Third District Court of Appeal

State of Florida

Opinion filed September 21, 2016.
Not final until disposition of timely filed motion for rehearing.

No. 3D15-1130
Lower Tribunal No. 12-22161

Ernest Staten,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rodolfo Ruiz, Judge.

Carlos J. Martinez, Public Defender, and Stephen J. Weinbaum, Assistant Public Defender, for appellant.

Pamela Jo Bondi, Attorney General, and Marlon J. Weiss, Assistant Attorney General, for appellee.

Before LAGOA, EMAS, and SCALES, JJ.

PER CURIAM.

Affirmed.

EMAS, J., concurring.

I concur in affirming the conviction and sentence below, as the error complained of is not fundamental and the failure to object waives the issue for appeal. I write however, to address the issue of the manner in which trial courts present the verdict forms to the jury at the conclusion of trial, and to suggest an alternative to avoid issues in future cases.

At the conclusion of the trial, the trial court instructs the jury:

> **3.12 VERDICT**
>
> You may find the defendant guilty as charged in the [information] [indictment] or guilty of such lesser included crime[s] as the evidence may justify or not guilty.
>
> If you return a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt. If you find that no offense has been proven beyond a reasonable doubt, then, of course, your verdict must be not guilty.

Fla. Std. J. Inst. (Crim.) 3.12.

With increasing regularity, trial courts have had to confront the question of how to determine the sequence by which a jury is to consider lesser-included offenses. The sequencing of these lesser-included offenses can be significant, because the jury is told that if they return a verdict of guilty, it should be "for the highest offense which has been proven beyond a reasonable doubt." The jury is thus led to believe (and the verdict forms should reflect) that the lesser-included

offenses are listed in descending order from the "highest" offense to the "lowest" offense. When these instructions were first created, such a determination may have been relatively straightforward. However, given the labyrinth of statutory provisions reclassifying and enhancing crimes, such a determination has seemingly grown more complex. Trial courts have wrestled with the question of whether the order in which the lesser-included offenses are set forth should be based upon the degree of the lesser-included offense or based upon the potential sentence which may be imposed for that offense. The Florida Supreme Court, in Sanders v. State, 944 So. 2d 203 (Fla. 2006), established a bright-line rule to simplify the process and ensure uniformity in the trial courts' determinations:

> While reclassification and enhancement statutes have made it difficult for trial courts to prepare appropriate verdict forms, the basic premise of what constitutes a proper lesser included offense has not changed. Trial courts should continue to rely primarily and ultimately upon the applicable statutory provisions for the charged crime when they are determining lesser included offense. However the Florida Standard Jury Instructions in Criminal Cases contain a schedule that assists in this task. The charged crime should be followed on the verdict form by the determined lesser included offenses in descending order by degree of offense.

Id. at 207 (emphasis added).

In her concurring opinion, Justice Pariente urged trial court judges to provide an interrogatory separate from the verdict form for determining any fact necessary for the reclassification, enhancement, or imposition of an applicable mandatory minimum sentence. Id. at 208-09 (Pariente, J., concurring). I wish to strongly echo this point, and to

emphasize that these separate verdict forms should be utilized for any offense (whether for the offense charged or for a lesser-included offense) in which the jury must determine some fact necessary for purposes of reclassification or imposition of a mandatory minimum sentence.[1]

It should first be pointed out that the question of whether an offense is subject to reclassification (e.g., section 775.087(1)(a)-(c), Florida Statutes (2016)), or imposition of a mandatory minimum, (e.g., section 775.087(2), Florida Statutes (2016)(the "10-20-Life" statute)) requires a factual determination by the jury for purposes of sentencing, and is not a determination of guilt for the core or substantive offense. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding 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.")

As an example:

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[1] I do not include "enhancement" statutes in this discussion because enhancement statutes are, at least generally, provisions which increase the potential penalty for already-enumerated offenses based upon "the fact of a defendant's prior conviction," for which no jury determination is required. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). See, e.g., § 775.084(1)(a)-(b),(4), Fla. Stat. (2016)(providing enhanced sentences for habitual felony offenders and habitual violent felony offenders where defendant has certain qualifying prior convictions). Instead, the proof necessary for enhancement is presented to the sentencing judge in a separate proceeding. See, e.g., § 775.084(1)(a)-(b),(4), Fla. Stat. (2016)(providing enhanced sentences for habitual felony offenders and habitual violent felony offenders).

