Third District Court of Appeal

State of Florida

Opinion filed February 12, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2248
Lower Tribunal No. 18-835

H.R., a juvenile,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Orlando A. Prescott, Judge.

Carlos J. Martinez, Public Defender, and Susan Lerner, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Christina L. Dominguez, Assistant Attorney General, for appellee.

Before EMAS, C.J., and FERNANDEZ and MILLER, JJ.

PER CURIAM.

INTRODUCTION

H.R., a juvenile, was adjudicated of committing the delinquent acts of activating a fire alarm without reasonable cause and resisting an officer without violence. The only issue raised in this appeal is whether the delinquency finding and adjudication on the resisting without violence charge must be reversed on appeal, where the underlying arrest was unlawful (because the arrest was for a misdemeanor not committed in the presence of the police officer), but H.R. failed to adequately preserve it below by a proper objection.

We affirm, holding that the failure to properly preserve this argument below requires affirmance, and cannot be rescued by the fundamental error exception to the rule of preservation. Our affirmance is without prejudice to the filing of a proper post-adjudicatory petition based on ineffective assistance of counsel.[1]

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[1] A juvenile has a constitutional right to the assistance of counsel in delinquency proceedings. In re Gault, 387 U.S. 1 (1967) (overruled on other grounds by Allen v. Illinois, 478 U.S. 364 (1986)); State v. T.G., 800 So. 2d 204 (Fla. 2001); Fla. R. Juv. P. 8.165. Implicit in this is the right to constitutionally effective assistance of counsel. The rules of juvenile procedure do not contain a provision analogous to Florida Rule of Criminal Procedure 3.850, which provides a procedure for a criminal defendant to seek collateral relief from a conviction based upon, inter alia, ineffective assistance of trial counsel. Florida law nevertheless provides a juvenile with the right to seek similar relief from an adjudication of delinquency based upon ineffective assistance of the juvenile's adjudicatory hearing counsel. See, e.g., R.J. v. State, 636 So. 2d 197 (Fla. 4th DCA 1994) (affirming delinquency adjudication without prejudice to seek collateral relief based upon ineffective assistance of counsel); J.E.P. v. State, 130 So. 3d 764 (Fla. 2d DCA 2014). See also D.D. v. State, 253 So. 3d 121 (Fla. 2d DCA 2018) (juvenile's counsel failed to properly move for judgment of dismissal; on appeal, juvenile raised issue and appellate court reversed upon a finding of ineffective

FACTS AND PROCEDURAL BACKGROUND

H.R. was attending high school when the fire alarm was pulled. At the time, H.R. had been walking with a classmate, who later testified that she saw H.R. lift the plastic piece covering the alarm, and then heard the fire alarm go off, but did not actually see H.R. pull the alarm.

Charlie Lopez, the School Resource Officer, viewed the surveillance video of the area, and identified H.R. and the witness, who were near the fire alarm at the time it was pulled. The witness provided a written statement that it was H.R. who pulled the alarm. When Officer Lopez attempted to arrest H.R., H.R. began fighting with the officer, flailing his arms, trying to get away, and telling the officer that he was not going to jail.

Relevant to our purposes, H.R. was charged as a juvenile with two delinquent acts: (1) activating a fire alarm without reasonable cause (a misdemeanor under (section 806.101, Florida Statutes (2018)); and (2) resisting an officer without violence (a misdemeanor under section 843.02, Florida Statutes (2018)).

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assistance of counsel on the face of the record); T.T.S. v. State, 253 So. 3d 1154, 1157 (Fla. 4th DCA 2018) (juvenile's trial counsel failed to properly move for judgment of dismissal on insufficient proof of "value" in charge of felony theft; juvenile raised issue on appeal and appellate court reversed upon concluding this was "a rare case where defense counsel's ineffectiveness in failing to move for a judgment of dismissal appears on the face of the record"). In this appeal, H.R. has not raised ineffective assistance of trial counsel, and we offer no comment on the merits of such an argument. Nevertheless, we affirm without prejudice to H.R. seeking such collateral relief.

The case proceeded to an adjudicatory hearing. Officer Lopez admitted during his testimony that he did not personally see H.R. pull the fire alarm and that the surveillance video he observed prior to H.R.'s arrest did not show H.R. (or anyone else) pulling the fire alarm.

After the State rested, H.R.'s counsel moved for judgment of dismissal. As to the resisting arrest, defense counsel argued that, at the time Officer Lopez arrested H.R., he had no legal duty to do so "because there was no probable cause as to who actually pulled the fire alarm." Counsel also argued that there was inadequate time for H.R. to actually resist the arrest. The trial court denied the motion, and the defense then rested without putting on evidence.

