IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2016-KA-01244-COA

JEREMY SHANE FOGLEMAN A/K/A JEREMY FOGLEMAN A/K/A JEREMY S. FOGLEMAN	**APPELLANT**

v.

STATE OF MISSISSIPPI	**APPELLEE**

DATE OF JUDGMENT:	08/18/2016
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT, SECOND JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: W. DANIEL HINCHCLIFF
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: KATY GERBER
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED IN PART; REVERSED AND RENDERED IN PART - 09/18/2018
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

WILSON, J., FOR THE COURT:

¶1. Following a jury trial in the Harrison County Circuit Court, Jeremy Shane Fogleman was convicted of failing to stop a motor vehicle pursuant to the signal of a law enforcement officer while operating the vehicle in reckless disregard of the safety of persons or property. *See* Miss. Code Ann. § 97-9-72(2) (Rev. 2014). After the jury was dismissed, the circuit judge sentenced Fogleman to the maximum term of five years in the custody of the Mississippi Department of Corrections (MDOC). The judge also found that Fogleman "used physical force, or made a credible attempt or threat of physical force against another person

as part of the criminal act." Miss. Code Ann. § 97-3-2(2) (Rev. 2014). Based on this finding, the judge classified Fogleman's offense as a "crime of violence," which rendered Fogleman ineligible for parole and limited his eligibility for any other type of early release. *See id.*; Miss. Code Ann. § 47-7-3(1)(g)(i) (Rev. 2015).

¶2. Fogleman does not challenge his conviction on appeal. He argues only that his crime should not have been classified as a "crime of violence" and that section 97-3-2(2) violates the Sixth Amendment to the United States Constitution by increasing the penalty for the crime based on facts not submitted to the jury and found by the judge alone. We agree with Fogleman that section 97-3-2(2) is unconstitutional insofar as it deems an offense a "crime of violence" based on facts found only by the judge. Therefore, we reverse and render the provisions of Fogleman's sentence stating that the conviction is for a "crime of violence." Fogleman's sentence shall simply be for a term of five years in MDOC custody.

FACTS AND PROCEDURAL HISTORY

¶3. On August 27, 2014, a Biloxi police officer observed a Dodge Charger with a partially obscured license plate. Dispatch informed the officer that there was an outstanding warrant for the arrest of the vehicle's owner, who also had a suspended driver's license.

¶4. When the officer activated the blue lights on his patrol car, the driver, later identified as Fogleman, sped away. The officer then activated his siren and pursued the Charger, and several officers joined the pursuit. The Charger topped seventy miles per hour as Fogleman drove through residential neighborhoods and down a busy highway. The chase ended when

the Charger collided with another car at an intersection. As a result of the collision, the Charger was disabled, and the second vehicle was totaled. The occupants of the other car sustained minor injuries. Fogleman was arrested at the scene.

¶5. Fogleman was indicted and, following a jury trial, convicted of failing to stop his vehicle pursuant to the signal of a law enforcement officer while operating the vehicle in reckless disregard of the safety of persons or property. *See* Miss. Code Ann. § 97-9-72(2). After the jury was dismissed, the judge sentenced Fogleman to five years in MDOC custody. On the State's motion, the judge also found that Fogleman "used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act." Miss. Code Ann. § 97-3-2(2). Therefore, the judge classified Fogleman's offense as a "crime of violence," which made Fogleman ineligible for parole and limited his eligibility for any other type of early release. *See id.*; Miss. Code Ann. § 47-7-3(1)(g)(i). The judge also denied Fogleman's motion for a judgment notwithstanding the verdict or a new trial, and Fogleman filed a notice of appeal.

