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IN THE SUPREME COURT OF FLORIDA

ERIC DESMOND PARRISH,

Petitioner,

vs.

CASE NO. SC22-1457
DCA NO. 1D21-1435
LT NO. 20-CF-134

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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Preliminary statement

Petitioner, Mr. Parrish, was the defendant in the trial court. In this Reply Brief, he will be referred to by his proper name. The Respondent, the State of Florida, was the prosecution below and will be referred to as "the State."

All references to the Initial Brief will be by citation to "IB," followed by the page number, all in parentheses. All references to the Answer Brief will be by citation to "AB," followed by the page number, all in parentheses. References to the district court record on appeal will be by citation to "R," followed by the appropriate volume and page number. References to the supplemental record on appeal will be made by citation to "SR," followed by the appropriate volume and page number. References to the trial transcript will be by citation to "T" followed by the appropriate volume and page number. References to the certified copies of appeal papers volume will be by citation to "AP," followed by the page number.

Argument

I. Whether a district court of appeal has jurisdiction to review a trial court's decision not to grant a downward departure sentence.

a. Preservation and this Court's jurisdiction

The State does not dispute that the issue was preserved or that this Court has jurisdiction because the First DCA certified conflict with the Second DCA's decision in *Barnhill v. State*, 140 So. 3d 1055, 1060 (Fla. 2d DCA 2014), the Fourth DCA's decision in *Fogarty v. State*, 158 So. 3d 669, 671 (Fla. 4th DCA 2014), and the Fifth DCA's decision in *Kiley v. State*, 273 So. 3d 193, 194 (Fla. 5th DCA 2019) on the issue of whether a DCA can review a trial court's decision not to impose a downward departure in *Wilson v. State*, 306 So. 3d 1267, 1273 (Fla. 1st DCA 2020), *review granted*, SC20-1870, 2021 WL 1157838 (Fla. Mar. 26, 2021). *Parrish v. State*, 349 So. 3d 485, 487 (Fla. 1st DCA 2022) (dismissing this portion of the appeal based on *Wilson*).

b. Standard of review

The parties agree that the standard of review is de novo. *Baldwin v. State*, 20 So. 3d 991, 992 (Fla. 1st DCA 2009).

c. Merits

1. The right to Appeal and District Court Jurisdiction

Although the State begins with a discussion of the underlying facts, they are irrelevant to the purely legal question before this Court, which is whether a district court has jurisdiction to review a trial court's decision not to grant a downward departure. (AB-3-5)

The State also relies on *State v. Creighton*, 469 So. 2d 735, 737–41 (Fla. 1985), which it recognizes was overruled by *Amendments to the Fla. Rules of App. Proc.*, 696 So. 2d 1103, 1104–05 (Fla. 1996). (AB-13-16) Because *Amendments*, discussed in the initial brief, reflects the current state of the law, Mr. Parrish will not address the caselaw that was overruled nearly three decades ago.

The State's main argument is that "[t]he fact that a litigant has a right to appeal does not say what sorts of issues the litigant may raise on appeal, nor the types of issues that the district court may adjudicate." (AB-17-18) It further argues that Florida rules and statutes limit the types of orders a defendant may raise on appeal and that a district court is without jurisdiction to hear any other claims. (AB-25-26) This argument fundamentally misunderstands jurisdiction.

"Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." *Lusker v. Guardianship of Lusker*, 434 So. 2d 951, 953 (Fla. 2d DCA 1983); *see also Malone v. Meres*, 109 So. 677, 684 (Fla. 1926) (discussing jurisdiction of courts).

Under Article V, § 4(b)(1) of the Florida Constitution, district courts have jurisdiction to review final orders from trial courts not directly appealable to this Court, such as death sentences, Art. V, § 3(b)(1), Fla. Const., or to a circuit court.

The Florida Rules of Appellate Procedure "shall govern" all proceedings in the Florida Supreme Court and the district courts of appeal. Fla. R. App. P. 9.010. "[T]he objective of the appellate rules is to provide a procedural mechanism for the orderly presentation of appeals and other forms of judicial review." Phillip J. Padovano, 2 Fla. Prac., Appellate Practice § 6:2 (2024 ed.). "[I]t is fundamental that statutes or rules regulating the exercise of such rights [to appeal] should be liberally construed in favor of the appealing party and in the interest of manifest justice." *Robbins v. Cipes*, 181 So. 2d 521, 522 (Fla. 1966).

