

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

RANDY R. KEMP, JR.,

Appellant,

Case No. 5D20-930

v.

STATE OF FLORIDA,

Appellee.

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Opinion filed December 4, 2020

3.850 Appeal from the Circuit  
Court for Putnam County,  
Patti A. Christensen, Judge.

Randy R. Kemp, Jr., Raiford, pro se.

No Appearance for Appellee.

ORFINGER, J.

Randy R. Kemp, Jr., appeals the trial court's denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. Because the attachments to the trial court's order do not conclusively refute Kemp's claims, we reverse and remand for the trial court to attach portions of the record conclusively refuting his claims or to hold an evidentiary hearing.

Kemp's plea agreement required that he admit violating his probation in exchange for a ten-year prison sentence with any prior credit accrued in the Department of Corrections ("DOC") on this case. After he was sentenced, the DOC forfeited Kemp's gain time. Kemp alleges that by forfeiting his gain time, the DOC thwarted the intent of his plea agreement.

It is well-settled that the DOC has the authority to forfeit all of a defendant's gain time following a violation of probation. See § 944.28(1), Fla. Stat. (2018); Horton v. State, 943 So. 2d 859, 860 (Fla. 1st DCA 2006). However, a defendant is entitled to have a plea agreement enforced if the DOC's forfeiture of gain time thwarts the intent of a negotiated plea. See McAllister v. State, 821 So. 2d 1250, 1250 (Fla. 1st DCA 2002) ("While the trial court cannot compel the DOC to follow the plea agreement since it would usurp the DOC's authority to forfeit gain time, the trial court can still effectuate the purpose of the plea agreement by either resentencing the appellant in a manner that will effectuate the plea agreement given the DOC's forfeiture, or by allowing the appellant to withdraw from his plea."); see also Etienne v. State, 994 So. 2d 450, 452 (Fla. 3d DCA 2008) (reiterating that defendant is entitled to have plea agreement enforced if DOC's forfeiture of gain time thwarted intent of negotiated plea agreement); State v. Jackson, 842 So. 2d 1040 (Fla. 3d DCA 2003) (explaining that while trial court cannot rescind DOC's forfeiture of gain time, it could grant motion to enforce plea where forfeiture thwarted intent of negotiated plea agreement); Dellahoy v. State, 816 So. 2d 1253, 1253 (Fla. 5th DCA 2002) (holding that DOC's forfeiture of gain time cannot be countermanded by court, but neither can forfeiture thwart plea agreement).

Here, the trial court's order does not contain any record attachments conclusively refuting Kemp's claim. Thus, we reverse and remand for the trial court to attach portions of the record conclusively refuting Kemp's claim or to hold an evidentiary hearing.

REVERSED and REMANDED for further proceedings.

LAMBERT and TRAVER, JJ., concur.