The court found H.R. delinquent of the fire alarm and resisting without violence charges.[2] This appeal followed.

H.R. challenges only the charge of resisting an officer without violence. He asserts, for the first time, that Officer Lopez could arrest H.R. for the fire alarm charge only if it was committed in the presence of Officer Lopez; and because it was not committed in the officer's presence, the officer's arrest of H.R. was unlawful and H.R. could lawfully resist such an arrest without violence. Accordingly, H.R.

[2] The trial court found H.R. not delinquent of the third charge of disrupting a school function. §877.13, Fla. Stat. (2018).

asserts, the trial court should have granted the motion for judgment of dismissal on the resisting charge.

We review de novo a trial court's denial of a motion for judgment of dismissal. P.N. v. State, 976 So. 2d 90, 91 (Fla. 3d DCA 2008).

ANALYSIS AND DISCUSSION

Generally, a police officer may make a warrantless arrest for a misdemeanor only if it is committed in the officer's presence. § 901.15(1), Fla. Stat. (2018). See Malone v. Howell, 192 So. 224, 226 (Fla. 1939) (holding: "An arrest without a warrant for a misdemeanor, to be lawful, can only be made where the offense was committed in the presence of the officer—that is it must have been within the presence or view of the officer in such a manner as to be actually detected by the officer by the use of one of his senses"); Hawxhurst v. State, 159 So. 3d 1012 (Fla. 3d DCA 2015); Weaver v. State, 233 So. 3d 501 (Fla. 2d DCA 2017); Kirby v. State, 217 So. 2d 619 (Fla. 4th DCA 1969).[3]

It is plain that, in this case, Officer Lopez was without authority to arrest H.R. for the misdemeanor of falsely activating the fire alarm because, as Officer Lopez testified, he did not see H.R. pull the fire alarm, either in person or upon viewing the surveillance video. Because the officer did not execute a lawful arrest (for activating

[3] There are several statutory exceptions which permit a warrantless misdemeanor arrest, see generally §§ 901.15(5)-(10), but none of those exceptions is applicable here.

the fire alarm), H.R. had the right to resist that arrest without offering violence. See Lee v. State, 368 So. 2d 395, 396 (Fla. 3d DCA 1979) (holding: "Under Section 843.02 [resisting arrest without violence] it is apparent that the proof of the legality of an arrest is an essential element to be shown by the prosecution. Here the record is devoid of any proof of the legality of the arrest which appellant resisted without violence. Without such proof, appellee failed to establish one of the essential elements of the crime for which appellant was convicted"); Johnson v. State, 395 So. 2d 594, 596 (Fla. 2d DCA 1981) (holding: "[S]ince the arrest itself was unlawful, a prosecution for resisting arrest without violence under section 843.02 must also fail. Proof of the lawfulness of the arrest is an essential element of that offense").

Had H.R.'s counsel, in moving for a judgment of dismissal, argued that the arrest was unlawful because the underlying misdemeanor had not been committed in the officer's presence, the issue would have been properly preserved and it would have been reversible error for the court to deny that motion.

However, as the State points out, H.R.'s counsel did not make this argument. At no point did counsel argue the application of section 901.15 or contend that the officer could not arrest H.R. for a misdemeanor that was not committed in the officer's presence. Counsel instead argued that "the officer had no legal duty to arrest H.R." and that "there was no probable cause as to who actually pulled the fire alarm."

In Johnson v. State, 478 So. 2d 885 (Fla. 3d DCA 1985), the defendant was charged with and convicted of sexual battery of a child under the age of eleven. On appeal, Johnson contended the trial court erred in denying his motion for judgment of acquittal on the ground that the state failed to establish the victim was eleven years of age or younger, an essential element of the charge. This court held that the issue was not adequately preserved by trial counsel:

> Although the defense counsel moved for a judgment of acquittal at trial, he did not do so based upon the ground now urged on appeal. Instead, he employed a general "boilerplate" motion in which he asserted, without explanation or argument, that the state had failed to prove a "prima facie case" of the crime charged in the indictment, which counsel then tracked as to each element, including age. In so doing, counsel failed to comply with Fla. R. Crim. P. 3.380(b) which requires that the motion for judgment of acquittal "must fully set forth the grounds upon which it is based."[4] Had counsel complied with the rule and specifically brought the ground now urged to the trial court's attention, the error, if any, might have been cured by allowing the state to re-open its case and supply the missing, technical element of age. Under these circumstances, then, the defendant may not now raise the point urged herein for the first time on appeal.

