NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ASHLEY M. TOYE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D16-5423

Opinion filed December 11, 2019.

Appeal from the Circuit Court for Lee County; Bruce E. Kyle, Judge.

Mariko Shitama Outman of Carlton Fields Jorden Burt, P.A., Tampa, and Chris W. Altenbernd of Banker Lopez Gassler P.A., Tampa, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Donna S. Koch, Assistant Attorney General, Tampa, for Appellee.

KELLY, Judge.

In 2007, a jury found Ashley M. Toye guilty of two counts of first-degree felony murder, two counts of kidnapping, two counts of aggravated assault, and one count of tampering with evidence based on events that occurred when Toye was

seventeen years old. The trial court sentenced Toye to the mandatory sentence of life in prison without the possibility of parole for the felony murders and to concurrent sentences totaling a term of twenty-five years for the other charges. In 2008, this court per curiam affirmed Toye's judgments and sentences. Toye v. State, 988 So. 2d 1104 (Fla. 2d DCA 2008) (table decision). In 2012, the Supreme Court declared that the Eighth Amendment to the United States Constitution prohibited the imposition of a mandatory life sentence without the possibility of parole for crimes committed by individuals under the age of eighteen. Miller v. Alabama, 567 U.S. 460 (2012). Relying on Miller, Toye unsuccessfully challenged her life sentences in the circuit court.[1] On appeal from that order, we reversed and instructed the circuit court to resentence Toye in accordance with the requirements of Miller. Toye v. State, 133 So. 3d 540, 547 (Fla. 2d DCA 2014).

After we remanded but before Toye was resentenced, the Florida Supreme Court held that Miller resentencings should be conducted pursuant to newly enacted legislation intended to bring Florida law in to conformity with Miller. See Falcon v. State, 162 So. 3d 954, 956-57, 963 (Fla. 2015), receded from on other grounds Williams v. State, 242 So. 3d 280 (Fla. 2018); Horsley v. State, 160 So. 3d 393, 395 (Fla. 2015). Pertinent to this appeal, section 775.082(1)(b), Florida Statutes (2015), provides:

> 1. A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted . . . of a capital felony . . . which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in

[1]The judge who presided over Toye's trial in 2007 had retired. Toye's postconviction motions have been heard by a successor judge.

> accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(a).
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> 2. A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted . . . of a capital felony . . . which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with s. 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with s. 921.1402(2)(c).

Section 921.1402, Florida Statutes (2015), in turn provides:

> (2)(a) A juvenile offender sentenced under s. 775.082(1)(b)1. is entitled to a review of his or her sentence after 25 Years. . . .
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> . . . .
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> (c) A juvenile offender sentenced to a term of more than 15 years under s. 775.082(1)(b)2., s. 775.082(3)(a)5.b., or s. 775.082(3)(b)2.b. is entitled to a review of his or her sentence after 15 years.

Thus, a finding that a juvenile offender actually killed, intended to kill, or attempted to kill results in a mandatory minimum sentence of forty years' imprisonment and judicial review after twenty-five years, while a finding that a juvenile did not actually kill, attempt to kill, or intend to kill, carries no mandatory minimum and requires judicial review after fifteen years.

At the time of Toye's resentencing, it was up to the sentencing judge to make the finding regarding whether the defendant actually killed, intended to kill, or

attempted to kill. See, e.g., Falcon, 162 So. 3d at 963 (holding that under section 775.082(1) the trial court must determine whether the defendant "actually killed, intended to kill, or attempted to kill the victim"). The State took the position that Toye should be sentenced under section 775.082(2)(b)(2), which entitled her to a review after fifteen years pursuant to section 921.1402(2)(c), and it recommended a term of years sentence rather than a life sentence:

> I do know that the State has toyed with what would be appropriate given the other sentences [of Toye's codefendants who entered pleas] and has considered recommending 30 years to the Court as an appropriate sentence. I know the State has also considered thinking about recommending somewhat less and asking for a term of probation.
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> But it would be the State's recommendation that the Court consider something less than a life sentence for Ms. Toye.

The State explained that while Toye was "an active participant," her culpability was different from the three codefendants in her case who got the longest sentences, and it noted that the two actual shooters received life and fifty years, respectively. Finally, the State pointed to Toye's immaturity at the time of the offense and the fact that she had "actively sought to rehabilitate herself while she has been incarcerated." The circuit court orally announced Toye's sentence at a subsequent hearing where it imposed life sentences and also found that Toye had intended to kill the victims; therefore, pursuant to sections 775.082(1)(b)(1) and 921.1402(2)(a), she was not entitled to review of her sentences for twenty-five years.

