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Justin NELSON, Appellant,

v.

STATE of Florida, Appellee.

Case No. 2D18-39

District Court of Appeal of Florida, Second District.

Opinion filed March 18, 2020.

Appeal from the Circuit Court for Pinellas County; Chris Helinger, Judge.

Howard L. Dimmig, II, Public Defender, and Timothy J. Ferreri, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Laurie Benoit-Knox, Assistant Attorney General, Tampa, for Appellee.

KHOUZAM, Chief Judge.

Justin Nelson appeals his conviction and sentence for aggravated assault. He was found guilty by a jury after the circuit court denied his motion to dismiss based on section 776.032, Florida Statutes (2017), Florida's "Stand Your Ground" law. Nelson argues that he is entitled to a new immunity hearing because section 776.032 was amended in 2017 to shift the burden of proof from the defendant to the State. We agree and reverse. As to Nelson's remaining claim, we affirm without comment.

The Florida Supreme Court recently held in Love v. State, 286 So. 3d 177, 190 (Fla. 2019), that "[s]ection 776.032(4) is a procedural change in the law and applies to all Stand Your Ground immunity hearings conducted on or after the statute's effective date" (emphasis added). Because Nelson's immunity hearing was held on June 9, 2017, the same day the amendment became effective, he is entitled to a new immunity hearing conducted under the amended statute. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Reversed and remanded with directions.

CASANUEVA and VILLANTI, JJ., Concur.

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David Dean CROFT, DOC #092628, Appellant,

v.

STATE of Florida, Appellee.

Case No. 2D18-5109

District Court of Appeal of Florida, Second District.

Opinion filed March 25, 2020.

Rehearing Denied May 14, 2020

Background: Prisoner serving life imprisonment sought postconviction relief, and the state agreed that prisoner was entitled to resentencing. The Circuit Court, 6th Judicial Circuit, Pinellas County, Joseph A. Bulone, J., granted the motion and directed the state to schedule resentencing. Before resentencing could be completed, the state moved for reconsideration, and the Circuit Court granted the state's motion, rescinded the prior order for resentencing, and denied prisoner's original motion. Prisoner appealed.

Holdings: The District Court of Appeal, LaRose, C.J., held that the postconviction court lacked jurisdiction to rescind order granting motion for resentencing.

Reversed and remanded with instructions.

1. Sentencing and Punishment ⚿2315

Postconviction court lacked jurisdiction to rescind order granting prisoner's motion for resentencing, although resentencing hearing had not yet occurred, where original order granting motion for resentencing was a final appealable order and state's motion for rehearing was filed more than two years after entry of final order. Fla. R. Crim. P. 3.850.

2. Sentencing and Punishment ⚿2262

The decisional law effective at the time of the resentencing applies to those proceedings. Fla. R. Crim. P. 3.850.

Appeal from the Circuit Court for Pinellas County; Joseph A. Bulone, Judge.

Howard L. Dimmig, II, Public Defender, and Pamela H. Izakowitz, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Donna S. Koch, Assistant Attorney General, Tampa, for Appellee.

LaROSE, Judge.

David Dean Croft appeals the denial of his motion for postconviction relief. See Fla. R. Crim. P. 3.850. We have jurisdiction. See Fla. R. App. P. 9.030(b)(1)(A); 9.141(b)(3). The postconviction court lacked jurisdiction to deny Mr. Croft's motion.[1] Consequently, we reverse.

Background

On May 29, 1983, six months shy of his eighteenth birthday, Mr. Croft and a juvenile confederate committed a murder. The State indicted each. The confederate went to trial first. He was found guilty, and the trial court sentenced him to life in prison without parole eligibility for twenty-five years. Then, in exchange for the State's waiver of the death penalty, Mr. Croft pleaded guilty to the same disposition.

Years later, the United States Supreme Court decided Graham v. Florida, 560 U.S. 48, 74, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), holding that the Eighth Amendment categorically forbids a sentence of life without parole for juvenile nonhomicide offenders, and Miller v. Alabama, 567 U.S. 460, 470, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), prohibiting the imposition of a mandatory life sentence without the possibility of parole for juvenile homicide offenders. Applying Graham and Miller, the Florida Supreme Court subsequently held that a juvenile homicide offender's life with parole sentence violated the Eighth Amendment based largely upon a presumptive parole release date set far beyond the juvenile offender's life expectancy. See Atwell v. State, 197 So. 3d 1040, 1048-50 (Fla. 2016).

