Third District Court of Appeal

State of Florida

Opinion filed August 31, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D18-2529
Lower Tribunal No. 07-5976

Cassel Foulks,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Jose L. Fernandez, Judge.

Carlos J. Martinez, Public Defender, and James A. Odell, Assistant Public Defender, for appellant.

Ashley Moody, Attorney General, and Brian H. Zack and Jennifer A. Davis, Assistant Attorneys General, for appellee.

Before SALTER, LOGUE and GORDO, JJ.

GORDO, J.

Cassel Foulks appeals the prison releasee reoffender ("PRR") minimum mandatory sentence imposed by the trial court after he violated probation. This appeal presents an issue of first impression regarding whether the State's initial waiver of the PRR sentence, pursuant to a negotiated plea, statutorily precludes the State from seeking to impose a PRR sentence upon revocation of probation. Analyzing this issue requires that this Court harmonize and give full effect to the plain language of the of the PRR statute, section 775.082, Florida Statutes (2019), and the statute governing resentencing upon revocation of probation, section 948.06, Florida Statutes (2019).[1] For the reasons that follow, we conclude the trial court appropriately imposed the minimum mandatory sentence after revoking Foulks' probation and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Foulks was arrested and charged in 2007 for aggravated battery on a law enforcement officer using a deadly weapon, high-speed fleeing or attempting to elude a law enforcement officer, resisting an officer with violence to his or her person, and unlawful possession of cannabis. The State determined Foulks was a PRR because he had been convicted of second-degree murder, a qualifying offense, within three years of his release from prison. The State filed a notice informing the

[1] We find no merit in Foulks' double jeopardy arguments and decline to address them.

Defendant and court that he qualified as a PRR and seeking imposition of the PRR sentence. The State filed a separate notice of its intent to seek imposition of enhanced penalties because Foulks qualified as a habitual felony offender and a habitual violent felony offender.[2]

On August 10, 2009, the State and Defense notified the court they had reached a negotiated plea agreement wherein Foulks would plead guilty to a reduced charge of aggravated assault on a law enforcement officer using a deadly weapon, a second degree felony, and be sentenced to four years' imprisonment as a habitual violent felony offender with a three-year minimum mandatory, followed by two years of probation. He agreed not to commit any further law violations. In exchange, the State would enter a waiver of the PRR imposition and agree to the reduced sentence.

During this original sentencing hearing, Foulks stipulated that he was convicted of murder in the second degree, for which he was released from state prison on June 6, 2005, and had not received any pardons for his sentence. The court advised Foulks that if he violated the terms and conditions of probation, he would be facing up to 30 years in state prison. Between 2012 and 2015, Foulks violated probation three times by committing new law violations. After his first revocation of probation in 2015, he was resentenced to 4.75 years in prison followed by three

[2] Foulks' habitual offender status is not at issue in this appeal.

years of reporting probation. He committed his fourth violation of probation in 2018, which led to the resentencing at issue in this appeal.

At the November 1, 2018 probation violation hearing, Foulks admitted the violation and the trial court revoked his probation. The State sought to impose the PRR minimum mandatory sentence pursuant to the notice filed prior to the original sentencing and established the PRR designation by a preponderance of the evidence. Foulks again admitted on the record that he was released from prison on June 6, 2005, after serving seven years on a second-degree murder charge and he conceded having committed a qualifying offense[3] on February 15, 2007, within three years of his release. The court sentenced Foulks to fifteen years and one day in state prison with a ten-year minimum mandatory as a habitual violent felony offender and a fifteen-year minimum mandatory as a PRR.

Foulks filed a motion to correct his sentence, which the trial court denied. This appeal followed.

[3] See State v. Hackley, 95 So. 3d 92, 94 (Fla. 2012) ("Because [aggravated assault on a law enforcement officer] is a felony that necessarily involves the 'threat by word or act to do violence to the person of another,' it falls within subsection (*o*) of the PRR statute, which covers '[a]ny felony that involves the use or threat of physical force or violence against an individual.'"); see also McClellion v. State, 186 So. 3d 1129, 1131–32 (Fla. 4th DCA 2016).

STANDARD OF REVIEW

"Because a motion to correct a sentencing error involves a pure issue of law, our standard of review is de novo." Salter v. State, 77 So. 3d 760, 764 (Fla. 4th DCA 2011) (quoting Kittles v. State, 31 So. 3d 283, 284 (Fla. 4th DCA 2010)). Additionally, this case presents a question of statutory construction, which is reviewed de novo. Cotto v. State, 139 So. 3d 283, 286 (Fla. 2014).