Toye challenges these sentences in this appeal. While this appeal was pending, the Florida Supreme Court decided Williams v. State, 242 So. 3d 280, 282 (Fla. 2018), which held that under the Sixth Amendment to the U.S. Constitution and

Alleyne v. United States, 570 U.S. 99 (2013), the finding that a defendant actually killed, intended to kill, or attempted to kill, under section 775.082(1)(b) must be made by a jury beyond a reasonable doubt, not by a judge. In light of Williams, this court relinquished jurisdiction to the circuit court so Toye could file a motion under Florida Rule of Criminal Procedure 3.800(b)(2) to correct sentencing error. The circuit court denied the motion after erroneously concluding that the legality of Toye's sentence could not be raised in a rule 3.800(b)(2) motion. See Jackson v. State, 983 So. 2d 562, 573-74 (Fla. 2008).

Thus, the first issue we address is whether Toye's sentence is legal under Williams. In Williams, the court held that in order for a juvenile offender to be sentenced under section 775.082(1)(b)(1), a jury must find beyond a reasonable doubt that the juvenile actually killed, intended to kill or attempted to kill the victim. 242 So. 3d at 287-88. Here, Toye was sentenced under section 775.082(1)(b)(1) after the sentencing judge found she intended to kill the victims. Absent a jury finding that she intended to kill the victims, however, Toye's sentence violated her Sixth Amendment right to a jury trial. See Alleyne, 570 U.S. at 114-15; Williams, 242 So. 3d at 287-88. Thus, as did the court in Williams, we look to the verdict form and the jury instructions in Toye's case to determine if there is a "clear jury finding" that Toye intended to kill the victims.[2] See Williams, 242 So. 3d at 288-89. We conclude there is not, a fact the State acknowledges in its brief. Thus, Toye was sentenced in violation of Alleyne and Williams.

[2]It was undisputed that Toye did not actually kill or attempt to kill the victims. At Toye's sentencing hearing, the State did not argue that Toye intended to kill the victims but, as previously explained, recommended that she be sentenced under section 775.082(1)(b)(2).

This does not end our inquiry, however. In Williams, the court also held that an Alleyne violation is subject to harmless error review. 242 So. 3d at 290. The court framed the harmless error inquiry as "whether the failure to have the jury make the finding as to whether the juvenile offender actually killed, intended to kill, or attempted to kill contributed to his sentence" or stated differently, "whether the record demonstrates beyond a reasonable doubt that a rational jury would have found the juvenile offender actually killed, intended to kill, or attempted to kill the victim." Id. (citing Galindez v. State, 955 So. 2d 517, 523 (Fla. 2007)). The State rightly recognizes that given our recent decision in Washington v. State, 257 So. 3d 520 (Fla. 2d DCA 2018), a case involving one of Toye's codefendants, the Alleyne error in this case cannot be considered harmless.[3]

The State argues that should we reverse Toye's sentence, all that is required on remand is for the sentencing court to correct Toye's sentence to conform to the jury's finding that she did not actually kill, intend to kill, or attempt to kill the victims; therefore, she is entitled to have her sentence reviewed after fifteen years. Toye contends that under Williams, she is entitled to a de novo resentencing hearing conducted pursuant to section 924.1401. See Williams, 242 So. 3d at 292-93. We agree.

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[3]Toye goes further and argues that not only is there no clear jury finding that she intended for the victims to be killed, but that by acquitting her of first degree premeditated murder as a principal, the jury necessarily determined that she did not intend for the victims to be killed. While that seems to be how the State viewed the jury's verdict, under the circumstances in this case we need not decide if Toye is correct. We note, however, that if the jury's verdict did amount to such a finding, Toye's sentence under section 775.082(1)(b)(1) would be unlawful and she would have to be resentenced in accordance with the jury's verdict. See Alleyne, 570 U.S. at 117-18.

In Williams, the court remanded for resentencing, not simply for correction of Williams's sentence to reflect that he was entitled to have his sentence reviewed after fifteen years. 242 So. 3d at 293-94. While Williams rejected the argument that on resentencing a jury could be empaneled to make the findings required by section 775.082(1)(b), it nevertheless held that Williams was entitled to "resentencing under 775.082(1)(b)2." Id. We are not willing to infer that the court did not mean what it said when it held that "resentencing is the appropriate remedy for an Alleyne violation that is not harmless." Id. at 292-93. The supreme court has repeatedly explained that a resentencing is a "completely new proceeding." Preston v. State, 607 So. 2d 404, 408 (Fla. 1992). It "has long held that where a sentence has been reversed or vacated, the resentencings in all criminal proceedings, including death penalty cases, are de novo in nature." State v. Fleming, 61 So. 3d 399, 406 (Fla. 2011). Thus, "when a defendant is resentenced, 'the full panoply of due process considerations attach' . . . [and] both parties may present new evidence bearing on the sentence." Id. at 406 (quoting State v. Scott, 439 So. 2d 219, 220 (Fla. 1983)). It is this history that prompted the dissent in Williams to point out that restricting the parties from empaneling a jury as part of the resentencing was inconsistent with the de novo nature of a resentencing. 242 So. 3d at 294. Further, sentencing under section 775.082(1)(b)(2) takes place "after a sentencing hearing conducted by the court in accordance with s. 921.1401," so the directive to resentence a defendant under section 775.082(1)(b)(2) necessarily contemplates a de novo sentencing hearing under section 921.1401. Id. at 284.

