Third District Court of Appeal

State of Florida

Opinion filed July 3, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-37
Lower Tribunal No. 01-21587B

Javarus Lamont Morgan,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal under Florida Rule of Appellate Procedure 9.141(b)(2) from the Circuit Court for Miami-Dade County, Alan S. Fine, Judge.

Carlos J. Martinez, Public Defender, and Jonathan Greenberg, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Richard L. Polin, Assistant Attorney General, for appellee.

Before SALTER, FERNANDEZ and LINDSEY, JJ.

SALTER, J.

Javarus Lamont Morgan ("Morgan") appeals an order denying two motions to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). This is the third time this Court has considered one of the two issues raised by Morgan, the so-called "stacking" of minimum mandatory sentences under the 10-20-life statute when a firearm is possessed but not discharged. See Morgan v. State, 137 So. 3d 1075 (Fla. 3d DCA 2014), decision quashed, 42 Fla. L. Weekly S680 (Fla. May 26, 2017); and Morgan v. State, 233 So. 3d 1194 (Fla. 3d DCA 2017) ("Morgan II").

After the remand by the Florida Supreme Court, Morgan II reversed the prior trial court order denying Morgan's motion on that issue. We remanded the case to the trial court to permit Morgan to file an amended motion "for the purpose of affirmatively alleging and establishing 'that the court records demonstrate on their face an entitlement to relief' on the claim raised in Morgan's original motion." Morgan II, 233 So. 3d at 1195.

Morgan amended his motion to correct illegal sentence in February 2018, raising two legal issues in two separate motions under Rule 3.800, and attaching documents from the record in the criminal case (including Morgan's 2003 plea). In the first motion, Morgan contended that the criminal case record established that his two consecutive minimum mandatory sentences under the 10-20-life statute[1] were

[1] § 775.087, Fla. Stat. (2001).

illegal under Walton v. State, 208 So. 3d 60 (Fla. 2016), and Williams v. State, 186 So. 3d 989 (Fla. 2016). These cases hold that "[g]enerally, 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." Williams, 186 So. 3d at 993.

In the second amended motion under Rule 3.800, Morgan claimed entitlement to a new sentencing hearing under Graham v. Florida, 560 U.S. 48 (2010), and applicable Florida precedent following Graham. It is undisputed that Morgan received a sentence exceeding 20 years for non-homicide crimes committed when Morgan was a juvenile.

The trial court heard the motions during three separate sessions in 2018. In November 2018, the trial court entered a closely-reasoned, seven-page order denying both motions.[2] This appeal followed.

Analysis: Williams Motion

"Whether a claim of error may be raised in a motion to correct illegal sentence under rule 3.800(a) is a pure question of law subject to de novo review." Martinez v. State, 211 So. 3d 989, 991 n.4 (Fla. 2017).

[2] As described in greater detail below, the trial court did modify Morgan's sentence to include a judicial review after he completes 20 years of incarceration. That ruling is not challenged here.

As required by the text of Rule 3.800 and the decisional law applying it, the trial court acknowledged that its evaluation of the Williams motion was restricted to a review of "the non-hearsay portion of the court records to determine if they establish whether the two offenses for which the consecutive minimum mandatory sentences were imposed were part of a single criminal episode." (citing Burgess v. State, 831 So. 2d 137 (Fla. 2002)). In an effort to demonstrate that the two offenses were part of a single criminal episode, Morgan's amended motion relied on the discovery depositions of the two victims. These were not trial transcripts (there was no trial) or depositions taken to perpetuate testimony, and the trial court also recognized that the transcript of the plea colloquy does not satisfy Morgan's burden.

Although the trial court described its discomfort at "what could be considered an elevation of form over substance," it properly determined that the discovery depositions were hearsay that does not qualify under the exceptions provided in sections 90.803 or 90.804 of the Florida Evidence Code. Specifically, the deposition testimony is not admissible record evidence under section 90.803(22) because the pretrial depositions were for discovery only and did not provide the requisite "opportunity and similar motive to develop the testimony" that trial testimony or a deposition to perpetuate testimony would have. Such pretrial discovery depositions "may not be used as substantive evidence at a criminal trial." State v. Green, 667 So. 2d 756, 759 (Fla. 1995) (citation omitted).