Id. at 886.

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[4] In similar fashion, Florida Rule of Juvenile Procedure 8.110(f) provides:

> Motion for Judgment of Dismissal. If, at the close of the evidence for the petitioner or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to establish a prima facie case of guilt against the child, it may, or on the motion of the state attorney or the child shall, enter an order dismissing the petition for insufficiency of the evidence. A motion for judgment of dismissal is not waived by subsequent introduction of evidence on behalf of the child. The motion must fully set forth the grounds on which it is based.

We hold that the argument pressed in the instant appeal—that the arrest was unlawful because the false alarm offense was not committed in the presence of the arresting officer, thus invalidating the resisting charge—was not adequately raised below so as to preserve it for appeal. While no "magic words" are necessary for preservation purposes, a party must nevertheless provide notice of the specific legal basis for the relief sought. See Sunset Harbour Condo. Assoc. v. Robbins, 914 So. 2d 925, 928 (Fla. 2005) (holding: "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved"); Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981) (holding appellate court will not consider issues not presented to the trial judge).

Accordingly, we can only reverse the adjudication of delinquency for the resisting charge if we determine the error in this case was fundamental. See F.B. v. State, 852 So. 2d 226, 229 (Fla. 2003) (reiterating that "in order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the . . . motion below" (quoting Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982)). "[A]n error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" Id. (quoting J.B. v. State, 705 So. 2d 1376, 1378 (Fla. 1998)).

In F.B., 852 So. 2d at 230, the Florida Supreme Court explained that there are two exceptions to the rule that a defendant must preserve a claim of insufficiency of the evidence with a timely challenge below: (1) death penalty cases and (2) "when the evidence is insufficient to show that a crime was committed at all." (Emphasis added).

F.B. engendered some uncertainty over whether this second exception, relevant to the present case, applies solely where the evidence wholly fails to prove any crime occurred or also applies where the evidence fails to prove the charged crime occurred (or a middle ground—where the evidence fails to prove the charged crime or any necessarily lesser-included crime occurred). The reason for this uncertainty stems, at least in part, from the concluding language in F.B.:

> Thus, an argument that the evidence is totally insufficient as a matter of law to establish the commission of a crime need not be preserved. Such complete failure of the evidence meets the requirements of fundamental error-i.e., an error that reaches to the foundation of the case and is equal to a denial of due process. See, e.g., Stanton v. State, 746 So.2d 1229, 1230 (Fla. 3d DCA 1999) (citing Troedel and stating that "a person who takes temporary possession of contraband for the sole purpose of turning it into the authorities, and promptly does so, **is [not] guilty of a crime**"); Griffin v. State, 705 So. 2d 572, 574 (Fla. 4th DCA 1998) (reversing conviction because a "conviction is fundamentally erroneous when the facts affirmatively proven by the State **simply do not constitute the charged offense** as a matter of law"); Harris v. State, 647 So. 2d 206, 208 (Fla. 1st DCA 1994) (reversing conviction and stating that "[c]onviction of a crime which did not take place is a fundamental error, which the appellate court should correct even when no timely objection or motion for acquittal was made below"); Nelson v. State, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989) (reversing conviction as fundamental error because

> defendant's conduct **did not constitute the crime of which he was convicted**).

Id. at 230-31 (emphasis added).

One of the cases cited by F.B., Nelson v. State, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989), is quite similar to the instant case. There, the defendant was convicted of felony petit theft and resisting an officer without violence. At the conclusion of the State's evidence, defense counsel moved for judgment of acquittal, arguing there was insufficient evidence that it was Nelson who committed the crime. Id. at 1309. The trial court denied the motion, and after his conviction, Nelson appealed, asserting that his conviction for resisting an officer without violence should be reversed because the undisputed evidence failed to establish a prima facie case of that crime.

The Second District court agreed that Nelson's actions did not constitute the crime of resisting an officer because when Nelson fled from the police, the officer was not engaged in the lawful execution of his duty. The State argued on appeal, however, that Nelson failed to preserve this issue for appeal because he did not raise it in his motion for judgment of acquittal. Agreeing that "[g]enerally, a defendant must articulate the correct grounds in a motion for judgment of acquittal in order for an appellate court to review the issue," the Nelson court held:

> This case, however, is not the usual failure of proof case. Instead this is a situation where Nelson's conduct did not constitute the crime of resisting an officer. Even though this issue was not raised in the trial court, it would be fundamental error not to correct on appeal a situation where Nelson stands convicted of a crime that never occurred.