Toye further argues she is entitled to resentencing before a different judge because the sentencing judge violated her right to due process when he considered

constitutionally impermissible factors in determining her sentence. Specifically, she contends that the sentencing judge improperly considered conduct for which she had been acquitted and that he penalized her for exercising her right to trial rather than entering a plea.

In support of her contention that the sentencing judge violated her right to due process when he found she intended to kill the victims, Toye relies on Ortiz v. State, 264 So. 3d 1032, 1034 (Fla. 4th DCA 2019), Doty v. State, 884 So. 2d 547, 549 (Fla. 4th DCA 2004), and Epprecht v. State, 488 So. 2d 129, 131 (Fla. 3d DCA 1986), which hold that the due process clause prohibits a court from considering charges of which an accused has been acquitted when imposing a sentence. We need not reach the issue of whether, in general, it is impermissible for a court to rely on conduct of which a defendant has been acquitted when imposing a sentence, because we conclude that under the controlling law at the time of Toye's 2015 sentencing, the sentencing judge was required to make the finding as to whether the defendant actually killed, intended to kill, or attempted to kill the victims. Under these circumstances we cannot say the judge relied on impermissible conduct.

We do, however, find merit in Toye's contention that comments by the sentencing judge could reasonably be viewed as suggesting that her sentence was based, at least in part, on her decision to go to trial. "When the comments of a sentencing court may reasonably be viewed as suggesting that the sentence was, at least in part, based on the defendant's decision to go to trial, resentencing before a different judge is appropriate." Walek v. State, 129 So. 3d 1185, 1188 (Fla. 2d DCA 2014). Because we conclude that viewed in light of the record as a whole, the

sentencing judge's comments could suggest that he based Toye's sentence, at least in part, on her failure to enter a plea, we believe she should be resentenced before a different judge. See Mosley v. State 198 So. 3d 58, 60 (Fla. 2d DCA 2015) (reversing and remanding for resentencing before a different judge where the record could reasonably be read to suggest that the defendant's sentence was the result, at least in part, of consideration of impermissible factors); Gillman v. State, 373 So. 2d 935, 939 (Fla. 2d DCA 1979) (holding that the appellant's choice of plea should not have played any part in the determination of his sentence).

Reversed and remanded for proceedings consistent with this opinion.

CASANUEVA, J., Concurs.
ATKINSON, J., Concurs with opinion.

ATKINSON, Judge, Concurring.

I concur in the majority opinion but write separately to address Toye's argument that the jury necessarily determined that the State failed to prove beyond a reasonable doubt that Toye actually killed, attempted to kill, or intended to kill the victims. Toye argues that such a finding was impossible because the jury returned a guilty verdict for the charge of felony murder based on kidnapping but found Toye not guilty of premeditated murder. However, those verdicts do not foreclose the possibility of some evidence short of premeditation from which the jury could have concluded that the defendant intended to kill the victim. Cf. Williams v. State, 242 So. 3d 280, 292 (Fla. 2018) ("It can be argued that a juvenile who admits to participating in a kidnapping and homicide to this extent intended for the victim to be killed.").

I agree that the indicia of Toye's intent and the evidence of her participation does not conclusively establish that a jury would have found an intent to kill had been proven beyond a reasonable doubt for the purpose of rendering the Alleyne error harmless. See id. at 291–92 ("Because the record fails to demonstrate beyond a reasonable doubt that a rational jury would have found that Williams actually killed, intended to kill, or attempted to kill Brookins, the Alleyne violation here was not harmless."). However, the evidence of Toye's participation in the acts of violence—at least one of which she herself committed—and of her acquiescence to and continued involvement in a scheme that she admitted seemed inexorably leading toward the death of the victims, does give rise to the possibility that a jury could have found she intended to kill the victims. Acknowledging that the Florida Supreme Court's majority opinion in Williams forecloses the State's opportunity to attempt to prove this before a jury upon remand, I agree that we must remand for "resentencing under 775.082(1)(b)2." See id. at 293–94.