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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

SUSAN KELLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-525

Opinion filed December 30, 2020.

Appeal from the Circuit Court for Charlotte County; Donald H. Mason, Judge.

Howard L. Dimmig, II, Public Defender, and Tosha Cohen, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Jonathan S. Tannen, Assistant Attorney General, Tampa, for Appellee.

KHOUZAM, Chief Judge.

Susan Kelley timely appeals the revocation of her probation and the resulting sentences for several drug-trafficking offenses, imposed following an unusual sequence of proceedings in which she mistakenly entered her negotiated plea twice, later admitted to violating her probation, and was ultimately sentenced to a mandatory

minimum sentence of twenty-five years in prison. As Kelley has failed to show reversible error, we affirm.

I. Background and Procedural History

On March 20, 2013, Kelley and six codefendants were charged with various offenses arising from their alleged involvement in a months-long scheme to obtain Oxycodone pills by presenting fraudulent prescriptions at pharmacies. Kelley herself was charged with conspiracy to traffic in illegal drugs (count one), trafficking in illegal drugs (counts two through five), and obtaining a controlled substance by fraud (counts twenty through twenty-three). The information stated that count one was a first-degree felony and cited to section 893.135(1)(c)1.c, Florida Statutes (2012), which sets forth the relevant twenty-five-year mandatory minimum.

Kelley entered a negotiated plea on August 19, 2013, agreeing that she would provide substantial assistance in investigating and prosecuting her codefendants before being sentenced. In exchange, the State agreed to sentence her to a three-year mandatory minimum sentence followed by seven years' probation. Sentencing was postponed, and the plea was sealed.

Kelley followed through with the agreement, testifying for the State at the trial of one of her codefendants. By the time Kelley's case was scheduled for sentencing on November 9, 2015, a different judge and prosecutor had been assigned to the case. Not realizing that Kelley had already entered a plea, the successor judge conducted another plea colloquy, and Kelley signed another plea form. At this hearing, the new prosecutor orally amended counts two through five—but not count one—to reflect a lesser amount of drugs covered under a different statutory subsection. Kelley

was sentenced to mandatory minimum terms of three years in prison to be followed by seven years of probation.

Following her release from prison, Kelley admitted to violating her probation by committing a number of new law violations. Her probation was revoked, and Kelley was sentenced to the mandatory minimum term of twenty-five years in prison on count one, mandatory minimum terms of fifteen years in prison on counts two through five, and time served on counts twenty through twenty-three. She filed a timely notice of appeal.

During the pendency of this appeal, Kelley filed a motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)(2). The circuit court partially granted the motion, and she was resentenced on counts two through five to fifteen years in prison with no mandatory minimum. The twenty-five-year mandatory minimum sentence on count one remained in place.

II. Analysis

Kelley proposes several alternative outcomes in this case. First, she argues that her underlying *convictions* should be vacated and she should be able to withdraw her plea because there was no "meeting of the minds" regarding the plea agreement and the two plea colloquies violated double jeopardy principles. Second, she argues that this case should be reversed and remanded for her to be sentenced under the first plea by the original judge because, if the first plea stands, "[t]he violation of probation is null since no sentence is yet in place." Finally, she argues that the twenty-five-year mandatory minimum sentence on count one should be reversed and

remanded for the imposition of the three-year mandatory minimum sentence that was agreed upon at the second plea hearing.

As a threshold issue, this is an appeal of the revocation of Kelley's probation and the partial denial of her rule 3.800(b)(2) motion, *not* her original conviction and sentence. If she wanted to challenge the two plea colloquies that led to her 2015 judgment and sentence, her opportunity to do so was in a timely appeal of that judgment and sentence or in a timely motion for postconviction relief. See § 924.06(2), Fla. Stat. (2015) ("An appeal of an order revoking probation may review only proceedings after the order of probation."); Fla. R. App. P. 9.140(b)(1) (authorizing appeal of final judgment, orders of probation, and revocation orders under separate subsections); see also Lindsay v. State, 842 So. 2d 1057, 1058-59 (Fla. 4th DCA 2003) (discussing the scope of the circuit and appellate courts' jurisdiction over appellant's original judgment and sentence, probation revocation, and postconviction motion); Farrar v. State, 42 So. 3d 265, 266 (Fla. 5th DCA 2010) (concluding that challenges to underlying convictions, such as double jeopardy claims, are not cognizable in a rule 3.800(b)(2) motion).

