DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PAUL PINKSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-611

November 24, 2021

Appeal from the Circuit Court for Pinellas County; Michael F. Andrews, Judge.

Jason T. Forman of Law Offices of Jason T. Forman, P.A., Fort Lauderdale, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and James A. Hellickson and Michael S. Roscoe, Assistant Attorneys General, Tampa, for Appellee.

VILLANTI, Judge.

Paul Pinkston appeals from (1) an order denying his motion for postconviction relief filed pursuant to Florida Rule of Criminal

Procedure 3.850 and (2) an order dismissing his motion to correct sentencing error filed pursuant to Florida Rule of Criminal Procedure 3.800(a). For the reasons explained below, we reverse the postconviction court's summary denial of Ground Three of Pinkston's 3.850 motion. We affirm the denial of the remaining grounds without comment. We also affirm the order dismissing Pinkston's 3.800(a) motion and explain our reasoning herein.

I. Ground 3 of the 3.850 Motion

In Ground Three, Pinkston asserted that the trial court mistakenly believed that it was required to impose consecutive sentences as to two separate armed robbery counts and that his trial counsel failed to properly advise the court in this regard and failed to object when the trial court imposed consecutive sentences. Pinkston supported this ground by citing to and attaching a copy of the transcript of the sentencing hearing:

> STATE: He was convicted . . . on counts one, three, and four. He has 10-year minimum mandatories on counts one, three, and four.
>
> It is the state's position, and I think that defense would agree with this contention, that the Court has no discretion in running, at least, counts one and three consecutive as being separate criminal episodes.

However, the Court has discretion as to whether to run count four concurrent with - -

THE COURT: Count three?

STATE: -- count three. That we would agree that count three and four are the same criminal episodes, . . . and [citing *Williams v. State*, 186 So. 3d 989 (Fla. 2016)] . . . it is not a mandatory consecutive on the same criminal episodes.

. . . .

THE COURT: What I think I hear you saying is the Court is obligated to alternately impose 20 years consecutive –

STATE: Yes. Ten plus ten –

THE COURT: One and three, and then concurrent if I wish with four.

STATE: [C]ount one has to be ten.

THE COURT: One and three consecutive.

STATE: . . . [C]ount three has to be consecutive to count one. And count four has to be consecutive to count one but maybe concurrent with count three.

THE COURT: All right.

DEFENSE COUNSEL: You were correct, Judge.

THE COURT: Yes, right. I think that's what I was saying.

DEFENSE COUNSEL: Yes.

(Emphases added.)

Section 775.087(2)(a), Florida Statutes (2014), requires the imposition of a minimum mandatory period of imprisonment for certain enumerated offenses when the defendant possessed a firearm during the commission of the offense. Section 775.087(2)(d) requires the trial court to "impose any term of imprisonment provided for in this subsection consecutively to any other term of imprisonment imposed for any other felony offense."

In *Williams v. State*, 186 So. 3d 989, 992 (Fla. 2016), the supreme court explained:

> As we have previously determined, [section 775.087(2)(d)] is clear and unambiguous. As written, paragraph (2)(d) contemplates two distinct imprisonment terms: a term imposed for a qualifying felony pursuant to subsection (2), and a term imposed for a non-qualifying felony. The last sentence of paragraph (2)(d) further delineates the manner in which these distinct imprisonment terms are to be served in relation to one another. Specifically, it expressly mandates only that a qualifying felony sentence run "consecutively to" any sentence imposed for a non-qualifying felony. Nothing within paragraph (2)(d)'s plain language also requires, as the State posits, a qualifying felony sentence to run consecutively to another qualifying felony sentence.
>
> Furthermore, at no point since its inception in the past sixteen years have we interpreted paragraph (2)(d) to mandate the imposition of consecutive sentences for the qualifying felonies. Rather, we have repeatedly deferred to the trial judge's discretion . . . ."

(Emphasis added) (citations omitted). In other words, the statute only mandates consecutive sentences if one of the offenses is a qualifying offense listed in paragraph (2)(a) and the other offense is not. However, if both offenses are qualifying offenses under paragraph (2)(a), the statute does not require consecutive sentences, although the trial court retains the discretion to impose consecutive sentences for the two qualifying offenses should it choose to do so.