ANALYSIS

This appeal involves the convergence of the application of sections 775.082(9) and 948.06(2)(b), Florida Statutes. We begin our analysis with the actual text of both statutes as the starting point of any statutory analysis is always most reliably rooted in the actual language of the statutes themselves. See State v. Peraza, 259 So. 3d 728, 730 (Fla. 2018). "[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRainey, 137 So. 157, 159 (Fla. 1931)).

A. Prison Releasee Reoffender Statute

Section 775.082 provides in relevant part:

> (9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
> . . . .

> o. Any felony that involves the use or threat of physical force or violence against an individual;
> . . . .
> within 3 years after being released from a state correctional facility . . . following incarceration for an offense for which the sentence pronounced was a prison sentence . . . .
> . . . .
> 3. If the state attorney determines that a defendant is a prison releasee reoffender as defined in subparagraph 1., the state attorney may seek to have the court sentence the defendant as a prison releasee reoffender. Upon proof from the state attorney that establishes by a preponderance of the evidence that a defendant is a prison releasee reoffender as defined in this section, such defendant is not eligible for sentencing under the sentencing guidelines and must be sentenced as follows:
> . . . .
> c. For a felony of the second degree, by a term of imprisonment of 15 years . . .
> . . . .
> (d)1. It is the intent of the Legislature that offenders previously released from prison or a county detention facility following incarceration for an offense for which the sentence pronounced was a prison sentence who meet the criteria in paragraph (a) be punished to the fullest extent of the law and as provided in this subsection . . . .

"The PRR statute is a mandatory minimum provision that creates a sentencing floor." Cotto, 139 So. 3d at 286 (citing State v. Cotton, 769 So. 2d 345, 354 (Fla. 2000)). "The PRR statute does not increase the maximum period of incarceration to which a person may be sentenced. Rather, under the PRR statute, only the maximum allowable sentence may be imposed." Id. at 289. The Florida Supreme Court has elaborated that "because the PRR statute imposes a mandatory minimum that is in

accordance with, and not beyond, the statutory maximum, a PRR sentence is not an enhanced sentence." Id. at 285. For this reason, the Court has recognized that the PRR statute is applied differently than sentencing enhancements. See e.g., id. at 289.

"The PRR statute specifically states that the legislative intent is to punish those eligible for PRR sentencing to *the fullest extent of the law*." Id. (citing § 775.082(9)(d)1., Fla. Stat. (2002)). Additionally, the PRR statute vests the state attorney with sole discretion to seek imposition of a PRR sentence for an eligible offender or waive it. Cotton, 769 So. 2d at 349 ("[W]here a defendant qualifies as a 'prison releasee reoffender,' it is the state attorney, and not the trial court, who has the authority to determine (in the exercise of prosecutorial discretion) whether or not to seek sentencing under the Act."); § 775.082(9)(d)1., Fla. Stat. "Imposing a PRR sentence is mandatory once the State proves that the defendant qualifies." State v. Baker, 874 So. 2d 643, 643 (Fla. 2d DCA 2004) (citing Cotton, 769 So. 2d 345).

B. Revocation of Probation Statute

The resentencing of an offender upon revocation of probation is governed by section 948.06(2)(b), which provides:

> If probation or community control is revoked, the court shall adjudge the probationer or offender guilty of the offense charged and proven or admitted, unless he or she has previously been adjudged guilty, and *impose any sentence which it might have originally imposed before placing the probationer on probation or the offender into community control. (emphasis added).*

The plain language of this section provides for the imposition of any sentence that might have originally been imposed before placing the offender on probation in exchange for a negotiated plea. See Eustache v. State, 248 So. 3d 1097, 1101 (Fla. 2018) ("This section clearly provides for the imposition of any sentence that was originally available to the sentencing judge.") (internal quotations omitted). Merriam-Webster defines "might" as the past tense of "may" used to "express permission, liberty, *probability, or possibility in the past*," "say that something is possible" or "express a present condition contrary to fact."[4] (emphasis added). This section encompasses any sentence the defendant was eligible to receive that might have been imposed at the original sentencing had a plea agreement not been reached. See, e.g., Aponte v. State, 810 So. 2d 1008, 1011 (Fla. 4th DCA 2002) ("There is no doubt that . . . the trial court could have assessed victim injury points at the original sentencing hearing had the state presented evidence to support victim injury points. Therefore, we see no reason why the plain reading of section 948.06[(2)(b)] does not permit the same victim injury points to be assessed upon a violation of probation.").

[4] *Might*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/might (last visited August 29, 2020).

C. Interplay Between Sections 775.082(9) and 948.06(2)

As the plain language of sections 775.082(9) and 948.06(2)(b) is clear, we need not resort to canons of statutory construction. "All statutory provisions must be given their full effect by the courts, and related statutory provisions must be construed in harmony with one another." Cotto, 139 So. 3d at 286 (citing Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008)).