"Criminal defendants are entitled to a direct appeal as a matter of right in Florida." *Sims v. State*, 998 So. 2d 494, 498 (Fla. 2008). Florida Rule of Appellate Procedure 9.110(h) makes clear that a direct appeal, i.e. an appeal from a judgment and sentence after a criminal trial, is plenary: "Except as provided in subdivision (k), the court may review any ruling or matter occurring before filing of the notice. Multiple final orders may be reviewed by a single notice, if the notice is timely filed as to each such order." Furthermore, "[t]he court must review all rulings and orders appearing in the record necessary to pass on the grounds of an appeal" and "the court may grant any relief to which any party is entitled" in the interest of justice. Fla. R. App. P. 9.140(i).

Judgments and sentences in criminal cases are solidly in the ambit of a plenary direct appeal after a criminal trial because they are final orders. Fla. R. Crim. P. 3.650 (defining a judgment as an adjudication of guilt); Fla. R. Crim. P. 3.670 ("When a judge renders a final judgment of conviction, withholds adjudication of guilt after a verdict of guilty, **imposes a sentence**, grants probation, or revokes probation, the judge shall forthwith inform the defendant concerning the rights of appeal therefrom.") (emphasis added). The

discretion exercised when denying a downward departure before entering a sentencing order is also a "ruling" in the record. Fla. R. App. P. 9.140(i).

The State argues that district courts do not have jurisdiction to entertain every type of claim, highlighting guilty pleas, *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979), which are not implicated here because Mr. Parrish went to trial. (AB-18) It then highlights political questions and sovereign immunity, grounded in the idea of separation of powers, which is also not implicated here. (AB-18-19)

Although the Legislature passed § 921.0026(1), Florida Statutes (2020), the downward departure statute, that is where its involvement ends. *Banks v. State*, 732 So. 2d 1065 (Fla. 1999), which articulated the two-step analysis for a downward departure, was first applied in a defense-initiated appeal the year after it was decided. *Reed v. State*, 761 So. 2d 1241, 1242 (Fla. 2d DCA 2000). If the Legislature disapproved of district courts reviewing trial court decisions not to impose a downward departure, it had two decades to say so. *See Goldenberg v. Sawczak*, 791 So. 2d 1078, 1081 (Fla. 2001) ("Long-term legislative inaction after a court construes a statute amounts to legislative acceptance or approval of that

judicial construction."); *cf* ch. 2021-156, § 1, Laws of Fla. (2021) ("The Legislature [found] that the opinion in *State v. James*, 298 So. 3d 90 (Fla. 2d DCA 2020), [was] contrary to legislative intent" and amended the statute.).[1]

Furthermore, the State fails to explain how separation of powers is implicated: the issue here is confined to the judicial branch. (AB-20-21) The Legislature passed the statute for trial courts to apply. A district court reversing a trial court's sentencing decision in a specific defendant's case does not usurp, encroach, or even implicate the Legislature's authority to pass or amend laws. *See State v. Crose*, Case No. 2D21-2784 (Fla. 2d DCA Jan. 26, 2024); 2024 WL 292231 at *20 (discussing separation of powers and noting that the judicial branch's function of interpretating legislative acts "encompasses the power of superior tribunals to review the rulings of lower courts within their jurisdiction—a power

[1] Available at https://sb.flleg.gov/nxt/gateway.dll/Laws/2021Laws/lf2021/general%20laws%20-%20regular%20session/chapters%202021-151%20-%202021-175/2021-156.htm?f=templates$fn=document-frameset.htm$3.0. Last accessed February 29, 2024.

expressly conferred to those tribunals by our constitution.") (citations omitted).

Nobody disputes that the Legislature prescribes the permissible penalty for an offense. (AB-20) If anything, finding an abuse of discretion and reversing a decision not to impose a downward departure would give effect to the Legislature's intent: by giving trial courts discretion to depart downward, it necessarily did not want that discretion abused. Appellate review is the inherent check on a trial court's authority. *Goodwin v. State*, 751 So. 2d 537, 538 (Fla. 1999) (noting "the role of the appellate courts in ensuring that criminal trials are free of harmful error, an essential judicial function that serves to protect a defendant's constitutional right to a fair trial.").

Likewise, the State conflates a district court reviewing a trial court's sentencing decision not to depart downward for an abuse of discretion with the Executive Branch's power to commute sentences. (AB-21) The Legislature's decision to allow trial courts to depart from the statutory minimum sentence, which the State does not dispute does not affect or implicate the Governor's ability to commute a sentence or grant clemency, does not violate separation

of powers. A district court conducting a case-specific analysis on direct appeal, which defendants are entitled to, likewise does not affect the Executive Branch's distinct discretionary authority to modify or commute a sentence. *Carroll v. State*, 114 So. 3d 883, 888 (Fla. 2013) (discussing Florida's clemency system).