The irregularities leading up to the original judgment and sentence would change the outcome of the revocation appeal only if Kelley could show that the original judgment or sentence was void and therefore the court never had the jurisdiction to place her on probation in the first place. See Wilson v. State, 487 So. 2d 1130, 1130 (Fla. 1st DCA 1986) ("Since the sentence which originally placed Wilson on probation was void, the court had no authority to revoke his probation."); Bales v. State, 489 So. 2d 888, 889 (Fla. 1st DCA 1986) ("Because the court lost jurisdiction to mitigate Bales'

sentence 60 days after it was initially imposed, the probation order dated January 3, 1984 was void. Since the order placing Bales on probation was void, the order revoking his probation and the sentence imposed are also void." (citing Wilson, 487 So. 2d at 1130)).

Kelley has not shown that the original judgment and sentence was void. Rather, she has simply shown that the court mistakenly conducted her plea colloquy twice and that the State mistakenly made her sign two plea forms. The fact that there were two plea colloquies does not constitute a violation of double jeopardy because Kelley was not subject to multiple prosecutions, convictions, or sentences for the same offense. See Rozier v. State, 620 So. 2d 194, 196 (Fla. 1st DCA 1993) (explaining that there are "three guarantees afforded by the constitutional protection against double jeopardy: (1) protection against a second prosecution for the same offense after an acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense").

The terms of the plea agreement as discussed at the August 2013 and November 2015 plea hearings were materially the same, and the judgment and sentence that was ultimately entered in 2015 was consistent with the agreement. At both hearings, Kelley stated that she was pleading guilty to the offenses as charged in the information. The information stated that count one was a first-degree felony and cited to section 893.135(1)(c)1.c, which sets forth the relevant twenty-five-year mandatory minimum. At both hearings, it was clear on the record that Kelley was receiving a downward departure sentence based on her agreement with the State and that sentence would be a mandatory minimum three years to be followed by seven

years of probation. At the first hearing, Kelley was fully advised of the minimum and maximum sentences, including specifically the twenty-five-year mandatory minimum on count one. The court accepted her plea but postponed sentencing. At the second hearing, the prosecutor made the deal even more favorable to Kelley by orally amending the information to reduce the charges in counts two through five. Then Kelley was sentenced to a mandatory minimum of three years on counts one through five without mention of the twenty-five-year mandatory minimum on count one. The court specifically noted that it was basing this downward departure sentence on Kelley's substantial assistance and cooperation with the State.

Both written plea forms make clear that the State was agreeing to recommend a reduced sentence of three years in prison followed by seven years of probation on counts one through five in exchange for Kelley's assistance in the investigation and prosecution of her codefendants. Both plea forms warn that Kelley would be subject to the statutory maximum penalty if she breached the agreement and show that she was facing up to a total of 170 years in prison. The first plea form clearly stated that if she was convicted on count one, then she was facing up to thirty years in prison with a twenty-five-year mandatory minimum sentence. The second plea form states that she was facing up to thirty years on count one without mentioning the mandatory minimum. The second form also specifically represented:

> 5. I have read the information in this case, or have had it read to me, and I understand the charge(s) to which I enter my plea(s). My lawyer has explained to me the maximum penalty for the charge(s), the essential elements of the crime(s), and possible defenses to the crime(s), and I understand these things. I understand that . . . if I am on probation, my probation can be revoked and I can receive a

> separate sentence up to the maximum on the probation charge in addition to the sentence imposed on this case.
> . . . .
> 8. IF CRIME WAS COMMITTED ON OR AFTER OCTOBER 1ST, 1998, THE FOLLOWING APPLIES:
> The sentencing guidelines calculate a minimum sentence of incarceration only. You can be sentenced to the statutory maximum for the crime. The Court does not need to give a reason to sentence you to the statutory maximum. Example: Third degree felony maximum is 5 years, Second degree felony maximum is 15 years, First degree felony maximum is 30 years. If you violate your probation or community control at a future date, you are **still** subject to these statutory maximums.