Similarly, section 90.804(2)(a), the "Former testimony" exception to hearsay, is inapplicable because there is no showing that the declarants are unavailable. The inclusion of the pretrial discovery depositions in the court record does not alter their status as inadmissible hearsay. See Stoll v. State, 762 So. 2d 870, 876 (Fla. 2000). Nor does taking judicial notice of the transcripts in the court file make them admissible if subject to challenge, such as for hearsay. See Dufour v. State, 69 So. 3d 235, 254 (Fla. 2011).

To assist review if this Court disagreed with the trial court's conclusion that the deposition testimony could not be considered, the trial court addressed the "single criminal episode" issue. The trial court indicated that, if the hearsay statements could be considered in support of Morgan's amended motion under Rule 3.800, it would have found "a single criminal episode for which consecutive minimum mandatory sentences are not permitted."[3]

We do not reach that alternative conclusion, however, as the trial court properly applied the rigorous record-based requirements of Rule 3.800. This Court's reference in Morgan II to "court records" and an amended motion by Morgan was

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[3] The State argues, and we agree, that "further factual development" through the testimony of the victims at a trial (as opposed to the hearsay in the pretrial deposition transcripts) might well have precluded Morgan from satisfying his burden (in a subsequent postconviction motion) to disprove the separateness of the criminal offenses against the two victims. Morgan knowingly and voluntarily elected not to proceed to trial.

not an invitation to depart from the text of Rule 3.800 or the cases interpreting that rule. The trial court was entirely correct in its order: "A defendant can use a Rule 3.800 to make a stacking claim resulting from a plea, but only when the trial court can rule on the motion based solely on non-hearsay record documents." (citing Taylor v. State, 969 So. 2d 489, 490 (Fla. 5th DCA 2007)).[4]

The State further argues that Williams and Walton, the Florida Supreme Court cases decided fifteen years after Morgan's crimes and thirteen years after his sentences were imposed, (a) were not based on constitutional grounds, (b) effected a change in applicable law, and (c) thus do not apply retroactively to convictions or sentences that previously were final. Morgan contends that Williams and Walton "did not break new ground but instead relied on a long line of caselaw," but candidly and properly concedes that the "long line of caselaw" precedes the enactment of the 10-20-life statute. Morgan also argues that the First District's recent decision in Hester v. State, 267 So. 3d 1084 (Fla. 1st DCA 2019), is inapposite.[5] We disagree,

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[4] The trial court's order also footnoted the valid policy considerations underlying this requirement: "For example, a reluctance to disturb an old sentence or require the state to forego the benefit of its plea bargain or require the State to choose between a 'plea' it did not agree to with the only remedy to vacate the plea and bring the case to trial 17 years after the events at issue."

[5] The order under review here was entered five months before the opinion in Hester was issued.

and the First District's analysis provides additional support for the trial court's denial of Morgan's Williams motion.

Analysis: Graham Motion

The trial court also denied Morgan's separate motion claiming entitlement to a new sentencing hearing under section 921.1401, Florida Statutes (2018), based on Graham and subsequent Florida cases applying that decision.[6] That order noted the conflict in decisions between the Second and Fourth Districts regarding cumulative terms of imprisonment similar to Morgan's, and the Florida Supreme Court's acceptance of review of the Fourth District decision (Hart v. State, 246 So. 3d 417 (Fla. 4th DCA 2018) (en banc), review granted, No. SC18-967 (Fla. Sept. 7, 2018)).

In the interim, however, the Florida Supreme Court dismissed Hart as moot. Hart v. State, No. SC18-967 (Fla. Nov. 27, 2018). In the course of this appeal, and as with our decision in Echevarria v. State, 44 Fla. L. Weekly D651 (Fla. 3d DCA Mar. 6, 2019), Morgan has requested that we cite to the decision of Pedroza v. State, 244 So. 3d 1128 (Fla. 4th DCA 2018), review granted, No. SC18-964 (Fla. Dec. 6, 2018). The State has acknowledged our discretion to do so.

[6] As noted above, the trial court did modify Morgan's sentence to include a judicial review after twenty years of incarceration under section 921.1402, Florida Statutes (2018).

We thus affirm, under the authority of Pedroza, the trial court's denial of Morgan's separate motion for resentencing.

Conclusion

For the reasons detailed above, we affirm the trial court's order denying each of Morgan's post-remand motions to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800.