IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RAYMOND LOUIS SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D11-4040

Opinion filed June 21, 2012.

An appeal from the Circuit Court for Escambia County.
Linda L. Nobles, Judge.

Nancy A. Daniels, Public Defender, and Glenna Joyce Reeves, Assistant Public Defender, Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General, and Therese A. Savona, Assistant Attorney General, Tallahassee, for Appellee.

ROWE, J.

Raymond Louis Smith, appeals his aggregate eighty-year sentence, asserting that the sentence is the functional equivalent of a life sentence without parole and thus violates the constitutional prohibition against cruel and unusual punishment in light of Graham v. Florida, 130 S. Ct. 2011 (2010). For the reasons that follow, we affirm.

Smith was convicted in two separate cases for the following eight offenses: two counts of sexual battery, two counts of burglary, one count of aggravated assault, one count of kidnapping, one count of possession of a weapon during the commission of a felony, and one count of possession of burglary tools. The offenses were committed between December 4, 1985, and December 6, 1985, when Smith was seventeen years old.

On April 22, 1986, after pleading nolo contendere, Smith was sentenced to five life sentences without the possibility of parole on the sexual battery, kidnapping, and burglary counts (some running consecutively, others concurrent), as well as three five-year sentences on the aggravated assault, possession of a firearm, and possession of burglary tools counts.

On March 23, 2011, following the Supreme Court of the United States' decision in Graham, the state filed a motion to correct illegal sentence because Smith had received multiple life sentences for non-homicide offenses committed when he was seventeen years old. After conducting a hearing, the trial court granted the state's motion and entered an order resentencing Smith (only as to the five counts for which Smith received life sentences) to concurrent forty-year sentences on four of the counts, and another forty-year sentence on the remaining count, to be served consecutively to the other forty-year sentences. Thus, Smith was sentenced to an aggregate of eighty years in prison.

ANALYSIS

Smith asserts that his sentence is the functional equivalent of a sentence of life without the possibility of parole in that it does not provide him with a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, and therefore, the sentence violates the prohibition against cruel and unusual punishment under Graham.

In Graham, the Supreme Court of the United States held that a sentence of life without parole for a juvenile offender who commits a non-homicide offense violates the Eighth Amendment. Id. at 2030. The Court concluded that while the state is not required to guarantee the juvenile eventual freedom, it must provide the juvenile some meaningful opportunity to obtain release if the juvenile demonstrates maturity and rehabilitation:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

Id.

This court has on three occasions considered whether a term-of-years sentence is the functional equivalent of life sentence. First, in Thomas v. State, 78 So. 3d 644 (Fla. 1st DCA 2011), we held that a fifty-year sentence was not unconstitutional pursuant to Graham, observing that Graham "specifically limited its holding to only 'those juvenile offenders sentenced to life without parole solely for a non-homicide offense.' " Id. at 646 (quoting Graham, 130 S. Ct. at 2023). We acknowledged, however, "that at some point, a term-of-years sentence may become the functional equivalent of a life sentence." Id. We concluded that the fifty-year sentence imposed on Thomas was not the functional equivalent of life imprisonment without the possibility of parole because Thomas would be in his late sixties when he was released from prison if he served the entirety of his sentence. Id.

Next, in Gridine v. State, 1D10-2517, 37 Fla. L. Weekly D69, available at 2011 WL 6849649 (Fla. 1st DCA Dec. 30, 2011), we determined that a seventy-year sentence was not the "functional equivalent" of a life sentence without the possibility of parole. Id. at *1.

Most recently, in Floyd v. State, 1D11-1983, 2012 WL 1216269 (Fla. 1st DCA Apr. 12, 2012), we held for the first time that a lengthy term-of-years sentence was the functional equivalent of a life sentence without parole, and thus

prohibited as cruel and unusual punishment under the authority of Graham. Id. at *1. But see Henry v. State, 82 So. 3d 1084, 1089 (Fla. 5th DCA 2012) (concluding that a ninety-year aggregate term-of-years sentence was not the functional equivalent of life sentence under Graham). We observed that if Floyd served the entirety of his combined eighty-year sentence, he would be ninety-seven when he was released. Id. at *2. In addition, because Floyd committed his offenses in 1998, he was required to serve at least eighty-five percent of his sentence. Id. Therefore, even if Floyd "received the maximum amount of gain time, the earliest he would be released is at age eighty-five." Id. Based on these facts, we concluded that "[t]his situation does not in any way provide [Floyd] with a meaningful or realistic opportunity to obtain release, as required by Graham." Id.

