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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOHNNIE SHIELDS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-493

Opinion filed May 27, 2020.

Appeal from the Circuit Court for Polk
County; J. Kevin Abdoney, Judge.

Howard L. Dimmig, II, Public Defender,
and Kevin Briggs, Assistant Public
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Johnny T. Salgado,
Assistant Attorney General, Tampa, for
Appellee.

SALARIO, Judge.

Johnnie Shields appeals from a sentence of five years in state prison that the trial court imposed after finding that he violated his probation. He argues that section 775.082(10), Florida Statutes (2016), limited the trial court to a non-state prison sanction and that its imposition of a state prison sentence based on a factual finding

made by the trial judge rather than a jury violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution. We agree and reverse.

Mr. Shields was originally charged with three counts of promotion of child pornography. He ended up pleading no contest to three counts of the lesser included offense of unlawful computer use. The trial court withheld adjudication and sentenced Mr. Shields to five years' probation, one condition of which was that he not have unsupervised contact with minors. Mr. Shields later had unsupervised contact with a minor, and after a hearing, the trial court decided to revoke his probation on that account. The trial court then held a hearing for the purpose of sentencing Mr. Shields anew for the three counts of unlawful computer use to which he initially pleaded.

Under section 775.082(10), convicted defendants who score fewer than twenty-two sentencing points under the Criminal Punishment Code—a category into which it is undisputed Mr. Shields falls—may be sentenced only to a non-state prison sanction. An exception applies when "the court makes written findings that a nonstate prison sanction could present a danger to the public," in which case a state prison sentence is permissible. Id. Based on testimony concerning the initial conduct underlying Mr. Shields' offenses and his subsequent conduct in violation of his probation, the State argued for a sentence of time in state prison.

Mr. Shields objected to the State's request, arguing that as interpreted by the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), the Sixth and Fourteenth Amendments require that a jury, not a judge, make the statutory finding of dangerousness. He directed the court to the Florida Supreme Court's decision in Brown v. State, 260 So. 3d 147 (Fla. 2018), which explicitly held that Apprendi extends to that statutory finding. Because he had fewer than twenty-two

points and no jury had made a finding of dangerousness, he contended that the trial court had to sentence him to a non-state prison sentence.

The State responded that because Mr. Shields was being sentenced after the revocation of his probation, Apprendi and Brown—each of which involved the imposition of a sentence immediately after conviction, not after a subsequent probation violation—did not apply and that the trial court could make the finding of dangerousness itself. The trial court agreed, found that Mr. Shields was in fact a danger to the public, and sentenced him to five years' state prison. Mr. Shields appeals from that sentence, raising the same argument he did at trial—namely, that the Sixth and Fourteenth Amendments prohibit a state prison sentence absent a jury finding of dangerousness.

In Apprendi, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury[] and proved beyond a reasonable doubt." 530 U.S. at 490. The Court recognized that the Sixth Amendment protection requiring a jury finding of guilt as to every element of a crime also applies to sentencing factors that increase a defendant's sentence beyond the statutory maximum because such sentencing factors "increase the prescribed range of penalties to which a criminal defendant is exposed." Id. at 476, 490 (quoting Jones v. U.S., 526 U.S. 227, 252-53 (1999)). In a subsequent decision, Blakely v. Washington, 542 U.S. 296, 303, 310 (2004), the Court applied Apprendi in the context of a plea case and also explained that a "statutory maximum" sentence is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."

In Brown, our supreme court held that Apprendi and Blakely require that a jury make a finding of dangerousness (or that the defendant admit to it) before a state

prison sentence can be imposed under section 775.082(10). See 260 So. 3d at 150-51. The court explained that the statutory maximum sentence for a defendant with fewer than twenty-two sentencing points is "a nonstate prison sanction," since that is the maximum sentence that a judge could impose solely on the basis of the facts reflected by a jury verdict. Id. at 150 (citing Blakely, 542 U.S. at 303). It therefore held that "subsection (10) violates the Sixth Amendment in light of Apprendi and Blakely based on its plain language requiring the court, not the jury, to find the fact of dangerousness to the public necessary to increase the statutory maximum nonstate prison sanction." Id. "In order for a court to impose any sentence above a nonstate prison sanction when section 775.082(10) applies, a jury must make the dangerousness finding." Id. at 151.

Thus, it is clear that the trial court could not have initially (i.e., upon his plea) sentenced Mr. Shields to state prison without a jury finding of dangerousness or Mr. Shields having admitted to it. The question is whether the result is any different here because the trial judge made the finding when Mr. Shields was sentenced a second time upon the revocation of his original probationary sentence. The answer depends on whether our supreme court's holding in Brown that a jury must make the dangerousness finding under section 775.082(10) governs in a postrevocation sentencing, an issue that no Florida court has explicitly addressed.