The State also relies on civil cases, such as *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 801 n.3 (Fla. 2003), where parties do not have the same constitutional concerns as a defendant in a criminal case. *See Seadler v. Marina Bay Resort Condominium Association, Inc.*, 376 So. 3d 659, 664-65 (Fla. 2023); (AB-24).

Likewise, the State relies on this Court's opinion in *State v. Dortch*, 317 So. 3d 1074, 1077–78 (Fla. 2021), which held that a defendant cannot appeal an involuntary plea without filing a motion to withdraw a plea. (AB-19) As discussed in the initial brief, Mr. Parrish went to trial and did not waive any appellate rights. *Bolware v. State*, 995 So. 2d 268, 272-73 (Fla. 2008) (entering a plea waives rights).

2. Downward Departures

The State argues that in-range sentences are per se unreviewable. (AB-24-25) In doing so, it reads this Court's opinions

in *Davis v. State*, 123 So. 2d 703, 707 (Fla. 1960) and *Stanford v. State*, 110 So. 1 (Fla. 1959) too broadly. (AB-19) There, the sentences were within the applicable range and this Court had no authority to modify them.

The State relies on this interpretation of *Davis* in response to the initial brief's discussion of the conflict cases, which determined that step 2 of *Banks* involves an "unlawful" sentence under Florida Rule of Appellate Procedure 9.140(B)(1)(E), as opposed to "illegal." *See, e.g., Barnhill* , 140 So. 3d at 1060 ("[T]here have been innumerable reported cases correcting sentencing errors that rendered a sentence unlawful but not completely illegal.").

Here, the Legislature decided to allow trial courts to grant downward departures for designated reasons and there is no reason an appellate court cannot review a trial court's decision not to do so. That is, contrary to the State's categorization, what a DCA reviews in this context is not if a sentence is in-range, but whether the trial court abused its discretion within the parameters set out in the downward departure statute. (AB-19-20) As discussed above, this possibility of leniency in sentencing is completely separate from the Executive's clemency power.

The State also argues that "[n]either the statute nor the rule authorized the First District to evaluate the propriety of Petitioner's in-range sentence." (AB-27) The State has limited appellate rights, § 924.07, Fla. Stat. (2020), but a criminal defendant's constitutional rights do not need to be specifically codified. On the contrary, the Legislature could not divest district courts of jurisdiction to review a final order such as a judgment or sentence even if it wanted to. *State v. Jefferson*, 758 So. 2d 661, 664-65 (Fla. 2000) ("[T]he Florida Constitution does not give the Legislature the authority to restrict the subject matter jurisdiction of the appellate courts to hear criminal appeals.") If this Court finds that it is ambiguous as to whether § 924.06, Florida Statutes or § 921.0026, Florida Statutes, permit a defendant to appeal the denial of a downward departure, which Mr. Parrish maintains does not need to be specifically articulated, the rule of lenity dictates that the ambiguity be resolved in Mr. Parrish's favor. *State v. Rife*, 789 So. 2d 288, 294 (Fla. 2001) (sentencing statutes are construed under the rule of lenity).

Furthermore, if the Legislature had intended to insulate the application of the downward departure statute from any appellate scrutiny, it would have said so. It did just that when it allowed

upward departure sentences, allowing the failure to impose a guidelines sentence to be appealed, but clearly stated that "the extent of departure from a guidelines sentence is not subject to appellate review." § 921.0016(2), Fla. Stat. (1997); s*ee also* § 390.01114(6)(g), Fla. Stat. (2020) ("An order authorizing a termination of pregnancy under this subsection is not subject to appeal."); § 400.235(6), Fla. Stat. (2019) ("The decision of the Governor is final and is not subject to appeal."); § 945.6035(7), Fla. Stat. (2023) ("The decision of the Administration Commission is final and binding on the authority and the department and shall not be subject to appeal."); § 44.104(11), Fla. Stat. (2023) ("Factual findings determined in the voluntary trial are not subject to appeal.").

"When the legislature has included a provision in one statute but omitted it in an analogous statute, courts should not read it into the statute from which it has been excluded." *Mesen v. State*, 271 So. 3d 164, 169 (Fla. 2d DCA 2019); *see also Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 315 (Fla. 2006) ("[W]e have pointed to language in other statutes to show that the Legislature

'knows how to' accomplish what it has omitted in the statute in question.") (citations omitted).