In this case, we consider whether the sentence Smith received is the functional equivalent of a life sentence without parole and whether the sentence affords Smith with a meaningful opportunity to obtain release. Graham, 130 S. Ct. at 2030. Like the defendant in Floyd, Smith has been sentenced to an aggregate eighty-year term-of-years sentence. However, this case is distinguishable from Floyd because the sentence imposed on Smith provides him with a meaningful opportunity to obtain release by virtue of the significant gain time available to Smith under the applicable statutes.

Because Smith's sentence was rendered in 1985, unlike the defendant in Floyd, Smith is not required to serve eighty-five percent of his sentence. Instead, the 1985 gain-time statutes apply. In re Commitment of Phillips, 69 So. 3d 951, 956 n.6 (Fla. 2d DCA 2010) ("A prisoner's ability to earn gain time is based on the statutes in effect at the time of the offense. See Weaver v. Graham, 450 U.S. 24, 33, 101 S. Ct. 960, 67 L.Ed.2d 17 (1981) (holding that the ex post facto clause applied to changes in gain time statutes)."). Under the 1985 statutes, Smith has the opportunity to earn significant amounts of gain time to dramatically reduce his total sentence served. Section 944.275(4)(a), Florida Statutes (1985), provides that "[a]s a means of encouraging satisfactory behavior, the department shall grant basic gain-time at the rate of 10 days for each month of each sentence imposed." § 944.275(4)(a), Fla. Stat. (1985) (emphasis added). Applying only the basic gain-time statute to Smith's eighty-year sentence, assuming no forfeiture of the basic gain time he is entitled to under the statute, Smith would serve a sentence of roughly sixty-three years, making him eligible for release when he is eighty-one years old.

However, in addition to basic gain time, Smith was also eligible to earn twenty days per month in incentive gain time for good behavior. Section 944.275(4)(b), Florida Statutes (1985), provides that "[f]or each month in which a prisoner works diligently, participates in training, uses time constructively, or

otherwise engages in positive activities, the department may grant up to 20 days of incentive gain-time, which shall be credited and applied monthly." § 944.275(4)(b), Fla. Stat. (1985). Considering both the basic and incentive gain time available to him, and assuming no forfeiture of gain time earned, it is evident that Smith was eligible to serve a sentence significantly less than the sixty-three years he would serve if only basic gain time were applied.[1] Because of the gain

[1] In the answer brief, the state references records of the Department of Corrections reporting Smith's prospective release date of May 25, 2032 (reducing Smith's total projected time served to 46 years) and demonstrating that Smith has forfeited a total 2290 days of gain time while serving his sentence. Because these matters are outside the record, they may not be considered by this court. See, e.g., Stewart v. State, 459 So. 2d 426, 428 n.3 (Fla. 1st DCA 1984) ("It would be patently improper for this court to consider evidence which was not introduced for consideration in the lower court proceeding."). However, we note that the procedural posture of this case presents an interesting question regarding the proper method for the state to introduce the current status of the defendant's sentence where defense counsel preserves the argument of "functional equivalency" under Graham through a contemporaneous objection at sentencing rather than by means of a Rule 3.800(b) motion. See Fla. R. App. P. 9.140(e) ("A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b)."); Jackson v. State, 983 So. 2d 562, 569 (Fla. 2008).

time available to him, we conclude that Smith has been afforded the requisite "meaningful opportunity to obtain release based upon demonstrated maturity and rehabilitation" mandated by Graham. Accordingly, Smith's sentences are affirmed.

AFFIRMED.

MARSTILLER, J., CONCURS.; PADOVANO, J., CONCURRING WITH OPINION.

PADOVANO, J., concurring.

I join in the decision to affirm the sentences in this case, as I believe that course of action is required by our precedents. However, I have come to the view that resentencing a juvenile offender to a lengthy term of years is not the correct approach to the problem identified in the Graham decision. In my view, the only lawful remedy is to declare unconstitutional section 947.16(6), Florida Statutes, to the extent that it applies to a juvenile offender sentenced as an adult. This would have the effect of making these offenders eligible for parole under the existing parole system.