Spurred on by this case law, Mr. Croft filed his rule 3.850 motion in August 2016. Noting that his "current presumptive parole release date is June 7, 2095," the State agreed that Mr. Croft "[wa]s entitled to be resentenced." In October 2016, the postconviction court granted Mr. Croft's rule 3.850 motion and directed the State to schedule a resentencing hearing.

Before a resentencing hearing could be completed, the State moved to reconsider the postconviction court's order, relying on State v. Michel, 257 So. 3d 3 (Fla. 2018). See Franklin v. State, 258 So. 3d 1239, 1241 (Fla. 2018) ("As we held in Michel, involving a juvenile homicide offender sentenced to life with the possibility of parole after 25 years, Florida's statutory parole process fulfills Graham's requirement that juveniles be given a 'meaningful opportunity' to be considered for release during their natural life based upon 'normal pa-

1. Our disposition of this issue moots Mr. Croft's second claim.

role factors,' [Virginia v. LeBlanc, —— U.S. ——, 137 S.Ct. 1726, 1729, 198 L.Ed.2d 186 (2017)], as it includes initial and subsequent parole reviews based upon individualized considerations before the Florida Parole Commission that are subject to judicial review." (first citing Michel, 257 So. 3d at 6; and then citing §§ 947.16-.174, Fla. Stat.)).

After a December 2018 hearing, the postconviction court granted the State's motion for reconsideration, rescinded the October 2016 order, and denied Mr. Croft's rule 3.850 motion.

Analysis

The October 2016 order granting Mr. Croft's rule 3.850 motion was a final appealable order. The State did not appeal. See Taylor v. State, 140 So. 3d 526, 528 (Fla. 2014) ("[A]n order disposing of a [rule 3.850] motion which partially denies and partially grants relief is a final order for purposes of appeal, even if the relief granted requires subsequent action in the underlying case, such as resentencing."); Cooper v. State, 667 So. 2d 932, 933 (Fla. 2d DCA 1996) ("A [rule 3.850] order denying in part and granting in part relief, however, marks the end of the judicial labor which is to be expended on the motion, and the order is final for appellate purposes.").

[1] Critically, Mr. Croft sought postconviction relief under rule 3.850, instead of Florida Rule of Criminal Procedure 3.800(a). This choice was significant. We have held that a rule 3.800(a) order finding that a movant is entitled to be resentenced, without imposing a new sentence, is a nonfinal nonappealable order. See State v. Rudolf, 821 So. 2d 385, 386 (Fla. 2d DCA 2002); see alsoFla. R. App. P. 9.140(c) (permitting the State to appeal orders "granting relief under Florida Rules of Criminal Procedure 3.801, 3.850, 3.851, or 3.853").[2] But under Taylor, the postconviction court lacked jurisdiction to rescind its October 2016 order, more than two years later, on the basis of an untimely rehearing motion. SeeFla. R. Crim. P. 3.850(j) ("Any party may file a motion for rehearing of any order addressing a motion under this rule within 15 days of the date of service of the order. . . . A motion for rehearing must be based on . . . an argument based on a legal precedent or statute not available prior to the court's ruling.").

[2] Accordingly, we must reverse the postconviction court's December 2018 order, reinstate the October 2016 order, and direct the postconviction court to conduct a resentencing hearing. We are mindful that Mr. Croft may have won a pyrrhic victory, see Franklin, 258 So. 3d at 1241; Michel, 257 So. 3d at 6, because "the decisional law effective at the time of the resentencing applies." State v. Fleming, 61 So. 3d 399, 400 (Fla. 2011). Hence, upon resentencing, Mr. Croft may yet receive the same sentence.

Reversed and remanded with instructions.

NORTHCUTT and SMITH, JJ., Concur.

2. Rule 9.140(c) omits rule 3.800(a) orders from the ambit of enumerated orders from which the State may appeal. See Rudolf, 821 So. 2d at 386. The State, however, may appeal orders imposing an unlawful sentence. SeeFla. R. App. P. 9.140(c)(1)(M), (N), (P).