Considering these forms, it appears that Kelley was indeed on notice that she could be sentenced to the statutory maximum sentences, including the mandatory minimum on count one. To the extent that she has a claim that she was not properly warned about the mandatory minimum sentence on count one at the second plea hearing, this is the type of claim that would have to be raised on direct appeal from the original judgment and sentence or in a postconviction motion—not here in her probation revocation appeal. And regardless of the merits of such a claim, it is not the type of claim that would render her sentence void.

Once Kelley admitted to violating her probation, she breached the plea agreement and was subject to any sentence that might have originally been imposed, including the mandatory minimum terms. See § 948.06(2)(b), Fla. Stat. (2017) ("If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control."); see also Foulks v. State, 45 Fla. L. Weekly D2062, D2064 (Fla.

3d DCA Aug. 31, 2020) ("[S]ection [948.06(2)(b)] encompasses any sentence the defendant was eligible to receive that might have been imposed at the original sentencing had a plea agreement not been reached.").

"[W]hen a defendant pleads guilty pursuant to a plea bargain and the court places him on probation, if he violates his probation the court can sentence him to a term in excess of the provisions of the original bargain." State v. Segarra, 388 So. 2d 1017, 1018 (Fla. 1980). This includes mandatory minimum terms. See State v. Valera, 75 So. 3d 330, 332 (Fla. 4th DCA 2011) (holding that the trial court erred by sentencing defendant to a sentence below the mandatory minimum after revoking his probation). "Only originally, as a result of a plea agreement and with the consent of the state, could appellee have received a sentence that waived the minimum mandatory term of incarceration." Id. "As a result of the unsuccessful termination of probation, the trial court was required to sentence appellee to the minimum mandatory sentence that could have been 'originally imposed before placing the probationer on probation.' " Id. (quoting § 948.06(2)(b)).

As the Third District recently explained in the context of a prison releasee reoffender (PRR) mandatory minimum sentence that the State had waived as part of a plea agreement but the court imposed after the defendant's probation was revoked:

> "[A] sentencing after a revocation of probation is, for all intents and purposes, just a resentencing on the original offense." Shields v. State, 296 So. 3d 967, 972 (Fla. 2d DCA 2020). "The events which bring about a revocation open a new chapter in which the court ought to be able to mete out any punishment within the limits prescribed for the crime." Aponte [v. State], 810 So. 2d [1008,] at 1010 [(Fla. 4th DCA 2002)] (quoting State v. Segarra, 388 So. 2d 1017, 1018 (Fla. 1980)).
> A revocation of probation essentially brings Foulks back to

> the starting point of any sentence he was facing at the original sentencing hearing. Prior to Foulks' original sentencing, the State had filed a notice to invoke sentencing as a PRR. As part of a negotiated plea, the State waived the PRR sentence. But, had Foulks rejected the plea agreement, the PRR minimum mandatory sentence would have been on the table. See State v. Davis, 834 So. 2d 898, 899 (Fla. 3d DCA 2002) (finding the State had not waived imposition of PRR when it offered the defendant a non-PRR sentence because the defendant's rejection of the plea offer negated any waiver by the State).

Foulks, 45 Fla. L. Weekly at D2064-65 (first alteration in original). Because Kelley was originally subject to the twenty-five-year mandatory minimum sentence before she entered into the plea agreement with the State, she was appropriately subject to it once her probation was revoked.

Ultimately, although Kelley has pointed out several irregularities in the proceedings below, she has failed to show any error warranting reversal in this appeal. Accordingly, we affirm.

Affirmed.

NORTHCUTT and ROTHSTEIN-YOUAKIM, JJ., Concur.