Third District Court of Appeal

State of Florida

Opinion filed October 28, 2020.
Not final until disposition of timely filed motion for rehearing.

No. 3D19-1636
Lower Tribunal No. 99-2559

Rancifer Brown,
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, Teresa Mary Pooler, 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 FERNANDEZ, LOGUE, and LOBREE, JJ.

LOBREE, J.

Rancifer Brown ("Brown") challenges the summary denial of his amended

motion to vacate sentence pursuant to Florida Rules of Criminal Procedure 3.781, 3.800(a), and 3.850, contending that he is entitled to be resentenced pursuant to chapter 2014-220, Laws of Florida. Bound by Kelsey v. State, 206 So. 3d 5 (Fla. 2016), we reverse and remand for resentencing.

In 2000, following a jury trial, Brown was convicted of armed robbery with a firearm, attempted second-degree murder with a firearm, and use of a firearm during the commission of a felony. These offenses occurred when Brown was seventeen years old. Brown was sentenced to life on the counts of armed robbery with a firearm and attempted second-degree murder with a firearm, and to fifteen years in prison on the remaining count. His convictions and sentences were affirmed on direct appeal in Brown v. State, 816 So. 2d 628 (Fla. 3d DCA 2002).

In 2010, following Graham v. Florida, 560 U.S. 48, 74-75 (2010), Brown moved to vacate his life sentences as unconstitutional. At the hearing, defense counsel advised the court that Brown was willing to accept a sentence of twenty-five years, which was the state's original plea offer, without the need of a separate sentencing hearing. The state, on the other hand, advised the court that its offer was forty years and a de novo resentencing of Brown was not required. The court agreed and, after vacating the two previously imposed life sentences, resentenced Brown without objection to thirty years in prison on counts one and two. In the subsequent

appeal pursuant to Anders v. California, 386 U.S. 738 (1967), we affirmed the new sentence. Brown v. State, 108 So. 3d 1100 (Fla. 3d DCA 2013).

In 2016, the Florida Supreme Court decided Kelsey, 206 So. 3d at 6, where it answered in the affirmative whether "a defendant whose *original* sentence violated Graham . . . and who was subsequently resentenced prior to July 1, 2014, [was] entitled to be resentenced pursuant to the provisions of chapter 2014-220." (emphasis added). A month after Kelsey, Brown again challenged his sentence by means of a motion alternatively under rules 3.800(a) and 3.850(a) and (b)(2), arguing that he was entitled to resentencing specifically under the framework established in chapter 2014-220. The state responded that Brown had waived his entitlement to any further resentencing because, at the hearing on his initial motion asserting a Graham violation, rather than proceeding to a full resentencing, he agreed to the new sentence of thirty years. The trial court agreed, finding that Brown's case was distinguishable from Kelsey and Grantley v. State, 211 So. 3d 301 (Fla. 3d DCA 2017), and concluding that Brown's actions constituted to a waiver of his entitlement to "any subsequently-enacted juvenile review periods." This appeal ensued.

We review the denial of Brown's challenge to the legality of his sentence de novo. See Kelsey, 206 So. 3d at 8; see also Jimenez v. State, 265 So. 3d 462, 476 n.10 (Fla. 2018). Brown argues that, under the narrow mandate in Kelsey, he is entitled to a resentencing pursuant to chapter 2014-220, Laws of Florida, as codified

in sections 775.082(3)(c), 921.1401, and 921.1402, Florida Statutes, despite the fact that he acquiesced to his current thirty-year sentence *and* the current term is not itself violative of Graham.

In Kelsey, the defendant was fifteen years old when he committed two armed sexual batteries, an armed burglary, and an armed robbery. 206 So. 3d at 6. After pleading guilty to the charges, he was sentenced to two life sentences and two concurrent twenty-five-year terms. Id. After Graham, Kelsey was resentenced to forty-five years in prison. Id. at 7. The Legislature enacted chapter 2014-220 several months thereafter. Kelsey unsuccessfully moved for a second resentencing. Id. On direct appeal from the resentencing, the First District determined that Kelsey was not entitled to a second resentencing. Id. The Florida Supreme Court disagreed, finding "that all juveniles who have sentences that violate Graham are entitled to resentencing pursuant to chapter 2014–220." Id. at 8. In its holding, the court explained that it agreed with Kelsey that "his sentence does not currently provide the relief specified in our previous decisions," referring to its prior mandate in Thomas v. State, 177 So. 3d 1275 (Fla. 2015), that "the application of the new statute is the appropriate remedy." Id. at 10.