We hold that Brown governs in this context. Nothing in Apprendi and Blakely—the wellsprings of the decision in Brown—indicate that the right to a jury determination of any fact that increases a sentence beyond the statutory maximum is limited to an initial sentencing. Nor would that interpretation make sense. If a defendant has a constitutional interest in a jury determination of a fact that increases his sentence, that interest is every bit as material when the defendant is resentenced—

following, say, an appellate reversal of an original sentence or a successful motion to correct an illegal sentence—as it was at the original sentencing hearing.

And although no Florida court has explicitly addressed whether Brown governs in a sentencing after a probation revocation, both our supreme court and the Fourth District have applied Brown to such a sentencing without discussing the question. See Gaymon v. State, 288 So. 3d 1087, 1089-90 (Fla. 2020) (holding, in a case involving a sentencing after a revocation of probation, that the proper remedy under Brown is to remand for resentencing to a non-state prison sanction or to empanel a jury to make the dangerousness finding); Lewis v. State, 286 So. 3d 290, 291-92 (Fla. 4th DCA 2019) (holding that a state prison sentence imposed after a probation revocation and based on a judge-made finding of dangerousness violated Brown). Decisions in related contexts confirm these courts' assumptions that Brown applies. For example, Florida courts have held that defendants in other resentencing proceedings are entitled to a jury determination of any fact that could increase a sentence beyond the statutory maximum. See, e.g., State v. Fleming, 61 So. 3d 399, 408 (Fla. 2011) (explaining that a resentencing pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) is a de novo proceeding which is afforded "the full panoply of due process rights" as the original sentencing and that Apprendi applies to such resentencings); Gilmore v. State, 64 So. 3d 200, 201 (Fla. 2d DCA 2011) ("The parties are correct that Apprendi and Blakely apply to Gilmore's resentencing."). And decisions involving constitutional protections due to a criminal defendant have not drawn any distinction between initial sentencings and postrevocation sentencings. See Finney v. State, 9 So. 3d 741, 744 (Fla. 2d DCA 2009) ("If the court could not have imposed imprisonment because a defendant was not represented in the underlying misdemeanor proceedings,

it cannot impose incarceration upon an ensuing revocation of probation."); Santeufemio v. State, 745 So. 2d 1002, 1003 (Fla. 2d DCA 1999) (explaining that "[s]entencing is a critical stage of criminal prosecution for which the defendant has a constitutional right to attend" in the context of a postrevocation sentencing). We thus see no reason in law or logic why a resentencing for an offense for which a Florida court originally imposed a probationary sentence after a violation of probation would be treated any differently from any other sentencing proceeding to which Apprendi and Blakely apply.

On the contrary, the Florida law governing probation confirms that a resentencing after a violation of probation should be treated the same way as the original sentencing. Under Florida law, a "violation of probation is not itself an independent offense punishable at law." Lambert v. State, 545 So. 2d 838, 841 (Fla. 1989); accord Lee v. State, 54 So. 3d 573, 573 (Fla. 1st DCA 2011). Rather, it is a violation of the terms of community supervision for an offense imposed as an alternative to a more severe punishment, which can result in the loss of that more lenient sentence and the imposition of a more severe one. See § 948.001(8), Fla. Stat. (2017) (defining probation); Lawson v. State, 969 So. 2d 222, 229 (Fla. 2007) (describing a court's discretion in granting and revoking probation). When a court resentences a defendant after revoking his probation, then, it is sentencing the defendant for the original offense, not for the conduct constituting the violation. See Lambert, 545 So. 2d at 841; Marion v. State, 582 So. 2d 115, 116 (Fla. 3d DCA 1991) ("[V]iolation of probation results in revocation of probation and resentencing on the original offense." (alteration in original) (quoting Irizarry v. State, 578 So. 2d 711, 714 (Fla. 3d DCA 1990))). As such, a trial court sentencing a defendant after a violation of probation may only "impose any sentence which it might have originally imposed before placing the probationer on

probation."[1] § 948.06(2)(b); accord Miller v. State, 177 So. 3d 95, 96 (Fla. 2d DCA 2015). Because Brown would have prohibited the trial court from imposing a state prison sentence at Mr. Shields' original sentencing absent a jury finding, it follows that the trial court could not do the same at a sentencing following the revocation of Mr. Shields' probation.

The State argues that Brown does not apply in a postrevocation sentencing because "[t]he Sixth Amendment . . . does not apply to probation revocation proceedings." Souza v. State, 229 So. 3d 387, 389 (Fla. 4th DCA 2017) (citing Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984)). Sure enough, Sixth Amendment protections generally do not apply in revocation proceedings because "the revocation proceeding implicates only a limited, conditional liberty interest rather than the absolute liberty interest enjoyed by a criminal defendant prior to trial." Peters v. State, 984 So. 2d 1227, 1233 (Fla. 2008) (holding that the Sixth Amendment rights set out in Crawford v. Washington, 541 U.S. 36 (2004), do not apply to revocation proceedings). Put differently, probation revocation proceedings are not a part of criminal prosecution. Id. at 1229. This is why a probation revocation can be based on a finding of criminal wrongdoing by a judge by a preponderance of the evidence rather than by a jury