The Supreme Court held in Graham that a sentence of life without parole for a juvenile offender convicted of a crime other than homicide violates the Eighth Amendment. The Court recognized that there may be some situations in which a juvenile offender in this class may be required to serve a life sentence but made it clear that the possibility of release cannot be foreclosed at the time of the sentence. As the Court explained, the state must give the defendant a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

The response to Graham in this court has been to determine whether a resentencing to a term of years without parole is the functional equivalent of a life sentence. In my view, this approach misses the mark entirely. If we conclude, as

we did in Floyd v. State, 2012 WL 1216269 (Fla. 1st DCA 2012), that 80 years is too much, we are saying in essence that the defendant will not have a meaningful portion of his life left by the time he is released. In contrast, if we conclude as we did in Thomas v. State, 78 So. 3d 644 (Fla. 1st DCA 2011), that 50 years is not too much, we are saying that the defendant will still be able to live a reasonable portion of his life outside of prison by the time he is released. But the question is not whether the defendant will have a significant part of his life remaining at the end of the sentence; rather, it is whether the defendant will have a reasonable opportunity to show that he has been rehabilitated during the course of the sentence and is therefore deserving of release at some point before the sentence expires.

This objective is one that could never be achieved by judges, at least not under our system. Florida judges have no authority to impose indeterminate sentences, as judges do in some other states. Moreover, a Florida judge has only a limited power to modify a sentence once it has been imposed. See Fla. R. Crim. P. 3.800(c) (limiting the power to modify a sentence to a period of 60 days after the imposition of the sentence or mandate by the appellate court). In Florida, the sentencing judge has no authority to classify an inmate, to decide where he or she will be housed, or to prescribe a treatment program or a particular course of rehabilitation. Florida judges do not monitor the progress of inmates once they are committed. They have no way of distinguishing inmates who are incorrigible from

those who have been truly rehabilitated. If a juvenile offender could somehow demonstrate the kind of maturity and rehabilitation the Court was referring to in Graham, a Florida judge would be powerless, in any event, to afford that juvenile a "meaningful opportunity to obtain release."

In my view, the only way the courts can carry out the mandate of the Graham decision is to ensure that a juvenile offender is eligible for parole or some equivalent of parole. On this point, I agree with Judge Wolf's dissent in Gridine v. State, 2011 WL 6849649 (Fla. 1st DCA 2011). The defendant in that case was resentenced after Graham to a 70-year term. The court held that the sentence did not violate the holding in Graham, but Judge Wolf dissented, with the following observation:

> . . . [t]he only logical way to address the concerns expressed by the United States Supreme Court in Graham is to provide parole opportunities for juveniles. The Legislature, not the judiciary, is empowered to create a provision for parole.
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> Absent the option of parole, I am at a loss on how to apply the Graham decision to a lengthy term of years. Is a 60-year sentence lawful, but a 70-year sentence not? Regardless, it is clear to me that appellant will spend most of his life in prison. This result would appear to violate the spirit if not the letter of the Graham decision. I, therefore, must respectfully dissent. However, in doing so, I note that absent a legislative solution, I look for guidance from either the United States or Florida Supreme Courts.

I fully agree with Judge Wolf's assessment of the problem but I think there is a workable solution even in the absence of legislation. Although legislative action would have been preferable, it is not absolutely necessary. If parole is the only effective solution to the constitutional deficiency indentified in Graham, and I believe that it is, the court can cure the deficiency by addressing the constitutional validity of the statute that places a limitation on the eligibility for parole.

That was precisely the approach taken by the Louisiana Supreme Court in State v. Shaffer, 77 So. 3d 939 (La. 2011). There, the court reversed a sentence of life without parole for a juvenile offender, on the ground that the sentence was invalid under Graham. However, the court did not order resentencing. Instead, the court simply held that the Louisiana statute precluding parole eligibility for anyone sentenced to life in prison could not be applied to juvenile offenders. The effect of the decision was to reinstate the life sentence but to modify it in such a way that the offender would be eligible for parole. The court did not order the release of the offender. In fact, the court emphasized that the decision it had made would not guarantee that he would ever be released. To the contrary, the decision merely ensured that the offender would be entitled to consideration by the Parole Commission. The availability of parole, the court concluded, would bring the sentence into compliance with the Graham decision.

Fewer inmates are eligible for parole consideration in Florida than in Louisiana, but the reasoning in the Louisiana Supreme Court's decision in Shaffer is applicable here, as well, and it is no less compelling. Florida still has a Parole Commission, and its members continue to meet regularly to set presumptive parole release dates for qualifying inmates. Thus, the system that is needed to bring our state into compliance with the Graham decision is already in place. The only impediment is that section 947.16(6), Florida Statutes provides that inmates sentenced after the effective date of chapter 82-171, Laws of Florida, shall not be eligible for parole.

