

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

RODERICK A. WASHINGTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D19-1671

October 22, 2021

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

Howard L. Dimmig, II, Public Defender, and Maureen E. Surber, Assistant Public Defender, Bartow (withdrew after briefing); Matthew R. McLain of McLain Law P.A., Longwood (substituted as counsel of record), for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Michael S. Roscoe, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge.

Roderick Washington appeals his second amended sentence, arguing that on remand from the reversal of his first amended

sentence the lower court erred by failing to hold a de novo sentencing proceeding. We agree, and we reverse Washington's sentence for a third time.

In 2009, Washington was convicted of two counts of first-degree murder and two counts of kidnapping, crimes that he participated in when he was a juvenile. We reversed his sentences and remanded for reconsideration of their proportionality. See *Washington v. State*, 110 So. 3d 1 (Fla. 2d DCA 2012) (*Washington I*). After Washington was resentenced, we reversed his amended sentences because the lower court improperly determined that Washington had intended to kill the victims, a finding that only a jury is empowered to make. See *Washington v. State*, 257 So. 3d 520 (Fla. 2d DCA 2018) (*Washington II*) (citing *Williams v. State*, 242 So. 3d 280 (Fla. 2018), for the proposition that *Alleyne v. United States*, 570 U.S. 99 (2013), "requires a jury, rather than a judge, to make the factual finding as to whether the juvenile offender actually killed, intended to kill, or attempted to kill the victim"). We remanded with directions for the circuit court to "resentence Washington under section 775.082(1)(b)(2)[, Florida Statutes (2016)]." *Id.*

On remand, the circuit court, over Washington's objection, refused to conduct a de novo sentencing proceeding. Instead, it summarily ordered that Washington's sentence be amended to reflect that he may seek a review of his sentence after fifteen years, as section 775.082(1)(b)2. requires.

Washington now appeals the second amended sentence, arguing that the circuit court was required to afford him a full de novo sentencing proceeding. He also asserts that he should be resentenced by a different judge because the judge who imposed the sentence at issue here did so after considering a constitutionally impermissible factor.

We previously addressed Washington's first issue in one of his codefendants' appeals, and we held that "the directive to resentence a defendant under section 775.082(1)(b)(2) necessarily contemplates a de novo sentencing hearing under section 921.1401." *Toye v. State*, 311 So. 3d 78, 83 (Fla. 2d DCA 2019) (citing *Williams*, 242 So. 3d at 284). The supreme court has since agreed that a "ministerial correction" of the defendant's sentence "falls short of the remedy of resentencing pursuant to section 775.082(1)(b)2.," which must instead proceed de novo on all issues bearing on the

sentence. *Puzio v. State*, 320 So. 3d 684, 688 (Fla. 2021). Thus, when given the directive in *Washington II* to resentence Washington under section 775.082(1)(b)2., the circuit court should have held a de novo sentencing proceeding. It erred by summarily ordering that Washington's sentence be amended.

We reject the State's assertion that the error is harmless. The State reasons that Washington effectively received the benefit of being sentenced under subsection 775.082(1)(b)2. by virtue of being granted review after fifteen years. The State also seems to intimate that because Washington has been sentenced to life each time by the same judge who presided over Washington's trial, Washington likely would not receive anything other than a life sentence at another de novo sentencing before that same judge, rendering the failure to hold a de novo resentencing harmless.

However, as we explained in *Toye*, "the directive to resentence a defendant under section 775.082(1)(b)(2) necessarily contemplates a de novo sentencing hearing under section 921.1401." *Toye*, 311 So. 3d at 83 ("[S]entencing under section 775.082(1)(b)(2) takes place 'after a sentencing hearing conducted by the court in accordance with s. 921.1401.' "); *see also Puzio*, 320 So. 3d at 688.

Washington was thus entitled to that de novo proceeding. While such a hearing may very well have resulted in Washington receiving the same sentence, he had the right to present his case, and it is possible that he could have received a lesser sentence. This is especially so considering Washington's second issue.

Washington maintains that he should be resentenced by a different judge because the judge who has presided over each of his sentencing proceedings to date considered a constitutionally impermissible factor in determining Washington's sentence. Specifically, the judge commented on Washington's decision not to enter a plea. Incidentally, the same judge made an identical observation in *Toye*, and in that case we found the comment sufficient to warrant resentencing in front of a different judge. *Id.* We follow the same course here and remand for Washington to receive a de novo resentencing hearing in front of a different judge.

Reversed and remanded with instructions.

KELLY and ATKINSON, JJ., Concur.

Opinion subject to revision prior to official publication.

