

to raise below, and ultimately preserve, the issue should bar us from considering it on appeal. *See id.* Accordingly, I would affirm the order in its entirety.



**Kenneth Ray YOUNG, Appellant,**

v.

**STATE of Florida, Appellee.**

**No. 2D11-5681.**

District Court of Appeal of Florida,  
Second District.

Feb. 20, 2013.

**Background:** Defendant filed postconviction motion to correct illegal sentences, challenging four concurrent sentences of life without parole, imposed for armed robbery convictions arising from robberies committed when defendant was 14 and 15 years old. The Circuit Court, Hillsborough County, Lisa Campbell and Daniel H. Sleet, JJ., granted the motion and, after a resentencing hearing, imposed four concurrent 30-year sentences. Defendant appealed.

**Holding:** The District Court of Appeal, Villanti, J., held that trial court was not required to use resentencing hearing as “meaningful opportunity” for defendant to seek release based upon rehabilitation and maturity.

Affirmed.

### 1. Infants ⇌3011, 3155

#### Sentencing and Punishment ⇌1607

Holding of United States Supreme Court in *Graham v. Florida* regarding proportionality requirement of Eighth Amendment, that juvenile offenders given life sentences for nonhomicide offenses must be given a realistic opportunity to obtain release before the end of that term,

did not require that trial court, in resentencing defendant who had previously been given life sentences for armed robberies committed when he had been 14 and 15 years old, use the resentencing hearing as the “meaningful opportunity” for defendant to seek release based upon rehabilitation and maturity; once trial court resentenced defendant to a nonlife sentence of four concurrent 30-year terms, its obligations under *Graham* were fulfilled. U.S.C.A. Const.Amend. 8.

### 2. Infants ⇌3011

#### Sentencing and Punishment ⇌1607

Trial court, in resentencing defendant who had previously been given life sentences for armed robberies committed when he had been 14 and 15 years old, sufficiently considered defendant’s rehabilitation and maturity in imposing concurrent 30-year sentences, to the extent that proportionality requirement of Eighth Amendment mandated consideration of defendant’s rehabilitation and maturity; evidence trial court considered included the nature of offenses, manner in which they were committed, defendant’s youthfulness at time of offenses, defendant’s statements about his culpability at time of arrest, defendant’s behavior during his trials, criminal code scoresheets applicable to the convictions, evidence of defendant’s behavior and rehabilitation during his time in prison. U.S.C.A. Const.Amend. 8.

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VILLANTI, Judge.

Kenneth Ray Young appeals the four concurrent thirty-year sentences imposed

when he was resentenced pursuant to *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). We reject without comment Young's argument concerning an alleged error in failing to use a single scoresheet when sentencing him for multiple offenses. However, Young also argues that the trial court violated the requirements of *Graham* when it failed to consider Young's rehabilitation and newfound maturity in determining what sentence to impose at the resentencing hearing. Because Young's interpretation of *Graham* does not comport with the plain language of that decision, we affirm on this issue as well.

Young was fourteen and fifteen years old when he committed a series of four armed robberies in 2000. He was originally sentenced to concurrent sentences of life without the possibility of parole for each conviction. After the Supreme Court released its opinion in *Graham*, which held that sentences of life without the possibility of parole were unconstitutional for juveniles who do not commit homicides,<sup>1</sup> Young filed a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). The postconviction court found that Young's sentence was unconsti-

tutional under *Graham*, and it granted the rule 3.800(a) motion and scheduled a resentencing hearing.

At that resentencing hearing, Young argued that *Graham* required the resentencing court to provide Young with a "meaningful opportunity to obtain release . . . based on demonstrated maturity and rehabilitation." Young argued that because Florida abolished its parole system in 1983, that "meaningful opportunity" had to occur at the resentencing hearing. Young then presented evidence that he contended demonstrated that he had been successfully rehabilitated during the eleven years he had already spent in prison. In turn, the State presented evidence concerning the nature of the crimes Young had committed and the continuing effects of those crimes on the victims. After considering this evidence, the resentencing court found that while Young had shown evidence of rehabilitation, he nevertheless needed to be punished for the crimes he committed and that "eleven years [was] not enough" based on the nature and number of the crimes. Thus, while the resentencing court recognized Young's efforts at rehabilitation, it sentenced Young to the sentence it deemed appropriate based on the totality of the circumstances surrounding his offenses,<sup>2</sup> i.e., concurrent terms of thir-