Section 775.082(9) clearly defines the class of offenders the Legislature seeks to punish to the fullest extent of the law upon proof by the State that the offender qualifies as a PRR. The PRR statute creates a minimum mandatory sentencing scheme. While the PRR minimum mandatory is distinguishable from minimum mandatory provisions associated with criminal offenses, the Supreme Court has read such minimum mandatory provisions in harmony with section 948.06. For example, the Court has held the plain language of section 948.06(b)(2) clearly contemplates that upon revocation of probation the court may impose any minimum mandatory sentence that may have been imposed at the original sentencing. See Eustache, 248 So. 3d at 1101. In Eustache, the Court held that after revoking a youthful offender's probation for a substantive violation and imposing an adult sentence, the sentencing court was "required to impose any minimum mandatory provisions associated with the offense(s)." Cooper v. State, 267 So. 3d 558, 560 (Fla. 5th DCA 2019) (citing Eustache, 248 So. 3d at 1101). See also State v. Valera, 75 So. 3d 330, 332 (Fla. 4th

DCA 2011) ("[T]he trial court was required to sentence appellee to the minimum mandatory sentence that could have been 'originally imposed before placing the probationer on probation.'").

Foulks argues the State's failure to establish the PRR designation at the initial sentencing hearing bars its later imposition upon resentencing. First, we note that, section 775.082(9) contains no explicit or implicit statutory prohibition against the State seeking to impose the PRR sentence following a waiver or proving the PRR designation at a resentencing hearing. The plain language of section 775.082(9)(a)3. provides that *if* the state attorney determines Foulks is a PRR, the state attorney may seek to have the court sentence him as such. Foulks' interpretation would require this Court to impermissibly read into the statute a limit on *when* the State may seek to impose the PRR sentence. "[W]hen construing statutes, courts 'are not at liberty to add words to statutes that were not placed there by the Legislature.'" State v. J.M., 824 So. 2d 105, 111 (Fla. 2002) (quoting Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999)).

Second, during the original sentencing hearing before the trial court, the following exchange was had between Foulks and the court while he was under oath:

> THE COURT: Now, let me talk about your record real quick. You are one and the same Cassel Foulks convicted in Case Number 98-1968B, murder in the second degree, and in May of '99 you were sentenced to seven years; is that correct?
> THE DEFENDANT: Yes.

> THE COURT: That case hadn't been set aside by any Judge. You finished your time and got released. You haven't received a pardon from the governor on that particular case; is that correct?
> THE DEFENDANT: No.
> THE COURT: Defense waive psi?
> MR. WILLIAMS: Yes.
> THE COURT: You are entitled to a psi, pre-sentence investigation so I could look at your record. However, by accepting the plea today, you waive or give up your right to that psi, you understand that, sir?
> THE DEFENDANT: Yes.
> THE COURT: Mr. Williams, you agree with that, sir?
> MR. WILLIAMS: We waive psi.
> THE COURT: Defendant stipulating he is one and the same as convicted of murder in the second degree, second degree murder being a qualifying offense as an H.V.O., and defendant -- when were you released from the state penitentiary on that case?
> THE DEFENDANT: June 6th of '06.
> THE COURT: This case having an offense date in early '07 if I am not mistaken.
> MRS. CARRERAS: I have the release date here. It says the release date was 6/6/05.
> THE COURT: 6/6 of '05 ring a bell?
> MRS. CARRERAS: This took place April of '06.
> THE COURT: Okay, 6/6/05 and this was April of '06?
> MRS. CARRERAS: Let me double check the A. Form.
> THE DEFENDANT: Yeah, it was '05.
> MRS. CARRERAS: I am sorry, Judge, this was February 15th of '07.
> THE COURT: Okay. So what is the release date?
> THE DEFENDANT: The release date was 6/6/05.

We find this a sufficient factual predicate stipulated to under oath by Foulks to prove by a preponderance of the evidence that he qualified as a PRR on the date of his original sentencing.

"[A] sentencing after a revocation of probation is, for all intents and purposes, just a resentencing on the original offense." Shields v. State, 296 So. 3d 967, 972 (Fla. 2d DCA 2020). "The events which bring about a revocation open a new chapter in which the court ought to be able to mete out any punishment within the limits prescribed for the crime." Aponte, 810 So. 2d at 1010 (quoting State v. Segarra, 388 So. 2d 1017, 1018 (Fla. 1980)). A revocation of probation essentially brings Foulks back to the starting point of any sentence he was facing at the original sentencing hearing. Prior to Foulks' original sentencing, the State had filed a notice to invoke sentencing as a PRR. As part of a negotiated plea, the State waived the PRR sentence. But, had Foulks rejected the plea agreement, the PRR minimum mandatory sentence would have been on the table. See State v. Davis, 834 So. 2d 898, 899 (Fla. 3d DCA 2002) (finding the State had not waived imposition of PRR when it offered the defendant a non-PRR sentence because the defendant's rejection of the plea offer negated any waiver by the State).

