FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-1565

TERRY LEE MCCLENDON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Mark Borello, Judge.

October 6, 2022

WINOKUR, J.

Terry Lee McClendon, Jr. appeals his sentence to 44.275 months in prison following the revocation of his probation. McClendon asks us to reverse his sentence, or alternatively, to cite *Wilson v. State*, 306 So. 3d 1267 (Fla. 1st DCA 2020), currently pending review in the Florida Supreme Court, to allow him to seek review there. Because we find that *Wilson* does not apply, and that McClendon's sentence is legal, we affirm.

In 2018, McClendon entered a guilty plea to felony battery, felony aggravated assault, and criminal mischief, and was sentenced to twelve months in jail, followed by two years of

probation. On December 8, 2020, the State alleged by affidavit that McClendon violated several conditions of his probation.

At the violation of probation hearing, McClendon requested a departure from the lowest permissible sentence established by the Criminal Punishment Code. *See* § 921.00265, Fla. Stat. The State argued that the trial court should sentence McClendon to the lowest permissible sentence of 49.275 months in prison. After hearing all of the evidence, the trial court concluded that the State had met its burden of showing that McClendon had willfully and substantially violated his probation. The court found that a sentence in the permissible range was appropriate. Specifically, the court stated that it did "not find reasons to depart from the [permissible range] in this case." However, the court orally pronounced a sentence of 44.275 months in prison—five months less than the lowest permissible sentence.

When the discrepancy between the oral pronouncement and the lowest permissible sentence was brought to the trial court's attention, the court acknowledged the error but stated that it could not correct it because its oral pronouncement controlled.[*] The court then revoked McClendon's probation and sentenced him to 44.275 months in prison.

McClendon argues on appeal that the trial court failed to properly consider his arguments in support of downward departure. The trial court has "wide discretion" in determining whether to grant a motion for downward departure. *Wilson*, 306 So. 3d at 1269. But once a departure sentence is granted, "the

[*] This conclusion was incorrect. In fact, an orally pronounced sentence is not final and may still be altered until the sentencing hearing is concluded. *Klingler v. State*, 257 So. 3d 571, 572 (Fla. 1st DCA 2018) (holding that "[t]he trial court's pronouncement becomes final when the sentencing hearing ends," quoting *Shepard v. State*, 940 So. 2d 545, 548 (Fla. 5th DCA 2006)). The sentencing court could have corrected its error. However, the State did not cross-appeal the erroneous departure sentence, so we do not consider this error. *See Mercer v. State*, 219 So. 3d 936, 938 (Fla. 1st DCA 2017).

extent of downward departure is not subject to appellate review." § 921.0026(1), Fla. Stat.

In *Wilson*, the appellant challenged the trial court's denial of a motion for downward departure and imposition of a sentence that was not illegal, below the lowest permissible sentence, or above the statutory maximum. *See* 306 So. 3d at 1270. In contrast, in this case the trial court did impose a sentence that fell below the lowest permissible sentence. McClendon's sentence was a departure sentence, notwithstanding the trial court's purported denial of his motion for departure. Because the *Wilson* court was reviewing a sentence that was not a departure, based on the sentencing court's refusal to impose a departure sentence, it does not apply.

The Legislature has authorized the appeal of a departure sentence in certain instances. *See* § 921.002(1)(h), Fla. Stat.; *see also* § 924.07, Fla. Stat. (authorizing the State to appeal a sentence on the ground that it is illegal or fell below the lowest permissible sentence established by the code); *Wilson*, 306 So. 3d at 1269 (explaining that appellate review of "a downward departure sentence is . . . limited"). Thus, the State could have filed a cross-appeal, challenging the sentence as illegal. *See* §§ 921.002(1)(f), .0026(1), Fla. Stat. (prohibiting the trial court from granting a downward departure unless there are "circumstances or factors that reasonably justify" the departure); § 921.002(3), Fla. Stat. ("Any sentence imposed below the lowest permissible sentence must be explained in writing by the trial court judge."); *see also State v. White*, 842 So. 2d 257, 258 (Fla. 1st DCA 2003) (holding that a downward departure sentence is illegal if not accompanied by oral or written reasons supporting the departure). Having received a departure sentence, McClendon, on the other hand, can only complain about the extent of departure, which is specifically prohibited by statute. *See* § 921.0026(1), Fla. Stat.

Before closing, we note the posture of this case and its relation to this appeal. The sentencing court plainly rejected McClendon's request for a departure sentence, finding a departure unjustified. But the court knowingly imposed a departure sentence anyway, mistakenly believing that it could not correct the erroneous departure. Under these circumstances, it is difficult to conclude

what benefit McClendon believes would result from reversal, which would only allow the court to impose the sentence it meant to impose in the first place. While McClendon does request "resentencing before a different judge," he gives no basis whatever to support the request. Criminal appeals ought to be limited to claims that would secure an actual benefit to the defendant, not to those where reversal would likely result in a worse outcome.

AFFIRMED.

B.L. THOMAS and BILBREY, JJ., concur.

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

Jessica J. Yeary, Public Defender, and Danielle Jorden, Assistant Public Defender, Tallahassee, for Appellant.

Ashley Moody, Attorney General, and Heather Flanagan Ross, Assistant Attorney General, Tallahassee, for Appellee.