1. The Supreme Court again took up the issue of sentences of life without the possibility of parole for juvenile offenders in *Miller v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In that case, the Supreme Court held that state sentencing statutes that make a sentence of life without the possibility of parole mandatory for juvenile homicide offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 2460. The Court explained that there is a clear distinction between the holdings of *Graham* and *Miller*. "*Graham* established one rule (a flat ban) [on life-without-parole sentences] for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses." *Id.* at 2466 n. 6. In this case, Young relied on

certain language from *Miller* in both his brief and at oral argument to argue that the trial court erred in resentencing him. However, Young is not a homicide offender, and he is not incarcerated under a sentence of life without parole. Therefore, the *Miller* decision is wholly inapplicable to either the issues or the decision in this case.

2. The original trial judge had retired before the resentencing hearing and thus was unavailable to resentence Young. The record shows that the judge who presided over the resentencing hearing had read the transcripts of all four of Young's trials as well as the presentence investigation report that was prepared before Young was originally sentenced. Thus, the resentencing court was completely

ty years in prison followed by ten years' probation.<sup>3</sup>

[1] In this appeal, Young does not contend that the length of his current sentence is illegal pursuant to *Graham*. Instead, Young contends that *Graham* required the resentencing court to use the resentencing hearing as the procedural mechanism through which he would have a "meaningful opportunity" to obtain his release based on demonstrated maturity and rehabilitation and that the resentencing court's failure to consider Young's efforts at rehabilitation requires this court to reverse and remand for resentencing. We reject this argument for two reasons.

First, we disagree with Young's interpretation of *Graham* as requiring the resentencing court to consider Young's newfound maturity and rehabilitation at the resentencing hearing. *Graham* addressed the narrow issue of whether a sentence of life without the possibility of parole imposed on a juvenile nonhomicide offender violated the Eighth Amendment's prohibition on cruel and unusual punishment. 130 S.Ct. at 17–18. The Court analyzed the issue as one of whether such a sentence is categorically "disproportionate to the crime." *Id.* at 2021. After a thorough review of national consensus, penological theory, and the psychological differences between juveniles and adults, the Court held that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 2034.

Notably, however, *Graham* did not prohibit all life sentences for juvenile nonhomicide offenders. *Id.* at 2030 (providing that "[a] State is not required to guarantee eventual freedom to a juvenile offender

convicted of a nonhomicide crime" and that the Eighth Amendment "does not require the State to release that offender during his natural life"). Instead, *Graham* held only that *if* a sentencing court "imposes a sentence of life [on a juvenile nonhomicide offender] it must provide him or her with some realistic opportunity to obtain release before the end of *that term*." *Id.* at 2034 (emphasis added). And *if* a life sentence is imposed, the opportunity for release must be based on considerations of the juvenile's demonstrated maturity and rehabilitation. *Id.* at 2030. Thus, to comply with the Eighth Amendment's proportionality requirements, a court may not sentence a juvenile nonhomicide offender to life and conclude *at the outset* that the offender is incorrigible and incapable of rehabilitation. *Id.* at 2033. Instead, if the court elects to impose a life sentence, it must provide the juvenile nonhomicide offender with a "chance to later demonstrate that he is fit to rejoin society" based on rehabilitation and newfound maturity. *Id.*

As is evident from the above, *Graham* did not alter Florida's Criminal Punishment Code to the extent that it sets forth the requirements for calculating the lowest permissible prison sentence to which a juvenile nonhomicide offender is exposed. *Graham* did not add "maturity and rehabilitation" as grounds for a downward departure sentence under Florida's sentencing statutes. And *Graham* did not provide a juvenile nonhomicide offender with the right to a de facto clemency hearing in place of a resentencing hearing. In point of fact, *Graham* says nothing about the conduct of resentencing hearings. Instead, *Graham* simply prohibits a court from imposing the specific sentence of life

familiar with all of the evidence presented both at those trials and at Young's original sentencing hearings.