Id.

Similarly, in M.W. v. State, 51 So. 3d 1220, 1221 (Fla. 2d DCA 2011), a juvenile was arrested by a school resource officer for an alleged assault against a school staff member which occurred outside the presence of the officer. When the officer attempted to handcuff the juvenile, the juvenile "bowed up a little bit and wouldn't physically put his hands behind his back," forcing the officer to forcibly handcuff him. Id. at 1221-22. The juvenile was charged with the assault on the school staff member, and was also charged with resisting the school resource officer without violence under section 843.02. Following an adjudicatory hearing, the trial court found the juvenile not delinquent on the assault charge, but delinquent on the resisting without violence charge. On appeal, the juvenile challenged the resisting without violence charge, asserting that because the alleged assault occurred outside the school resource officer's presence, the arrest was unlawful. Our sister court agreed, reversing and remanding to the trial court for entry of an order of dismissal, despite the fact that defense counsel had failed to make this argument in the trial court, holding "the circuit court's determination that M.W. had committed a delinquent act that never occurred constitutes fundamental error that may be raised for the first time on appeal." Id. at 1223. (citing F.B., 852 So. 2d at 230).

Conversely, in Young v. State, 141 So. 3d 161, 164 (Fla. 2013), the defendant was charged with burglary of a dwelling and the trial court denied his unelaborated

motion for judgment of acquittal. On appeal, Young argued that the State had failed to prove an essential element of the charge, namely that the building was, in fact, a dwelling, and asserted reversal was mandated because it was fundamental error for the trial court to deny his motion under these circumstances. Id. at 165. The Fifth District affirmed the conviction. See Young v. State, 73 So. 3d 825 (Fla. 5th DCA 2011). The Florida Supreme Court approved the Fifth District's decision, and held that the fundamental error exception did not apply where there was evidence from which a jury could have concluded defendant committed at least the offense of burglary of a structure. Id. The Court reiterated: "As the evidence indicates that **a crime** was in fact committed by Young, Young's conviction cannot be said to be fundamental error. Therefore, any specific issue that Young would like to address on appeal must have been preserved at the trial level." Id. (Emphasis added.)

The State contends that Young and the Florida Supreme Court's subsequent decision in Monroe v. State, 191 So. 3d 395 (Fla. 2016) clarifies any uncertainty and that this fundamental error exception applies only where the evidence fails to establish any crime was committed.

In Monroe, the following question was certified to the Supreme Court as one of great public importance:

> DO F.B. V. STATE, 852 So. 2d 226 (Fla. 2003), AND YOUNG V. STATE, 141 So. 3d 161 (Fla. 2013), REQUIRE PRESERVATION OF AN EVIDENTIARY DEFICIENCY WHERE THE STATE PROVED ONLY A LESSER INCLUDED OFFENSE AND THE SENTENCE

REQUIRED FOR THE GREATER OFFENSE WOULD BE UNCONSTITUTIONAL AS APPLIED TO THE LESSER OFFENSE?

The Court answered this question in the affirmative, explaining that its prior opinion in "Young supports the more stringent reading of F.B. to require a showing that the evidence could not support the conviction **of any crime whatsoever** before an evidentiary deficiency may be held to constitute fundamental error." Id. at 400 (emphasis added).

H.R. argues that Monroe and Young are distinguishable because the evidence in those cases established the commission of a lesser-included offense of the crime charged (a circumstance not present in the instant case).[5] Although this is true, we are nevertheless bound by the Supreme Court's opinions in F.B., and Young, as further clarified by the above-quoted language in Monroe. Read together, these cases stand for the proposition that the fundamental error exception does not permit appellate review of unpreserved error in the State's evidentiary failure to prove the crime/delinquent act unless the evidence failed to establish the commission of **any** crime/delinquent act whatsoever. Because the evidence in this case supported a

[5] The only lesser-included offense of resisting an officer without violence is attempted resisting an officer without violence. See Fla. Std. J. Inst. (Crim.) 21.2. The attempt, like the completed offense, requires proof of a lawful arrest. Because the underlying misdemeanor had not been committed in the officer's presence, the officer had no authority to make a warrantless arrest of H.R. Thus, the State could not establish the offense of resisting an officer without violence or the lesser-included offense of attempted resisting an officer without violence.

determination that H.R. committed the delinquent act of assault, we hold that no fundamental error occurred.

We therefore affirm without prejudice to H.R. raising a claim of ineffective assistance of counsel on collateral review.