The issue in this case raises the additional question of whether the statute requires consecutive sentences if the offenses occurred during separate criminal episodes. In *Williams*, the supreme court answered this question in the negative:

> Generally, consecutive sentencing of mandatory minimum imprisonment terms for multiple firearm offenses is impermissible if the offenses arose from the same criminal episode and a firearm was merely possessed but not discharged. It follows, therefore, that a trial court must impose the mandatory minimum sentences concurrently under such circumstances.
>
> If, however, multiple firearm offenses are committed contemporaneously, during which time multiple victims are shot at, then consecutive sentencing is permissible but not mandatory. In other words, a trial judge has discretion to order the mandatory minimum sentences to run consecutively, but may impose the sentences concurrently.

Williams, 186 So. 3d at 993 (citations omitted). In this case, as the postconviction court correctly found, Pinkston's offenses were committed in separate criminal episodes. Although *Williams* does not speak to this precise scenario specifically, the supreme court previously addressed this question in *Palmer v. State*, 438 So. 2d 1, 4 (Fla. 1983), in which the court said, "[W]e do not prohibit the imposition of multiple *concurrent* . . . mandatory sentences upon conviction of separate offenses included under subsection 775.087(2) . . . ." *Williams* says nothing that could cause us to interpret the holding in *Palmer* differently.

With the above in mind, we construe section 775.087(2)(d) as encompassing four (insofar as we are concerned here) possible scenarios:[1]

> 1. If one of the offenses is a qualifying felony and the other is a non-qualifying felony, the trial court must impose consecutive sentences. This is the only scenario under which consecutive sentences are *required*. *Williams*, 186 So. 3d at 992 ("[Section 775.087(2)(d)] expressly mandates only that a qualifying felony sentence run 'consecutively to' any sentence imposed for a non-qualifying felony.").

[1] These scenarios all assume that the defendant possessed a firearm during the commission of the crimes but did not discharge it.

2. If both offenses are qualifying felonies, the trial court retains the discretion to impose either consecutive or concurrent sentences. *Id.* ("Nothing within paragraph (2)(d)'s plain language also requires . . . a qualifying felony sentence to run consecutively to another qualifying felony sentence.").

3. If the two qualifying felonies arise from the same criminal episode, consecutive sentencing is impermissible; the trial court must impose concurrent sentences. This is the only scenario under which consecutive sentences are *prohibited*. *Id.* at 993.[2]

4. If two qualifying offenses arise from separate criminal episodes, the trial court retains the discretion to impose either consecutive or concurrent sentences. *Id.* at 992 ("[A]t no point . . . have we interpreted paragraph (2)(d) to mandate the imposition of consecutive sentences for the qualifying felonies. Rather we have repeatedly deferred to the trial judge's discretion . . . ."); *Palmer*, 438 So. 2d at 4 ("[W]e do not prohibit the imposition of multiple concurrent . . . mandatory sentences upon conviction of separate offenses included under subsection 775.087(2) . . . .").

In its order denying Ground Three of Pinkston's 3.850 motion, the postconviction court also considered *James v. State*, 244 So. 3d

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[2] Again, this assumes that the defendant possessed a weapon but did not discharge it. But if the defendant discharged the weapon during the perpetration of two qualified offenses committed during the same criminal episode and there was more than one victim, the result might be different. *See Williams*, 186 So. 3d at 993 (consecutive sentencing would be "permissible but not mandatory" if multiple victims were shot at during the same criminal episode).

1142 (Fla. 2d DCA 2018), a case that Pinkston had cited in his motion:

> [T]he State argues that *James* does not explicitly hold that the rule in *Williams* applies to crimes occurring in separate criminal episodes, but to the extent that it implicitly concluded as much, *James* is contrary to section 775.087, Florida Statutes, and *Williams*. Regardless . . . *James* . . . was decided after Defendant was sentenced and therefore counsel could not have been ineffective for failing to make arguments based on *James*.

But *James* is neither contrary to section 775.087 nor is it at odds with *Williams*. Nor does *James* announce any new change in the law or a divergent application of established law. To the contrary, *James* is a concise four-paragraph opinion that simply applies section 775.087 and *Williams* to the facts of that case. Moreover, with the exception of the fact that *James* was a direct appeal from a judgment and sentence, it is on all fours with the instant case. Specifically, *James* clarified the very point that is at issue here: Because the offenses in *James* did not arise from a single criminal episode, the trial court was free to sentence James concurrently or consecutively, in its discretion. *James*, 244 So. 3d at 1143. Thus, the error identified in *James* was the identical error made by the

trial court in this case; it was under the erroneous impression that a consecutive sentence was mandatory under the statute.