3. Two of these sentences were subject to ten-year minimum mandatory terms, but the application of these minimum mandatory terms is moot as Young has already completed them.

on a juvenile nonhomicide offender unless the court also provides “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* at 2030.

Because Young was originally given a sentence of life without the possibility of parole, *Graham* required that Young be resentenced. The resentencing court did so, and it imposed a sentence of thirty years in prison followed by ten years’ probation. Nothing about this sentence offends *Graham*, and *Graham* required nothing more from the resentencing court under the facts of this case.

The thrust of Young’s argument in his brief and at oral argument is that *Graham* requires the court to provide a juvenile nonhomicide offender with a “meaningful opportunity” to be released from *any* sentence before its natural expiration, regardless of the length of that sentence, based on the defendant’s maturity and rehabilitation. This is simply incorrect. *Graham* holds only that a court may not sentence a juvenile nonhomicide offender to *life in prison* without providing a meaningful opportunity for release—not that a juvenile nonhomicide offender sentenced to a term of years must be provided with a meaningful opportunity for release at some point during that term of years. Here, Young was resentenced to a term of thirty years in prison, following which he will be released. Young has a sentence that specifically provides for his eventual release, and he is not entitled under *Graham* to an additional opportunity for release.<sup>4</sup>

Young also suggests that his guaranteed release after thirty years is not sufficient to comply with *Graham* because that release will not be based on his “demonstrated maturity and rehabilitation.” Again, Young misreads *Graham*. *Graham* re-

quires that juvenile nonhomicide offenders who are *sentenced to life* be provided with “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” *Id.* Juvenile nonhomicide offenders who are given sentences—even lengthy ones—which provide for their release during their anticipated lifetimes do not need such an opportunity since their eventual release is a foregone conclusion.

Moreover, contrary to Young’s argument in his brief and at oral argument, *Graham* does not *require* a resentencing court to use a juvenile nonhomicide offender’s resentencing hearing as the “meaningful opportunity” to seek release based upon rehabilitation and maturity. Instead, the Court in *Graham* made a deliberate decision to permit each state to develop its own procedures for determining how, when, and with what degree of frequency any review of a juvenile nonhomicide offender’s life sentence must occur. *Id.* at 2030 (noting that “[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance” with the requirement of providing the meaningful opportunity to obtain release). Thus, states may choose to provide this opportunity through parole hearings, early release, conditional release, “bonus” gain time, or other statutory methods yet to be devised. In Florida, these procedures appear to be a work in progress. However, since Young was not resentenced to a life sentence, we need not address the proper mechanism for providing the opportunity required by *Graham*. Instead we note only that *Graham* does not *require* that a resentencing hearing be the mechanism for this opportunity.

4. Certainly, Young retains the opportunity to seek early release from his sentence through executive clemency. Any other opportunities

for release must come from the legislative branch—not from the judicial branch or *Graham*.

In short, the resentencing court complied with the requirements of *Graham* when it granted Young's rule 3.800(a) motion and resentenced him to a sentence other than life without the possibility of parole. Had the resentencing court again imposed a life sentence, it would have been required by *Graham* to devise some means of providing Young with a subsequent opportunity to seek release from that life sentence based on his demonstrated maturity and rehabilitation. However, once the resentencing court imposed a nonlife sentence on Young, its obligations under *Graham* were fulfilled, and Young is not entitled to further relief under *Graham*.

[2] Second, even if we agreed with Young that *Graham* required the resentencing court to use the resentencing hearing as an opportunity for Young to gain release based on maturity and rehabilitation, the record shows that the resentencing court did so. The record plainly shows that the resentencing court took evidence on and considered in detail the nature of Young's offenses, the manner in which they were committed, Young's youthfulness at the time of the offenses, Young's statements about his culpability at the time of his arrest, Young's behavior during his trials, the Criminal Punishment Code scoresheets applicable to Young's convictions, the evidence presented concerning Young's behavior and rehabilitation during his time in prison, the statutory bases for a downward departure sentence, and the arguments of the parties as to an appropriate sentence. After considering *all* of this evidence and information, the resentencing court determined that thirty years in prison followed by ten years' probation was the appropriate sentence. This term of years does not offend the Eighth Amendment. *Id.* at 2058 (Alito, J., dissenting) (noting that *Graham's* attorney "conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional");

*see also Walle v. State*, 99 So.3d 967, 972-73 (Fla. 2d DCA 2012) (holding that a sentence of sixty-five years imposed on a juvenile nonhomicide offender, which sentence was to run consecutively to a twenty-seven-year sentence for offenses committed in a different county, did not violate the Eighth Amendment as discussed in *Graham*).

