs 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.

A key issue in this post-conviction appeal, and one upon which we ordered supplemental briefing, is "whether the Florida Supreme Court's decision in *Lee v. State*, 258 So. 3d 1297 (2018), applies retroactively." *Lee* all but unanimously held, consistent with Justice Polston's unanimous decision in *State v. Shelley*, 176 So. 3d 914, 916 (Fla. 2015), that the determination of whether multiple convictions for soliciting a minor "are based upon the same conduct for purposes of double jeopardy, the reviewing court may consider only the charging document." *Lee*, 258 So. 3d at 1304 (Justice Quince concurred in result only). The State's briefing in this case advocates that *Lee* not be given retroactive effect. Counsel for Dettle withdrew after the supplemental briefing order issued, so no supplemental brief was forthcoming on Dettle's behalf, leaving only the State's position having been briefed. That said, the principles of *Witt v. State*, 387 So. 2d 922, 930 (Fla. 1980), and its progeny, suggest that the type of change brought about by *Lee* is not a "jurisprudential upheaval" and does not fall into the "major" category for which retroactive application in a post-conviction case is warranted. *Id.* at 927 ("Quite clearly, the main purpose for Rule 3.850 was to provide a method of reviewing a conviction based on a major change of law, where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside."). *Shelley* and *Lee* are highly significant cases because both involved the protection of the constitutional right against double jeopardy; but every decision affecting a constitutional right does not automatically make the decision retroactive. Notably, Dettle successfully argued on direct appeal that a double jeopardy violation occurred, *Dettle v. State*, 218 So. 3d 910 (Fla. 1st DCA 2016), but he did not pursue supreme court review on his *Shelley/Lee* issue despite the then-existing conflict among the districts, which *Lee* resolved. *See Dettle v. State*, 226 So. 3d 285 (Fla. 1st DCA 2017) (Bilbrey, J., dissenting from

denial of certification and discussing conflict). Instead, Dettle allowed the mandate to become final and chose to be resentenced thereby making his post-conviction claim less compelling.

Gilbert A. Schaffnit of Law Offices of Gilbert A. Schaffnit, Gainesville, for Appellant.

Ashley Moody, Attorney General, and Steven E. Woods, Assistant Attorney General, Tallahassee, for Appellee.