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[1]Naturally, this means that a trial court cannot impose a sentence above the statutory maximum based on conduct that occurred after the initial sentence. See Routenberg v. State, 677 So. 2d 1325, 1326 (Fla. 2d DCA 1996) ("Because none of the justifications [for departure] existed at the time of the initial sentencing for the original offense, they are invalid." (citing Williams v. State, 581 So. 2d 144, 146 (Fla. 1991))); see also Johnson v. State, 864 So. 2d 1256, 1257 (Fla. 5th DCA 2004). That is likely a problem in this case because the trial court expressly justified its upward departure in part based upon the conduct of Mr. Shields giving rise to the violation of his probation. Mr. Shields did not raise this issue in the trial court and has not raised it here, however. There is thus no need for us to consider it further. See I.R.C. v. State, 968 So. 2d 583, 588 (Fla. 2d DCA 2007) ("[A] reviewing court [will] ordinarily reverse only on the basis of the specific arguments presented by the appellant.").

beyond a reasonable doubt. See Johnson v. United States, 529 U.S. 694, 700 (2000); Humbert v. State, 933 So. 2d 726, 727 (Fla. 2d DCA 2006).

But Mr. Shields is not challenging the trial court's decision to revoke his probation; he is challenging the trial court's decision to sentence him to five years in a state prison. Probation revocation and sentencing are distinct events. See Tasker v. State, 48 So. 3d 798, 805 (Fla. 2010) (explaining that a "sentencing after revocation of probation is a 'deferred sentencing proceeding' " in determining whether a sentencing error is reviewable in an appeal from a revocation order (citing Green v. State, 463 So. 2d 1139, 1140 (Fla. 1985))); State v. Hicks, 478 So. 2d 22, 23 n.* (Fla. 2d DCA 1985) (noting that "a probation revocation usually leads to sentencing" and that "an attorney is required at a sentencing proceeding" in determining whether an attorney should be required at a revocation proceeding). And as we have shown, a sentencing after a revocation of probation is, for all intents and purposes, just a resentencing on the original offense. The fact that the Sixth Amendment right to jury trial does not apply to a trial court's decision to revoke probation thus does not mean that the right does not apply to a sentencing after probation is revoked.[2]

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[2]In United States v. Haymond, 139 S. Ct. 2369 (2019), the United States Supreme Court considered whether a federal statute requiring an additional prison term of five years when a defendant on supervised release commits one of several enumerated offenses was unconstitutional under Apprendi. In a fractured opinion that failed to produce a majority on reasoning, the Court held that it was. We need not delve into the divided opinions in Haymond in this case, however, because the applicability of the Sixth Amendment is much more clear here. The statute at issue in Haymond explicitly contemplated a federal court considering a violation of supervised release to impose a sentence based on conduct occurring after the original offense. In this case, in contrast, Florida law is clear that a court revoking probation cannot impose a sentence other than the one it could have originally imposed.

Moreover, the State's sole precedential support for its argument, the Fourth District's decision in Souza, is inapplicable here. See 229 So. 3d 387. In Souza, the trial court made a dangerousness finding pursuant to section 948.06(8)(e)(2), Florida Statutes (2016), which requires trial courts to revoke the probation of violent felony offenders upon a finding that they pose a danger to the community. Id. at 388. The defendant challenged the revocation of her probation by arguing that section 948.06(8)(e)(2) is unconstitutional according to Apprendi. Id. at 388-89. Significantly, "[a] Section 948.06(8)(e)[(2)] danger finding is not an element for sentencing purposes." Id. at 389. The Fourth District therefore properly concluded that Apprendi was not applicable. Id. In sum, Souza concerned an entirely different statute and was not a situation where the defendant was sentenced above the statutory maximum based entirely upon judicial factfinding. Id.; see also Hollingsworth v. State, No. 4D18-3705, 2020 WL 1547265, at *3-4 (Fla. 4th DCA Apr. 1, 2020) (distinguishing Brown from Souza in that Brown involved section 775.082(10), which results in an increase of the statutory minimum sentence and triggers Apprendi, while Souza involved section 948.06(8)(e)(2), which "does not increase either the statutory maximum or the statutory minimum").

In the case before us, the trial court revoked Mr. Shields' probation and sentenced him based on his plea to three counts of unlawful computer use; it did not sentence Mr. Shields for his conduct which constituted the violation of his probation. Therefore, the trial court could only impose a sentence which it could have imposed at Mr. Shields' initial sentencing. See § 948.06(2)(b). Because no jury made a finding that a non-state prison sanction could present a danger to the public, the trial court could not sentence Mr. Shields to state prison pursuant to section 775.082(10)—either at the

initial sentencing or at the postrevocation sentencing. See Brown, 260 So. 3d at 150-51. The trial court therefore erred by doing so. On remand, the trial court should either impose a non-state prison sanction or "empanel a jury to make such a determination, if the State seeks that finding in the defendant's case." See Gaymon, 288 So. 3d at 1093.

Reversed and remanded with instructions.

MORRIS and BLACK, JJ., Concur.