Moreover, the fact that the resentencing court did not give the weight to Young's rehabilitative efforts that he thought the court should have does not mean that the court failed to consider that evidence in reaching its sentencing decision. In fact, the record belies this assertion. The resentencing court could have resentenced Young to a life sentence and devised some means of providing him with an opportunity for later release, but it elected not to do so. The resentencing court could have accepted the State's request for a forty-year sentence followed by ten years' probation, but it elected not to do so. Thus, the fact that the resentencing court rejected Young's request to be released, having served only eleven years in prison for committing four armed robberies during which Young held a gun to the heads of some of the victims, does not show that the court ignored the evidence of Young's newfound maturity and rehabilitation. Instead, the record demonstrates that the resentencing court considered *all* of the evidence before it, including the evidence of rehabilitation and maturity, in reaching its sentencing decision. We will neither second-guess the resentencing court's decision nor delve into the thought processes behind the imposition of Young's sentence. *See Nusspickel v. State*, 966 So.2d 441, 444 (Fla. 2d DCA 2007) (noting that "the trial court's imposition of a sentence that is within the minimum and maximum limits set by the legislature 'is a matter for the trial [c]ourt in the exercise of its discretion, which cannot be inquired into upon the appellate level'")

(quoting *Shellman v. State*, 222 So.2d 789, 790 (Fla. 2d DCA 1969))). Instead, finding no abuse of discretion in the imposition of this sentence, we affirm.

Affirmed.

NORTHCUTT and KHOUZAM, JJ.,  
Concur.



**Wayne MARTIN, Appellant,**

v.

**STATE of Florida, Appellee.**

**No. 1D10-6169.**

District Court of Appeal of Florida,  
First District.

Feb. 22, 2013.

Rehearing Denied April 25, 2013.

**Background:** Defendant was convicted in a jury trial in the Circuit Court, Walton County, Kelvin C. Wells, J., of aggravated assault on a law enforcement officer for which he was sentenced to mandatory term of 20 years' imprisonment. Defendant appealed.

**Holdings:** The District Court of Appeal, Swanson, J., held that:

- (1) evidence indicating that defendant had acted in self defense during his physical altercation with a police officer was admissible;
- (2) evidence was sufficient to support requested jury instruction on self-defense;
- (3) defense counsel's statement during jury instruction conference that evidence did not support a jury instruction on self defense did not rise to the level of an affirmative agreement to follow the jury instruction; and

- (4) trial court's refusal to administer requested jury instruction on self defense was not harmless error.

Reversed and remanded for new trial.

### 1. Criminal Law $\Leftrightarrow$ 661, 1139, 1153.1

Generally, a trial court's decision on the admissibility of evidence will not be reversed absent an abuse of discretion; the trial court's discretion, however, is limited by the evidence code and applicable case law and, as such, a court's erroneous interpretation of these authorities is subject to de novo review.

### 2. Criminal Law $\Leftrightarrow$ 661

#### Witnesses $\Leftrightarrow$ 2(1)

A defendant has a fundamental right to present witnesses and offer evidence relevant to his defense.

### 3. Criminal Law $\Leftrightarrow$ 338(1)

It is error for a court to deny the admission of evidence that tends in any way, even indirectly, to establish a reasonable doubt of a defendant's guilt.

### 4. Criminal Law $\Leftrightarrow$ 338(1)

If there is any possibility of a tendency of evidence to create a reasonable doubt, the rules of evidence are usually construed to allow for its admissibility.

### 5. Assault and Battery $\Leftrightarrow$ 83(4)

Evidence indicating that defendant believed that he was acting in self defense during his physical altercation with officer was admissible, in prosecution for aggravated assault on a law enforcement officer; specifically, evidence that defendant's delirium arguably caused him to believe his life was in danger, which would have explained why he discharged his firearm, unquestionably tended to create a reasonable doubt regarding the motivation for his actions.