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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-691

Filed 7 May 2024

Cumberland County, No. 01 CRS 59934

STATE OF NORTH CAROLINA

v.

JAMES RYAN KELLIHER, Defendant.

Appeal by Defendant from order entered 31 March 2023 by Judge James Floyd Ammons, Jr., in Cumberland County Superior Court. Heard in the Court of Appeals 7 February 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Heidi M. Williams, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

MURPHY, Judge.

When an appellate court remands a matter to the trial court, the remand may be general or limited; and, in the case of a limited remand, the appellate court may divest the trial court of discretion it would otherwise retain were the remand general. Here, where our Supreme Court clearly conveyed to the trial court its intent to limit the scope of its remand from Defendant's prior appeal, the trial court was not

authorized to conduct a new, discretionary sentencing hearing. We therefore reverse and remand for the entry of judgments consistent with our Supreme Court's prior mandate.

BACKGROUND

On 17 June 2022, Defendant James Ryan Kelliher prevailed on his appeal to the North Carolina Supreme Court contesting a resentencing arising from convictions of two counts of robbery with a dangerous weapon, two counts of first-degree murder, and one count of conspiracy to commit robbery. *State v. Kelliher*, 381 N.C. 558, 561 (2022) ("*Kelliher I*"). After successfully challenging his earlier resentencing, Defendant now appeals from a new judgment of the Superior Court sentencing him to 64 to 86 months imprisonment for the first count of armed robbery; followed consecutively by 64 to 86 months imprisonment for the second count of armed robbery; followed consecutively by two concurrent life-with-parole sentences, as well as a 25 to 39 month active sentence for conspiracy running concurrently with the robberies—an overall sentence totaling just over 39 years.

The relevant background, as discussed by our Supreme Court in the prior appeal, is as follows:

On 7 August 2001, James Ryan Kelliher participated in the killing of Eric Carpenter and his pregnant girlfriend, Kelsea Helton. Kelliher was seventeen years old. At the time he was indicted, juveniles were still subject to the death penalty, and the State indicated its intent to try Kelliher capitally. Kelliher pleaded guilty to various charges including two counts of first-degree murder, for

STATE V. KELLIHER

Opinion of the Court

which he was ordered to serve two consecutive sentences of life without parole. After the United States Supreme Court issued its decision in *Miller v. Alabama*, 567 U.S. 460 (2012), the trial court conducted a resentencing hearing, during which the court expressly found that Kelliher was “a low risk to society” who was “neither incorrigible nor irredeemable.” Nevertheless, the trial court ordered Kelliher to serve two consecutive sentences of life with the possibility of parole. Each of these sentences requires Kelliher to serve twenty-five years in prison before becoming eligible for parole. As a result, because the court ordered Kelliher to complete his first life sentence before beginning his second life sentence, Kelliher must serve fifty years in prison before initially becoming parole eligible at the age of sixty-seven.

On appeal, Kelliher argued that because the trial court found him to be “neither incorrigible nor irredeemable,” it violated the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina Constitution to sentence him to what he contended was a de facto sentence of life without parole. A unanimous panel of the Court of Appeals agreed that Kelliher’s sentence violated the Eighth Amendment. *State v. Kelliher*, 273 N.C. App. 616, 644 (2020). After the Court of Appeals issued its decision, but prior to briefing and oral argument at this Court, the United States Supreme Court decided *Jones v. Mississippi*, another case examining the scope of the Eighth Amendment in the context of juvenile sentencing. [*Jones v. Mississippi*, 539 U.S. 98] (2021). In addition to arguing that the Court of Appeals erred in concluding that Kelliher’s consecutive life with parole sentences implicated the Eighth Amendment, the State now asserts that *Jones* completely undermines Kelliher’s federal and state constitutional claims.

Id. at 559-60.

Our Supreme Court held that “it violates both the Eighth Amendment to the United States Constitution and article I, section 27 of the North Carolina

Constitution to sentence a juvenile homicide offender who has been determined to be ‘neither incorrigible nor irredeemable’ to life without parole.” *Id.* at 560. It further held that

any sentence or combination of sentences which, considered together, requires a juvenile offender to serve more than forty years in prison before becoming eligible for parole is a de facto sentence of life without parole within the meaning of article I, section 27 of the North Carolina Constitution because it deprives the juvenile of a genuine opportunity to demonstrate he or she has been rehabilitated and to establish a meaningful life outside of prison.

Id. Ultimately, the case was “remand[ed] to the trial court with instructions to enter two concurrent sentences of life with parole.” *Id.* at 597.