Brown correctly argues that his challenge is indistinguishable from Grantley, where we reversed the denial of a second motion to correct illegal sentence and held that a juvenile defendant whose original sentence violated Graham but whose

successful resentencing pursuant to it preceded the enactment of chapter 2014-220 was nevertheless entitled to a new sentencing under Kelsey. See Grantley, 211 So. 3d at 302-03; Perry v. State, 263 So. 3d 86, 87 (Fla. 4th DCA 2019) (same). But see McCullum v. State, 263 So. 3d 276, 277 (Fla. 1st DCA 2019) (affirming denial of Kelsey claim raised by motion to correct illegal sentence based on law of case doctrine, as identical claim had been raised on direct appeal from resentencing and review denied, finding that manifest injustice exception inapplicable).

The recent decision in Pedroza v. State, 291 So. 3d 541 (Fla. 2020), preserved the holding of Kelsey, while receding from much of its dicta, abrogating Johnson v. State, 215 So. 3d 1237 (Fla. 2017), and disapproving of several district court opinions applying Johnson. The court held that "a juvenile offender's sentence does not implicate Graham, and therefore Miller,[1] unless it meets the threshold requirement of being a life sentence or [its] functional equivalent." Pedroza, 291 So. 3d at 548. However, Pedroza clarified that Kelsey's narrow holding remained that "a juvenile nonhomicide offender [whose original sentence violated Graham is] *entitled* to a *second* resentencing for a Graham violation *where* his first resentencing *did not provide . . . [for] resentencing under chapter 2014-220*." Id. at 547 (emphasis added). That is, Kelsey requires that, if a subsequent resentencing obtained after a Graham violation was not pursuant to chapter 2014-220, then a

[1] Miller v. Alabama, 567 U.S. 460 (2012).

defendant is entitled to further resentencing specifically under the chapter, *despite* the fact that the current sentence is not itself violative of Graham.[2] Contrary to the state's suggestion, Pedroza reasserted that "the issue raised by [Kelsey] was not whether the length of sentence [the juvenile] *received on resentencing* . . . was *itself* a Graham violation." Id. at 547-48 (emphasis added). Here, it is undisputed *both* that Brown's original sentence violated Graham *and* that his subsequent resentencing, mandated by Graham, was not pursuant to chapter 2014-220.

We are not persuaded by the state's argument that Brown waived his claim when he was resentenced. Although bargained-for, knowing, and voluntary pleas may waive violations of fundamental rights, such as double jeopardy claims, see Martinez v. State, 298 So. 3d 1196, 1201 n.5 (Fla. 3d DCA 2020), we have afforded relief for Miller/Graham violations despite the entry of such pleas. See e.g. Wadley v. State, 178 So. 3d 424 (Fla. 3d DCA 2015). Moreover, the record in this case does not clearly reflect that Brown's current sentence was imposed pursuant to a plea. Even if we were to conclude, as did the trial court, that the resentencing was pursuant to a plea, the record does not reflect that it was "voluntarily and intelligently entered into." Cf. State v. Berry, 647 So. 2d 830, 832 (Fla. 1994) (requirements of prior statute governing sentencing of juvenile charged as adult could be waived by plea

[2] Cf. McCrae v. State, 267 So. 3d 470, 471 (Fla. 1st DCA 2019) (original thirty-year sentence for juvenile offender convicted of second-degree murder was not inconsistent with Graham or Miller).

so long as trial court informed defendant of rights provided by statute and ensured that waiver of rights was voluntary, knowing, and intelligent).

We recognize that "the 'decisional path' or 'path of reasoning' in Kelsey is less than clear," Pedroza, 291 So. 3d at 548, and much of its rationale has been eroded by Pedroza. Nonetheless, Kelsey continues to compel the disposition of this case and others like it, which belong to a narrow and discrete class. We reverse and remand for a full resentencing hearing on the counts of armed robbery with a firearm and attempted second-degree murder with a firearm, in accordance with the sentencing procedures set forth in chapter 2014-220, as codified in sections 921.1401 and 921.1402.

Reversed and remanded for resentencing.