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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

BRANDON LAMAR GAGE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-4580

Opinion filed February 21, 2020.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Polk County; William D. Sites, Judge.

Brandon Lamar Gage, pro se.

Ashley Moody, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Brandon Lamar Gage appeals the order denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Because Gage's fifty-year sentence for nonhomicide offenses that he committed as a juvenile violates the Eighth Amendment as set forth in Graham v. Florida, 560 U.S. 48 (2010), we reverse.

In April 2016, Gage was convicted of armed sexual battery and battery based on offenses he committed when he was fifteen years old. The trial court sentenced Gage to fifty years' imprisonment for the sexual battery and to time served for the battery.[1] The fifty-year sentence included no possibility of review.

In his rule 3.850 motion, Gage argued that because he had been a juvenile nonhomicide offender, his fifty-year sentence violated Graham, and that he was therefore entitled to relief under Kelsey v. State, 206 So. 3d 5 (Fla. 2016). The postconviction court concluded that the sentence was legal and denied the motion.

In Henry v. State, 175 So. 3d 675, 679 (Fla. 2015), cert. denied, 136 S. Ct. 1455 (2016), the supreme court addressed a conflict among the district courts of appeal regarding "how to decide if lengthy term-of-years sentences of juvenile nonhomicide offenders should be evaluated for whether such sentences violate Graham." In concluding that Henry's ninety-year sentence without the possibility of review was unconstitutional under Graham, the court held "that the constitutional prohibition against cruel and unusual punishment under Graham is implicated when a juvenile nonhomicide offender's sentence does not afford any 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.' " Henry, 175 So. 3d at 679 (quoting Graham, 560 U.S. at 75); see also id. at 680 ("[T]he Eighth Amendment will not tolerate prison sentences that lack a review mechanism for evaluating this special class of offenders for demonstrable maturity and reform in the future because any term of

[1]Although Gage was sentenced in 2016 after a new trial, see Gage v. State, 147 So. 3d 1020, 1021 (Fla. 2d DCA 2014), he committed the offenses in 2010. Therefore, chapter 2014-220, Laws of Florida, by its terms, did not apply. See Morris v. State, 246 So. 3d 244, 244-45 (Fla. 2018).

imprisonment for a juvenile is qualitatively different than a comparable period of incarceration is for an adult." (citing Graham, 560 U.S. at 70-71)).

In Kelsey, the supreme court clarified what constitutes a "lengthy term-of-years sentence" for these purposes, stating

> that all juvenile offenders whose sentences meet the standard defined by the Legislature in chapter 2014-220, [Laws of Florida,] a sentence longer than twenty years, are entitled to judicial review. We therefore hold that all juveniles who have sentences that violate Graham are entitled to resentencing pursuant to chapter 2014-220, Laws of Florida, codified in sections 775.082, 921.1401 and 921.1402, Florida Statutes (2014).

206 So. 3d at 8 (emphasis added). The court reaffirmed that "Graham does indeed apply to term-of-years sentences" and that a sentence need not be a " 'de facto life' sentence[] for Graham to apply." Id. at 10 (citing Guzman v. State, 183 So. 3d 1025, 1026 (Fla. 2016)). The court explained, "By using chapter 2014-220 as a guide, we avoid second-guessing the legislative contemplation that resulted in the twenty-year cutoff for judicial review contained in the law." Id.

In Johnson v. State, 215 So. 3d 1237, 1239 (Fla. 2017), the supreme court reiterated "that juveniles who receive term-of-years sentences that do not provide a meaningful opportunity for early release based on maturity and rehabilitation during their natural lives are entitled to resentencing pursuant to chapter 2014-220, Laws of Florida." (citing Henry, 175 So. 3d at 680). The court explained that to qualify as a "meaningful opportunity for early release," courts must ensure (1) "that a juvenile nonhomicide offender does not receive a sentence that provides for release only at the end of a sentence," (2) "that a juvenile nonhomicide offender who is sentenced post-Henry does not receive a sentence which includes early release that is not based on a

demonstration of rehabilitation and maturity (i.e. gain time or other programs designed to relieve prison overpopulation)"; and (3) "that a juvenile nonhomicide offender who is sentenced post-Henry does not receive a sentence that provides for early release at a time beyond his or her natural life." Johnson, 215 So. 3d at 1243.

This court has construed Johnson as "clarifying that Kelsey applies to all juveniles who have been sentenced to term-of-years sentences of more than twenty years in prison but who would not have the opportunity for judicial review as provided in chapter 2014-220, Laws of Florida." Alfaro v. State, 233 So. 3d 515, 516 (Fla. 2d DCA 2017) (reversing and remanding for resentencing of juvenile nonhomicide offender sentenced to thirty years' imprisonment); see also Cuevas v. State, 241 So. 3d 947, 949 (Fla. 2d DCA 2018) (reversing and remanding for resentencing of juvenile nonhomicide offender sentenced to twenty-six years' imprisonment); Blount v. State, 238 So. 3d 913, 913-14 (Fla. 2d DCA 2018) (reversing and remanding upon State's concession that resentencing was warranted for juvenile nonhomicide offender sentenced to forty years' imprisonment); Mosier v. State, 235 So. 3d 957, 958 (Fla. 2d DCA 2017) (reversing and remanding upon State's concession that resentencing was warranted for juvenile nonhomicide offender sentenced to thirty years' imprisonment followed by ten years' probation).

Consistent with these decisions, we hold that because Gage was sentenced to a term of more than twenty years' imprisonment without an opportunity for early release or judicial review, he is entitled to resentencing. Accordingly, we reverse the postconviction court's order and remand for resentencing pursuant to the juvenile

sentencing guidelines codified in sections 775.082, 921.1401, and 921.1402, Florida Statutes (2019).[2]

In so holding, we recognize that the First and Fourth Districts disagree with our interpretation of Kelsey. See Hart v. State, 255 So. 3d 921, 928 (Fla. 1st DCA 2018) (rejecting the argument that Kelsey and Henry require that all juvenile nonhomicide offenders sentenced to more than twenty years' imprisonment must be resentenced and afforded the judicial review mechanism); Hart v. State, 246 So. 3d 417, 419 (Fla. 4th DCA 2018) (en banc) (holding that a thirty-year prison sentence for a juvenile nonhomicide offender is not illegal under Graham; stating that it is unclear when a juvenile nonhomicide offender's sentence becomes illegal under Graham but it is clear that the supreme court "has not plainly required that all 'term-of-years' juvenile offender sentences—even those of shorter duration—provide a mechanism for early release based on demonstrated maturity and rehabilitation").[3] We therefore certify conflict with those two decisions.

Reversed and remanded with directions; conflict certified.

MORRIS and BADALAMENTI, JJ., Concur.

---

[2]We note that in Kelsey, the supreme court held that jeopardy did not attach to Kelsey's sentence that was deemed illegal "because it did not provide him a meaningful opportunity for early release based on maturation." Kelsey, 206 So. 3d at 11. It explained that when Kelsey was resentenced under sections 775.082, 921.1401, and 921.1402, the State could seek life imprisonment with judicial review. Gage, like Kelsey, was convicted of sexual battery with the use or threatened use of a deadly weapon, which is a life felony under section 794.011(3), Florida Statutes (2010).

[3]In Hart, the Fourth District certified conflict with Cuevas, Blount, Mosier, and Alfaro. 246 So. 3d at 421.