On 31 March 2023, the trial court held a hearing to determine the appropriate course of action on remand. Primarily, the trial court sought to determine whether it was authorized to enter a resentencing order including Defendant’s convictions for robbery with a dangerous weapon and conspiracy to commit robbery:

All right. I have a question about the other crimes. I know the Supreme Court says that 40 years is the key. Even though I don’t understand where that came from, I think the Court needs to read it literally. I fully understand [N.C.G.S. §] 15A-1335 and understand that on a resentencing after an appeal a defendant cannot receive a greater sentence simply because he appealed. His original sentence was life in prison without parole times two. His current sentence is life in prison with parole times two. It would appear to me that if the Court were to sentence him on the other offenses consecutive to the life imprisonment with parole, that that could in no way exceed the original sentence and, in fact, would in no way exceed the sentence

he's currently serving. And by that I mean he's clearly serving a sentence today of life in prison with parole followed by life in prison with parole.

Now, just because I'm kind of a I-have-to-think-through-it guy, I put myself in [the previous sentencing judge's] position and I've read his order. I have his order here in front of me and I have read it. In December of 2018, [the previous sentencing judge] had three choices basically. Can leave these sentences life in prison without parole or I can change them from life without parole to life with parole and run them consecutively or I could change them from life in prison without parole to life in prison with parole and run them concurrently. And [that judge] said several times that there are no buy-one-get-one-free murders. There are no do one, do another one but only have to pay for one. And in the dissent in Kelliher that is—and I understand what a dissent is—that is reiterated by Justice Newby.

So the question in my mind comes, if [the previous sentencing judge] were hearing this today, in light of what the Supreme Court had said, would he have said, you know, I've got the most severe. I've got the least severe. I took the middle ground because I thought that was appropriate. No, wait. There's no middle ground. I have the most severe and I have the least severe. Would he have said, based on the findings that I have made, I cannot get to the least severe so I'm going to stick with the most severe? It would be nice for a sentencing judge to know that. Here are your choices, Judge. Five years later, oh, wait a second. We're changing it. And I understand the concept of moving the goal post and evolving of law and everything has to be decided.

So my first thought was do I need to conduct a completely new resentencing hearing, a new [Miller] hearing? Then we've got [N.C.G.S. §] 15A-1335. And I believe I'm getting this case right. We also have [*State v. Robinson*] from this county . . . in which a judge—a Superior Court judge reduced a sentence for a defendant. Supreme Court ruled

it was totally and completely improper for him to do that. They did not give the [S]tate a fair hearing. And then another panel at the Supreme Court at another time said yeah but even though he improperly sentenced him to life rather than death, you cannot now go back to death, an argument which I believe the United States Supreme Court rejected in that same case.

. . . .

So even if I were to say we need to conduct another [*Miller*] hearing, I think that's moot. All right. So if you want to say, Judge, you're—that's completely crazy, then I'll move onto something else. But if you want to argue that, then we can talk about that in just a minute. And just because I'm the kind of guy that thinks about crazy things, I said, well, if 40 years is the limit, then this Court should determine what sentence within that time period is appropriate under all the circumstances. Can the Court arrest judgment in one of these murder cases and reduce it to second degree murder and sentence the defendant for first degree murder and then second degree murder but make sure that he—I keep the sentence below 40? Can the Court resentence on these other convictions that he pled to, these other matters, which were two counts of armed robbery and one count of conspiracy? And even though you say those sentences have been served, if the Court vacates all of those sentences and then starts over, . . . he will not lose a day of credit because the combined records department of department of corrections will figure that out.

So right now I see my choices as do nothing and just do what he's arguing the Supreme Court said just—and just do the paperwork. Make them concurrent. Or consider whether sentencing on these other offenses is appropriate and whether to make them consecutive or concurrent or whether to arrest judgment in one of these cases and change the character of the conviction to such that the punishment is not unconstitutional or start completely over where [the previous sentencing judge] was.

The State argued the trial court “should give [] [D]efendant one life with parole followed by two consecutive armed robbery convictions. . . . [C]onsecutively, that is two murders together, plus armed robbery, plus armed robbery, the top end will end up being 39.3 years.” Defendant, meanwhile, argued that the parties “[were] here in this particular case not necessarily for a resentencing. It’s more of a remand from a resentence with instructions from the Court—the Supreme Court.”

Ultimately, the trial court agreed with the State:

[DEFENDANT:] Your Honor, again, I’m . . . just submitting back to the Court . . . that this opinion that we’re before Your Honor for specifically just talks about murders and again that’s the life with—

THE COURT: Well, to me, that’s the whole key. I mean I can read. It says we order it remanded for the imposition of two concurrent life sentences. I got that. After we’ve already handled all these other issues, that’s what I intend to do. I’m going to do that.

[DEFENDANT]: I know, Judge.

THE COURT: But there’s still questions about these other offenses.

[DEFENDANT]: I don’t think that’s why we are here though. I think the scope to which this—

THE COURT: Tell me why we’re not here for that.