Giving full effect to sections 775.082(9) and 948.06(b)(2), we conclude that when the State seeks to impose the PRR sentence and proves the PRR designation by a preponderance of the evidence before resentencing an offender that was originally facing a PRR sentence, the court is required to impose the minimum mandatory sentence.

D. No Reliance on Waiver

Foulks cannot reasonably allege that he entered into a negotiated plea with the State in reliance on a permanent waiver of the PRR designation. Aside from the fact that there is no basis in Florida law for a permanent PRR waiver, Foulks' violation of probation would have nullified the State's waiver under traditional contract principles. "A plea agreement is a contract and the rules of contract law are applicable to plea agreements." Johnson v. State, 225 So. 3d 930, 932 (Fla. 3d DCA 2017) (quoting Garcia v. State, 722 So. 2d 905, 907 (Fla. 3d DCA 1998)). As part of that contract, the State and the defendant both receive a benefit for their bargain, but a defendant breaches the original plea agreement by violating the terms of probation. See Davis v. State, 680 So. 2d 527, 528 (Fla. 1st DCA 1996); Mulder v. State, 356 So. 2d 870, 871 (Fla. 4th DCA 1978), ("It cannot be said that the legislature intended to leave society without any recourse against those defendants who receive the benefit of the court's mercy by being placed on probation and, subsequently, violate the terms thereof."). After violating the terms of his probation, Foulks "cannot now be heard to argue that the State is bound by the terms of an agreement which resulted in the initial imposition of probation." Segarra, 388 So. 2d at 1018 (quoting Mulder, 356 So. 2d at 871); see Hunt v. State, 613 So. 2d 893, 898 (Fla. 1992) ("[A] defendant cannot be allowed to arrange a plea bargain, back

out of his part of the bargain, yet insist the prosecutor uphold his end of the agreement." (quoting Hoffman v. State, 474 So. 2d 1178, 1182 (Fla. 1985))).

E. Distinguishing Enhancement Statutes

Foulks entered the plea agreement fully aware of the statutory maximum sentence he was facing. From the beginning of the proceedings the State put Foulks on notice that he qualified for the PRR designation and the State intended to seek imposition of the minimum mandatory. "In contrast to the PRR statute, the HFO provision allows courts to sentence a defendant who qualifies as an HFO to an *extended term of imprisonment*." Cotto, 139 So. 3d at 287 (citing § 775.084(1)(a), (4)(a), Fla. Stat. (2002)). Where an enhancement statute is implicated, the Supreme Court has declined to allow resentencing to an enhanced sentence upon revocation of probation because the trial court must "provid[e] defendants who enter a plea agreement with the requisite notice of the most severe punishment that can be imposed." Snead v. State, 616 So. 2d 964, 966 (Fla. 1993). It is well-settled that a defendant cannot be sentenced as a habitual offender upon revocation of probation where not originally sentenced as a habitual offender. Yet, "[w]hile the intent behind the habitual offender statute is to *increase the maximum allowable* sentence, the intent behind the PRR provision is to provide for *maximum sentencing* within the sentencing statute." Cotto, 139 So. 3d at 290. The habitual offender enhancement statutes increase the maximum sentence that can be imposed, whereas the PRR

sentence is not an enhanced sentence and does not increase the maximum period of incarceration to which a person may be sentenced. Here, Foulks was notified that he was facing up to thirty years in state prison if he violated his probation and was specifically advised by the court that he faced a statutory maximum of fifteen years on the aggravated assault charge standing alone. Because he was advised of the maximum punishment (which is also the minimum mandatory under the PRR statute) by the sentencing judge at the initial sentencing hearing, there is no parallel concern regarding notice of maximum punishment as is raised with sentencing enhancements. Accordingly, cases precluding habitual offender enhancements upon revocation of probation do not apply here.

CONCLUSION

Prior to the imposition of the minimum mandatory sentence upon revocation of Foulks' probation, the State established by a preponderance of the evidence, and Foulks conceded, that he qualified as a PRR. Harmonizing and giving effect to the plain language of the operative statutes, we conclude the State may seek to have the PRR sentence imposed upon revocation of probation because the trial court might have originally imposed it before placing Foulks on probation. Accordingly, we affirm the court's imposition of the PRR minimum mandatory sentence.

Affirmed.