ANALYSIS

¶6. Prior to 2014, various sentencing statutes employed the term "crime of violence," but "there was no comprehensive statutory definition of 'crime of violence.'" *Miller v. State*, 225 So. 3d 12, 14 (¶7) (Miss. Ct. App. 2017). In 2014, the Legislature enacted Mississippi Code section 97-3-2, which in subsection (1) designates approximately twenty specific crimes as "crimes of violence." Miss. Code Ann. § 97-3-2(1); 2014 Miss. Laws ch. 457, § 39

(H.B. 585) (effective July 1, 2014). In addition, subsection (2) states:

> In any felony offense with a maximum sentence of no less than five (5) years, upon conviction, the judge may find and place in the sentencing order, on the record in open court, that the offense, while not listed in subsection (1) of this section, shall be classified as a crime of violence if the facts show that the defendant used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act. No person convicted of a crime of violence listed in this section is eligible for parole or for early release from the custody of the Department of Corrections until the person has served at least fifty percent (50%) of the sentence imposed by the court.

Miss. Code Ann. § 97-3-2(2). Although this provision states that the person convicted shall be eligible for parole after he has served fifty percent of his sentence, the parole eligibility statute provides that "[n]o person who, on or after July 1, 2014, is convicted of a crime of violence pursuant to Section 97-3-2 . . . shall be eligible for parole." Miss. Code Ann. § 47-7-3(1)(g)(i). Thus, a judge's finding under section 97-3-2(2) actually renders the defendant ineligible for parole throughout his entire sentence. Absent such a finding, the defendant would be eligible for parole after serving only twenty-five percent of his sentence. Miss. Code Ann. § 47-7-3(1)(g)(i).

¶7. In this case, the judge found that Fogleman was guilty of a "crime of violence" under section 97-3-2(2), finding as follows:

> [T]he Court finds . . . that the defendant was fleeing from law enforcement at a high rate of speed and there was obviously a risk of violence inherent in driving a vehicle at a high rate of speed through a downtown area and it shows indifference to the consequences of the actions of Mr. Fogleman, and certainly had the potential for serious damage or injury, and injury did occur. Although it was not that serious, there were injuries.

> And borrowing some language from the *Sykes* case cited by the State,[1] the determination to elude capture makes a lack of concern for the safety or property of persons as pedestrians and other drivers an inherent part of the offense. And the case also cites to the perpetrator's indifference to the collateral consequences as violent or even lethal potential for others.
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> So the Court finds, and I'm going to require that it be put in the sentencing order, that this was a violent crime in accordance with Section 97-3-2 of the Mississippi Code.

¶8. As noted above, Fogleman argues that the judge's designation of his offense as a "crime of violence" pursuant section 97-3-2(2) violates the Sixth Amendment to the United States Constitution.

¶9. As applied to the states through the Fourteenth Amendment, the Sixth Amendment guarantees the right to a trial by jury in all serious criminal cases. *See generally Duncan v. Louisiana*, 391 U.S. 145 (1968). In addition, the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). That is, "all the essential elements" of the crime must be proven beyond a reasonable doubt. *Id.* at 361. Applying the Sixth Amendment in conjunction with the Fourteenth Amendment, the United States Supreme Court has held that "any 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime" that must be submitted to the jury and proven beyond

[1] *Sykes v. United States*, 564 U.S. 1 (2011), *overruled on other grounds by Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 111 (2013) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).[2]

¶10. In *Alleyne*, the Court held that this constitutional rule applies not only to facts that increase the maximum sentence but also to any fact that triggers a mandatory *minimum* sentence. *See id.* at 102, 111-16.[3] The Court reasoned that "[i]t is indisputable that a fact triggering a mandatory minimum alters the prescribed range of sentences to which a criminal defendant is exposed." *Id.* at 112. "And because the legally prescribed range is the penalty affixed to the crime, . . . it follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense." *Id.* According to the Supreme Court, it is "obvious . . . that the floor of a mandatory range is as relevant to wrongdoers as the ceiling. A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense." *Id.* at 113. "Moreover," the Court continued, "it is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment." *Id.* "The essential point" of the Court's decision was that any fact that "produce[s] a higher range . . . is an element of a distinct and aggravated crime. It must, therefore, be submitted to the jury and found beyond a reasonable doubt." *Id.* at 115-16.

