

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

**ORLANDO MCCORMACK,**  
Appellant,

v.

**STATE OF FLORIDA,**  
Appellee.

No. 4D15-2886

[June 21, 2017]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Dennis D. Bailey, Judge; L.T. Case No. 12-16738 CF10A.

Carey Haughwout, Public Defender, and Alan T. Lipson, Assistant Public Defender, West Palm Beach, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellee.

MAY, J.

The defendant appeals his conviction and sentence for kidnapping with a firearm, aggravated assault with a firearm, and battery. He argues that: (1) the court erred in denying his motion for mistrial after the prosecutor commented on his right to remain silent; (2) the court erred in sentencing him; and (3) that double jeopardy bars his convictions for aggravated assault with a firearm and kidnapping with a firearm. The State agrees there is an error in sentencing. We agree with the State and reverse and remand on the sentencing issue. We affirm on the remaining issues.

The defendant and victim were married at the time of the incident. The victim had previously been in a long-term relationship with another man. The victim's daughter lived with the victim and defendant.

Not surprisingly, the defendant's and victim's version of the facts conflict. According to the victim, she was asleep in a guest room of their house when the defendant pushed the door open and accused her of having a relationship with her ex-boyfriend.

They quarreled over the issue. With a gun in his hand, the defendant told the victim he was going to shoot her and her daughter in the head. When the victim tried to take the gun away, it fired.

The defendant then put the gun to the victim's head, walked her to the front door, and forced her into his car. He threatened to kill the ex-boyfriend, and asked for directions to his house. The couple struggled. The victim grabbed the defendant in the crotch; the defendant bent over and bit her hand.

A police officer observed the defendant almost hit a car. The officer followed them home, asked them where they were coming from, and the defendant told the officer they were coming from a friend's house. The victim was unable to get the officer's attention to indicate there was something wrong.

After the officer left and they reentered the house, the defendant revealed that he had two guns. The victim told him to throw them in the lake next to their house. He refused and instead drove away to dispose of the guns elsewhere. The victim woke her daughter and fled to a neighbor's house.

The victim told the neighbor that the defendant tried to kill them. The daughter called the police. At the request of the police, the daughter called the defendant, who then spoke to the police.

According to the defendant, when he entered the guest bedroom, the victim was sitting on the bed counting money from a duffel bag. He then asked about the money, and she pulled a semi-automatic pistol from the bag and put it against his forehead. He bit her while trying to get the gun away from her.

He told her he would not call the police, but that their marriage was over. When he was leaving, the victim insisted upon joining him. The defendant claimed he did not own or possess a gun nor did he fire the gun.

The police observed a hole in the tile floor from the bullet and damage to the sliding mirror closet door. A bullet jacket was found as well. A gunshot residue test of the victim's hands came back negative.

The jury found the defendant guilty on all counts and answered 'yes' to the special verdict interrogatory on whether defendant possessed and discharged a firearm. At sentencing, the trial court found there were two criminal episodes as it relates to the issue of consecutive versus

concurrent sentences. Specifically, the court found:

the aggravated assault took place in the bedroom where the defendant said to the victim, “I’m going to kill you, I’m going to kill your daughter and then I’m going to kill myself,” and then later he takes her at gunpoint to the car to go look for the purported paramour, which is a completely different episode.

The court sentenced defendant to ten years in prison with a ten-year mandatory minimum for armed kidnapping; twenty years in prison with a twenty-year mandatory minimum for aggravated assault with a firearm; and sixty days’ time served for battery, with credit for 989 days served on all counts. The twenty-year sentence was to run consecutively to the ten year sentence.

The defendant later moved to correct the sentencing error, arguing the ten and twenty year mandatory minimum sentences imposed consecutively were illegal. The trial court failed to rule on the motion within sixty days, deeming the motion denied.

The defendant argues the trial court erred in imposing mandatory minimum sentences consecutively where the crimes were part of one continuous criminal episode with no temporal break. He requests we vacate his sentence and remand for resentencing. The State agrees the case must be remanded for resentencing based on *Williams v. State*, 186 So. 3d 989 (Fla. 2016).

Florida’s 10-20-life statute provides:

[O]ffenders who actually possess, carry, display, use, threaten to use, or attempt to use firearms or destructive devices [ar]e punished to the fullest extent of the law, and the minimum terms of imprisonment imposed pursuant to this subsection shall be imposed for each qualifying felony count for which the person is convicted. *The court shall impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense.*

§ 775.087(2)(d), Fla. Stat. (2016) (emphasis added).

We had previously held that consecutive sentences were required even where the offenses arose out of one criminal episode. *See Wright v. State*,

143 So. 3d 995, 998 (Fla. 4th DCA 2014); *Williams v. State*, 125 So. 3d 879, 880 (Fla. 4th DCA 2013). Based on these decisions, the trial court was required to sentence the defendant consecutively.

However, our supreme court recently held that “consecutive minimum terms of imprisonment for multiple offenses are not required by the 10–20–Life statute, but are permissible, when the offenses ar[i]se from a single criminal episode.” *See Williams v. State*, 186 So. 3d at 989 (quashing *Williams v. State*, 125 So. 3d at 880). The trial court specifically found that there were two criminal episodes in this case, which distinguishes it from *Williams*.

Nevertheless, the supreme court noted the statute “expressly mandates only that a qualifying felony sentence run ‘consecutively to’ any sentence imposed for a non-qualifying felony.” *Williams*, 186 So. 3d at 992. Nothing in the language of the section requires a qualifying felony sentence to run consecutively to another qualifying felony sentence. *Id.* Here, both the aggravated battery and aggravated kidnapping were charged under the 10–20–Life statute, making them each qualifying felonies. Those sentences may be, but are not required to be, served consecutively. *See Williams*, 186 So. 3d at 992.

Because the trial court did not have the benefit of the supreme court’s recent decision in *Williams*, we reverse and remand the case to the trial court for resentencing, now knowing that it has the discretion to impose the sentences consecutively or concurrently.

*Affirmed in part; Reversed in part.*

CIKLIN, C.J., and TAYLOR, J.J., concur.

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***Not final until disposition of timely filed motion for rehearing.***