

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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

JOEVONTE PETIT-HOMME,

Appellant,

v.

Case No. 5D19-108

STATE OF FLORIDA,

Appellee.

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Opinion filed November 8, 2019

Appeal from the Circuit Court
for Brevard County,
Nancy Maloney, Judge.

Kepler B. Funk, Keith F. Szachacz, and
Alan S. Diamond, of Funk, Szachacz &
Diamond, LLC, Melbourne, for Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Robin A. Compton,
Assistant Attorney General, Daytona
Beach, for Appellee.

EVANDER, C.J.,

Appellant, Joevonte Petit-Homme, was convicted, after a jury trial, of lewd or lascivious battery of a child between the ages of twelve and sixteen,¹ and of use of a child

¹ § 800.04(4)(a), Fla. Stat. (2014).

in a sexual performance.² He was sentenced to fifteen years in prison followed by fifteen years of sex offender probation. On appeal, he contends that the trial court erred by considering impermissible factors in fashioning the sentence imposed. We reverse the sentence and remand for resentencing by a different judge.

At trial, the State presented evidence that Appellant had engaged in a sexual encounter with the underage victim and had videotaped the incident. The evidence presented at trial was sufficient to support Appellant's convictions. However, the various criminal acts alleged to have been committed by Appellant in the affidavit for arrest warrant executed by a police detective at the onset of the case were far more egregious than the criminal acts charged and proven at trial.

After the parties presented evidence and argument at the sentencing hearing, the trial judge announced, "I'm going to give you a little bit of background on my decision and what my ruling is, and how I support my ruling." The trial judge then set forth, in great detail, the "circumstances of the particular offense" for which she was imposing sentence. However, the "circumstances" recited by the trial judge were consistent with the facts alleged in the arrest affidavit, not the evidence presented at trial. When defense counsel noted that there was no evidence of some of the "circumstances" recited by the trial court, the trial judge agreed but then immediately pronounced sentence. Based on our review of the sentencing transcript, it is unclear whether, in determining Appellant's sentence, the trial court weighed uncharged and unproven crimes alleged to have been committed by Appellant.

² § 827.071(2), Fla. Stat. (2014).

A trial court's consideration of unsubstantiated allegations of misconduct in sentencing constitutes a due process violation. *Shelko v. State*, 265 So. 3d 1003, 1005 (Fla. 5th DCA 2019). "Where the record reflects that the trial judge may have relied upon impermissible considerations in imposing sentence, the State bears the burden to show from the record as a whole that the judge did not rely on such considerations." *Id.* Here, the State has failed to meet that burden. Accordingly, we remand for a de novo sentencing hearing before a different judge. See *McGill v. State*, 148 So. 3d 531, 532 (Fla. 5th DCA 2014).

REVERSED and REMANDED for resentencing.

EISNAUGLE and SASSO, JJ., concur.