[DEFENDANT]: It’s not in the opinion, Judge. I mean those offenses, as the court indicated, are not—and even in the *Miller* hearing, none of this was considered. The only thing we were talking about was those particular life

without parole sentences. That's in the Court of Appeals' opinion and the Supreme Court opinion.

THE COURT: Well, [the previous sentencing judge's] order didn't vacate those. They didn't go away. He didn't address them because his full sentence was life with parole plus life with parole. He left those other ones there. He was doing a resentencing. Okay. I see what you're saying. This is just—you just want me to kind of check the box.

Thus, the trial court concluded that *Kelliher I* was “silent as to the [nonmurder convictions] and, therefore, [it] order[ed] that all of the prior judgments in this matter be vacated to comply with the Supreme Court’s mandate,” announcing in open court that it would enter the State’s proposed sentence of life with parole followed by two consecutive armed robbery convictions and entering a corresponding written order on 31 March 2023.

ANALYSIS

On appeal, Defendant argues the trial court exceeded the authority given to it under the mandate of *Kelliher I*, violated the law of the case, imposed a sentence violative of N.C.G.S. § 15A-1354, and violated the Eighth Amendment. However, as we agree that the trial court’s resentencing order violated the mandate of *Kelliher I*, we address only that argument.

The trial court’s interpretation of the mandate in a prior appeal is an issue of law, reviewable de novo. *State v. Hardy*, 250 N.C. App. 225, 232 (2016).

Under the law-of-the-case doctrine, when an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become

the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

Spoor v. Barth, 257 N.C. App. 721, 728 (2018) (citing *Hayes v. City of Wilmington*, 243 N.C. 525, 536 (1956)).

In *Kelliher I*, our Supreme Court specifically held that the trial court was divested of the usual discretion it would retain during a resentencing hearing due to the binary nature of the correction to the judgments appealed from:

For the foregoing reasons, and based specifically on our analysis of the independent protections afforded by article I, section 27 of the North Carolina Constitution, the judgment of the Court of Appeals is modified and affirmed. Although we would ordinarily leave resentencing to the trial court's discretion, we agree with the Court of Appeals that "of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional." [*Kelliher I*, 273 N.C. App. 616, 644 (2020)]. Accordingly, we remand to the trial court with instructions to enter two concurrent sentences of life with parole.

Kelliher I, 381 N.C. at 597. Our opinion, which our Supreme Court modified and affirmed, contained similar language:

Under different circumstances, we would leave resentencing to the sound discretion of the trial court. *See, e.g., State v. Nunez*, 204 N.C. App. 164, 170[] . . . (2010) (remanding for resentencing and noting that, on remand, "[w]hether the two sentences should run concurrently or consecutively rests in the discretion of the trial court"). Here, however, we hold that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional. We therefore instruct the

trial court on remand to enter two concurrent sentences of life with parole as the only constitutionally permissible sentence available under the facts presented.

Kelliher I, 273 N.C. App. at 644, *aff'd as modified*, 381 N.C. 558.

“It is well established that remands may be general or limited in scope.” *State v. Watkins*, 246 N.C. App. 725, 730 (2016). “Although resentencing remands in our State are typically *de novo* and are properly classified general remands,” we will interpret a remand as limited so long as it “convey[s] clearly the intent to limit the scope of the [trial] court’s review.” *Id.* at 730, 32.

Here, our Supreme Court made abundantly clear that, while the ordinary remedy on remand from a successfully appealed sentence is a new sentencing hearing within the discretion of the trial court, no such discretion existed here because the sole defect in the judgments was that the trial court had selected consecutive, rather than concurrent, life sentences with parole. *Kelliher I*, 381 N.C. at 597 (“Although we would ordinarily leave resentencing to the trial court’s discretion, we agree with the Court of Appeals that of the two binary options available—consecutive or concurrent sentences of life with parole—one is unconstitutional.”). The full extent of the mandate was to “remand to the trial court with instructions to enter two concurrent sentences of life with parole.”¹ *Id.* Accordingly, the trial court took action

¹ The specificity of the mandate was further reflected in the fact that the previous appeal culminated in the reversal of the trial court’s determination that the life without parole sentences were to run consecutively, not the vacation of the judgments. *Kelliher I*, 273 N.C. App. at 644.

inconsistent with the mandate, and we must remand for the entry of new judgments exactly identical with those previously appealed from except in that the life without parole sentences are to run concurrently rather than consecutively.

Having so held, Defendant's remaining arguments are moot. *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 242 N.C. App. 524, 528 (2015) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

CONCLUSION

The trial court improperly entered an order that exceeded the scope of the mandate in *Kelliher I*. We therefore vacate the trial court's resentencing order and remand for the entry of new judgments compliant with our Supreme Court's mandate.

VACATED AND REMANDED.

Judges ARROWOOD and HAMPSON concur.

Report per Rule 30(e).