Along those lines, the State posits that "[i]t would be a rather inert rule for adjudicating the merits were a claim to never succeed." (AB-24) While deferential, abuse of discretion is not an impossible standard. This Court has described the standard as "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (citation omitted). The crux of this test is reasonableness and "the trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner." *Id.*

Although there do not appear to be any decisions reversing the denial of a downward departure for an abuse of discretion, appellate courts have found an abuse of discretion when sentencing a juvenile offender like Mr. Parrish. *J.M.H. v. State*, 311 So. 3d 903, 917-18 (Fla. 2d DCA 2020) (finding an abuse of discretion when imposing a life sentence for a juvenile offender on that record); *see*

also Macomber v. State, 254 So. 3d 1098, 1099 (Fla. 1st DCA 2018) (abuse of discretion in allowing partial statement); *Turner v. State*, 311 So. 3d 185, 191 (Fla. 2d DCA 2020) ("[B]ecause the trial court abused its discretion in denying Mr. Turner's motion for a continuance, we reverse and vacate Mr. Turner's conviction and sentence [] and remand for a new trial on that charge."); *Jackson v. State*, 177 So. 2d 353, 355 (Fla. 3d DCA 1965) ("Under these circumstances we do not feel that it is possible to hold that the trial court's discretion was not abused and that the error was not harmful to the defendant."); *Pastor v. State*, 792 So. 2d 627, 630-31 (Fla. 2d DCA 1965) (finding an abuse of discretion in admitting collateral crime evidence).

Even if no district court has found an abuse of discretion for a trial court declining to grant a defendant's request for a downward departure sentence, which appears to be the case, the district court's ability to review the ruling as part of a plenary direct appeal is an important check on trial courts and essential to protect a defendant's constitutional rights. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (discussing the importance of appellate review complying with the Due Process Clause when it is "an integral part" of a

State's adjudicatory process); *Goodwin*, 751 So. 2d at 538 (discussing the role of appellate courts).

3. This Case

The State believes that Mr. Parrish argues for a "radical" departure from precedent. (AB-33) As discussed above, district courts have been reviewing denials of downward departure sentences for two decades and the Legislature has done nothing to indicate its disapproval. *Reed*, 761 So. 2d at 1242. Mr. Parrish submits that divesting district courts of jurisdiction to review a defendant's sentence on direct appeal in a criminal case would be a far more radical a departure from long-understood notions of due process.

For example, the State argues that "[i]f Petitioner of all people was content to shoot his taxpayer-funded shot on appeal, there is no end to the defendants who might flood the district courts with senseless and resource-consuming appeals." (AB-34) It is impossible to reconcile that reasoning with the long-understood right criminal defendants have to a plenary direct appeal. *Sims*, 998 So. 2d at 498.

Furthermore, this issue would need to be raised on a defendant's direct appeal, so it would not "flood" the district courts with any new cases; at most, it would be an additional issue in a brief. To the extent these appeals are "senseless" or "resource-consuming," it ostensibly would not take the reviewing court much time to determine there was no abuse of discretion, assuming that is the case, nor would saying that it was affirming the sentence [potentially without elaboration] as opposed to dismissing that portion of the appeal.

A troubling implication of the State's position is that a trial court would not advise defendants of their constitutional right to a direct appeal because it thinks the appellate court might not have jurisdiction. This is especially troubling because it is the reviewing court, not the trial court, that ultimately decides whether a sentence is legal (as well as any other alleged errors at trial). *See Green v. State*, 314 So. 3d 611, 614 (Fla. 3d DCA 2020) ("We emphasize that harmless error is the standard that is applicable in the *reviewing court*; it is not the standard employed by the trial court [].") (italics in original). The current system should not be changed in that regard. Rather, if a defendant's plenary direct

appeal, which they are entitled to, has no meritorious issues, a district court should continue to affirm. *Leonard v. State*, 760 So. 2d 114, 119 (Fla. 2000) (discussing that appeals without merit should be affirmed).

The State does not address that appeals under *Anders v. California*, 386 U.S. 738 (1967), which, by definition, are understood not to have reversible error, including presumably in-range and otherwise legal sentences, are affirmed rather than dismissed for lack of jurisdiction. The same is true if an issue is not preserved or dispositive. *See LeBoss v. State*, 359 So. 3d 436, 441 (Fla. 1st DCA 2023).

Finally, the State does not dispute Mr. Parrish's contention that this Court should only resolve the jurisdictional question and not conduct the *Banks* analysis in the first instance.

Conclusion

Petitioner requests that this Court quash the First DCA's opinion in *Wilson*, approve the Second DCA's decision in *Barnhill*, the Fourth DCA's decision in *Fogarty*, and the Fifth DCA's decision in *Kiley*. He asks that this Court remand the case to the First DCA with instructions to reinstate the appeal and review the trial court's decision not to grant a downward departure for an abuse of discretion under *Banks*.

Certificates

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on Bridget K. O'Hickey, Assistant Solicitor General, at bridget.ohickey@myfloridalegal.com, on March 1, 2024.

Respectfully submitted,

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