¶11. Post-*Alleyne*, other state courts have held that facts that require the court to impose

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[2] The Supreme Court continues to "recognize[] a narrow exception to this general rule for the fact of a prior conviction." *Alleyne*, 570 U.S. at 111 n.1.

[3] *Alleyne* overruled *Harris v. United States*, 536 U.S. 545 (2002), which held that the *Apprendi* rule did *not* apply to mandatory minimum sentences. *Alleyne*, 570 U.S. at 102.

or extend a period of ineligibility for parole must be submitted to the jury and proven beyond a reasonable doubt. The New Jersey Supreme Court held that a statute was unconstitutional under *Alleyne* because it required the court to impose a period of parole ineligibility if the judge found that the defendant was involved in organized crime. *See State v. Grate*, 106 A.3d 466, 475-76 (N.J. 2015). Likewise, the Michigan Supreme Court held that the state's sentencing guidelines were unconstitutional under *Alleyne* to the extent that they required the court to extend a defendant's parole eligibility date based on facts found by the judge but not the jury. *See People v. Lockridge*, 870 N.W.2d 502, 516-17 (Mich. 2015).

¶12. Similarly, the trial judge in this case found that Fogleman's crime was a "crime of violence." This required the judge to make a finding that Fogleman "used physical force, or made a credible attempt or threat of physical force against another person as part of the criminal act." Miss. Code Ann. § 97-3-2(2).[4] Only the judge made this finding—the jury did not. The judge's finding did not increase the maximum penalty to which Fogleman was exposed. But the judge's finding did, among other consequences, *eliminate* Fogleman's eligibility for parole. Miss. Code Ann. § 47-7-3(1)(g)(i). It also made Fogleman ineligible for any type of early release until he has served at least half of his sentence. Miss. Code Ann. § 97-3-2(2). Absent the judge's finding, Fogleman would be eligible for release on parole

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[4] In *Descamps v. United States*, 570 U.S. 254 (2013), the Supreme Court specifically recognized that if the "use, attempted use, or threatened use of physical force" is an element of the offense, then the issue would have to be submitted to the jury, and the fact would have be proven beyond a reasonable doubt. *See id.* at 257-58, 269-70.

after serving only fifteen months. Miss. Code Ann. § 47-7-3(1)(g)(i). However, because of the judge's finding, Fogleman's five-year sentence must be served without eligibility for parole. *Id.* Thus, the judge's finding at least doubled the minimum term that Fogleman will have to serve in prison.

¶13. Section 97-3-2(2) runs afoul of *Alleyne*'s holding. The judge's finding that the defendant used, attempted to use, or threatened to use "physical force" increases the minimum sentence that the defendant must serve in prison and indisputably "alters the prescribed range of sentences to which [the] defendant is exposed." *Alleyne*, 570 U.S. at 112. Contrary to *Alleyne*, section 97-3-2(2) "*aggravate*[*s*] the punishment" based on judicial fact-finding. *Id.* at 113. Under *Alleyne*, section 97-3-2(2) violates the defendant's rights under the Sixth and Fourteenth Amendments to the extent that it permits the circuit judge to find that an unlisted felony is a "crime of violence."[5] Therefore, we must reverse and render the provisions of Fogleman's sentence stating that it shall be served as a sentence for a "crime of violence" pursuant to section 97-3-2(2). Fogleman's sentence shall simply be for a term of five years in MDOC custody. Fogleman's conviction for felony fleeing from a law enforcement officer is affirmed.

¶14. **AFFIRMED IN PART; REVERSED AND RENDERED IN PART.**

LEE, C.J., IRVING AND GRIFFIS, P.JJ., BARNES, CARLTON, FAIR,

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[5] We emphasize that our decision in this case has no effect on sentencing or parole eligibility with respect to those crimes that are specifically listed as per se crimes of violence in section 97-3-2(1).

GREENLEE AND WESTBROOKS, JJ., CONCUR. TINDELL, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.