Assume that a defendant is charged by information with the offense of armed robbery, which pursuant to section 812.13(2)(a), is a first-degree felony punishable by life. The information also alleges that, "during the commission of the armed robbery, the defendant actually possessed a firearm" which, if proven, would subject the defendant to a ten-year mandatory minimum sentence under the 10-20-Life statute (see section 775.087(2)(a)). However, the defendant is charged together with a co-defendant, and at trial one of the issues is whether the defendant or co-defendant actually possessed the firearm during the armed robbery.

Assume that, during deliberations, the jurors unanimously agree that the defendant committed the offense of armed robbery,[2] but cannot reach a unanimous decision on whether the defendant actually possessed a firearm during the commission of the armed robbery. It is at this point that the distinction between a verdict for the core offense charged (armed robbery), and a verdict for the factual determination necessary for imposition of the ten-year mandatory minimum sentence (actually possessed a firearm during the commission of the armed robbery) becomes manifestly important.

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[2] The jury could find the defendant guilty of armed robbery based upon a principal theory, even if the firearm was actually possessed by a co-defendant during the commission of the crime. Stripling v. State, 645 So. 2d 589 (Fla. 3d DCA 1994); Freeny v. State, 621 So. 2d 505 (Fla. 5th DCA 1993). However, a defendant's actual physical possession of the firearm is necessary to trigger imposition of the ten-year mandatory minimum sentence under section 775.087(2)(a). Williams v. State, 622 So. 2d 456 (Fla. 1993).

If the jury was provided with a single verdict form to render a verdict both on the core offense and the finding of fact necessary for imposition of the ten-year mandatory minimum, the above scenario could result in the foreperson sending a note to the court stating that they are unable to sign and return the verdict because they are deadlocked and cannot reach a "verdict." In actuality, however, the jury has reached a unanimous verdict as to the defendant's guilt on the core offense of armed robbery, but has failed to reach a unanimous finding of fact necessary for imposition of the mandatory minimum sentence (whether the defendant actually possessed a firearm during the commission of the armed robbery).

There is the very real potential that a trial judge in these circumstances might decide that the jury has not reached a verdict and declare a mistrial, resulting in an entirely new trial. Such an outcome could be avoided, however, if the trial judge provided the jury with two separate forms: one verdict form for the core substantive offense which can be considered, voted on, and signed by the foreperson, and a second verdict form for the determination of fact necessary for imposition of a mandatory minimum sentence. Additional instructions should be provided to guide the jury appropriately to consider, complete and sign the two verdict forms, and advising that the second verdict form should be considered, completed and signed only if the jury has first completed and signed the first verdict form finding the defendant guilty of the core offense (or any appropriate lesser-included offense).

If, in the example described above, separate verdict forms (with separate signature lines for the foreperson) were provided to the jury, the jury would advise the court that it had reached a verdict on the armed robbery but was deadlocked as to a decision on the second "verdict." The trial judge could receive and accept the first verdict and, if appropriate, declare a mistrial on the second "verdict" (i.e., the factual determination necessary for imposition of the mandatory minimum sentence). This would preserve the valid guilty verdict for the armed robbery, leaving only a decision on what further action should be taken on the issue of determining any fact necessary for imposition of the mandatory minimum sentence.[3]

I would urge the trial courts to follow the recommendation of Justice Pariente in her concurring opinion in Sanders, 944 So. 2d at 208-09, and provide juries with individual verdict forms that permit separate consideration of, and verdicts for, the core substantive offense and for the jury's distinct determination of any fact necessary for reclassification or imposition of a mandatory minimum sentence. In doing so, we conserve our precious judicial resources, preserve the

[3] Although I have been unable to find any reported decisions from Florida, I conclude that the State could choose either to abandon its pursuit of the mandatory minimum sentence or request a new jury trial for the limited purpose of determining whether, "during the commission of the armed robbery, the defendant actually possessed a firearm." The latter option would not appear to implicate double jeopardy principles. See United States v. Williams, 449 F.3d 635 (5th Cir. 2006); California v. Anderson, 211 P.3d 584 (Cal. Ct. App. 2009).

labor and lawful determinations of a unanimous jury, and thereby advance the proper administration of justice.