In this case, the postconviction court correctly concluded that Count 1 (armed robbery, Victim 1), and Count 3 (armed robbery, Victim 2) were not part of a single criminal episode because the offenses involved different victims, were committed in two separate locations, and there was about an hour break between them. *See Hartman v. State*, 92 So. 3d 893, 895 (Fla. 5th DCA 2012) ("When determining whether the offenses arose from the same criminal episode, the court must consider '1) whether separate victims are involved; 2) whether the crimes occurred in separate locations; and 3) whether there has been a temporal break between the incidents.' " (quoting *Teague v. State*, 26 So. 3d 616, 618 (Fla. 1st DCA 2009))). Thus, although the nature and manner of commission of the offenses may have supported joinder for trial, they were not "the same criminal episode" for sentencing purposes.

Unfortunately, the postconviction court's analysis went astray at this point, resulting in the erroneous conclusion that Pinkston's trial counsel could not have been ineffective for failing to argue that the trial court had discretion to impose concurrent sentences

because the trial court did not, in fact, have such discretion. But as we have explained above, the supreme court said exactly the opposite. Thus, although the postconviction court correctly concluded that the two armed robbery counts occurred in different criminal episodes, its conclusion that the trial court properly determined that it did not have discretion to impose concurrent sentences was incorrect. Accordingly, we must reverse the postconviction court's denial of Ground Three of Pinkston's motion for postconviction relief.

We note that *James* involved a direct appeal from a judgment and sentence in which James alleged trial court error, whereas the instant appeal arises from the denial of a postconviction motion alleging ineffective assistance of counsel. Therefore, we cannot remand with instructions to resentence Pinkston as we did in *James*[3] despite the strength of the record evidence supporting Pinkston's arguments. Accordingly, we remand with instructions to reconsider Ground Three of Pinkston's motion for postconviction

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[3] *See James*, 244 So. 3d at 1143 ("When a trial court labors under the mistaken impression that it cannot exercise its discretion at sentencing, the appellant is entitled to be resentenced." (quoting *Mason v. State*, 210 So. 3d 120, 121 (Fla. 2d DCA 2016))).

relief in light of this opinion. The court may require an additional response from the State before proceeding according to rule 3.850.[4]

II. Denial of 3.800(a) Motion

In his motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a), Pinkston argued that "[t]he mandatory minimum sentence of count one must run concurrently with counts three and four, rather than consecutively." His argument is based on the premise that all counts arose from a single criminal episode.

The postconviction court dismissed the motion as successive because it had considered and rejected Pinkston's argument in his 3.850 motion that his consecutive sentences were illegal because Count 1 and Count 3 arose from the same criminal episode. The court also concluded that Pinkston's 3.800(a) motion "would be denied even if the Court reconsidered it on the merits."

We agree with the postconviction court's conclusion that the 3.800 motion was successive. In his 3.850 motion, Pinkston

[4] Should the court grant relief and determine that Pinkston is entitled to be resentenced, it may, of course, impose concurrent or consecutive sentences, in its discretion.

presented alternative arguments: Either counsel was ineffective for failing to advise the court of its discretion to impose concurrent sentences, or counsel was ineffective for failing to object to illegally imposed consecutive sentences. Pinkston's alternative argument that the consecutive sentences were illegal hinged on the premise that the two offenses were "deemed part of a single criminal episode for sentencing purposes."

In the order denying Pinkston's 3.850 motion, the postconviction court correctly concluded that Pinkston's premise was false–the two offenses were not part of a single criminal episode. Because the court had previously considered this specific issue, Pinkston was not entitled to review of the same argument couched as a motion to correct an illegal sentence. *See Fuston v. State*, 764 So. 2d 779, 779 (Fla. 2d DCA 2000) ("[A] defendant is not entitled to successive review on a rule 3.800(a) motion of a specific issue which has already been decided against him.").

We note that the postconviction court's analysis of Pinkston's 3.800(a) motion also misinterprets section 775.087(2)(d) and *Williams*, but this does not require reversal because the court correctly dismissed the motion as successive. More importantly,

even if the 3.800(a) motion was not successive, the motion would still fail because Pinkston's consecutive sentences were not illegal– they were entirely within the trial court's discretion to impose. *See Williams v. State*, 957 So. 2d 600, 602 (Fla. 2007) ("[A]n 'illegal sentence' [is] one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances."). Pinkston's 3.800(a) motion could have been denied on the merits for this reason.

The order denying Pinkston's 3.850 motion is reversed as to Ground Three only and this case is remanded for further proceedings consistent with this opinion. The orders denying the remaining grounds of Pinkston's 3.850 motion are affirmed. The order dismissing Pinkston's motion to correct illegal sentence pursuant to rule 3.800(a) is affirmed.

Affirmed in part, reversed in part, and remanded.

LUCAS and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.