The class of eligible inmates in Florida depends on the date of the conviction and sentence, whereas the class of eligible inmates in Louisiana is based on the kind of sentence the court has imposed. But this is not a material difference. If the constitutional deficiency can be cured in Louisiana by striking a statutory provision that precludes parole eligibility for a life sentence, it can also be cured in Florida by striking a statutory provision that precludes parole eligibility for inmates sentenced after a particular date.

The remedy in Shaffer of reinstating parole eligibility will not necessarily result in an earlier release date. For example, if the trial judge had resentenced the defendant in this case to life in prison with the proviso that he would be eligible for release on parole, the defendant could actually serve life in prison. To say that the

defendant is eligible for parole is certainly not a guarantee that he will be paroled. The value of the approach taken in Shaffer is that it gives the defendant exactly the kind of opportunity the Eighth Amendment requires under the rule in Graham.

In contrast, the term of years sentences we have approved in this case do not afford the defendant that opportunity. He will be released at a fixed point in the future, and the timing of his release will have no connection with his behavior in prison or any efforts he might make to rehabilitate himself. He might be able to establish his rehabilitation next week, next month, or next year, but it will make no difference. We have assumed that the Graham problem was solved by the new 40-year consecutive sentences, but I think the fallacy in this assumption is that the problem is not one that could ever be solved by the sentence itself. It is a problem that requires individual evaluation by professionals working in our correctional system.

For these reasons, I believe that the Florida courts have no alternative but to declare section 947.16(6) unconstitutional to the extent that it applies to a juvenile offender sentenced as an adult. In my view, this is the only way to ensure compliance with the mandate of the Graham decision. It is true that Graham is limited to life sentences without parole, but the reasoning of the decision would apply with equal force to a sentence for a term of years without parole. And I

believe that it is only a matter of time before we will be forced to conclude that it is impossible to say how long that term must be.

Judge Griffin succinctly expressed the futility of this exercise in Henry v. State, 82 So. 3d 1084 (Fla. 5th DCA 2012). There, the court held that Graham was limited to a term of life without parole and that it did not therefore require the court to invalidate a lengthy sentence to a term of years without parole.[2] As Judge Griffin explained,

> If we conclude that Graham does not apply to aggregate term-of-years sentences, our path is clear. If, on the other hand, under the notion that a term-of-years sentence can be a *de facto* life sentence that violates the limitations of the Eighth Amendment, Graham offers no direction whatsoever. [Footnote omitted] At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the Graham majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is "life" or 107 years. Without any tools to work with, however, we can only apply Graham as it is written. If the Supreme Court has more in mind, it will have to say what that is.

[2] Our decisions in Floyd, Thomas, and the present case expressly and directly conflict with the decision by the Fifth District in Henry. The Fifth District held in Henry that a sentence for a term of years, no matter how long, does not violate the mandate of Graham. In contrast, our decisions hold that a sentence to a term of years without parole violates Graham if it is the functional equivalent of a life sentence.

Id. at 1089.

I agree that the courts will never be able to draw a line between a sentence to a term of years that offends the Eighth Amendment and one that does not. Even if we could arrive at a set limit for the length of the sentence itself, we would be forever drawing distinctions between the ages of juvenile offenders at the time of the offenses, the various sentence structures and the various provisions for gain time. In the end, none of this would achieve the goal of affording the juvenile an opportunity to show that he or she is worthy of release.

As Judge Griffin has pointed out, there is language in the majority opinion in Graham suggesting that a sentence for a very long term of years without the possibility of parole may be no better than a sentence to life without parole. While I agree with this analysis, I do not think that Florida judges must await further guidance from the United States Supreme Court to resolve the problems that are presently before us.

The principle announced in Graham is clear, and it is apparent to me that it would apply to a sentence for a term of years in the same way that it applies to a sentence of life. We can apply the spirit of the Graham decision, as Judge Wolf put it, by declaring invalid the law restricting parole eligibility as it applies to this class of offenders. The Eighth Amendment requires the possibility of release, and it seems to me that that possibility can be afforded only by a system of parole

eligibility. It follows that a statute restricting parole eligibility violates the Eighth Amendment as applied to juvenile offenders.

Were I not bound by the precedents of this court, I would hold that section 947.16(6) is unconstitutional, to the extent that it removes parole eligibility for juvenile offenders who have been sentenced as adults.