

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2008

ARTHUR THOMPSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D07-2418

[June 25, 2008]

PER CURIAM.

Appellant, Arthur Thompson, was convicted by a jury, on July 22, 1991, of first-degree murder, burglary with assault and battery, and robbery, all arising from his uninvited entry into a trailer and killing of its resident. The trial court sentenced Thompson to life in prison as a habitual felony offender (HFO) with a 25-year mandatory minimum for the murder conviction, life in prison as a HFO for the burglary conviction, and 30 years in prison as a HFO for the robbery conviction. The sentences ran consecutively to each other. It was only the designation of appellant as a HFO that permitted the trial court to sentence him above the guidelines. See § 775.084(4)(e), Fla. Stat. (1989).

Appellant filed a rule 3.800(a) motion in the trial court seeking relief pursuant to *Hale v. State*, 630 So.2d 521 (Fla. 1993), which held that HFO sentences cannot run consecutively to each other when the offenses occur in a single criminal episode. Under *State v. Callaway*, 658 So.2d 983 (Fla. 1995), *Hale* can be applied retroactively. See also *Teague v. State*, 871 So.2d 301 (Fla. 1st DCA 2004) (holding that a *Hale* claim is cognizable in a rule 3.800(a) motion as long as the fact that multiple convictions arose from a single criminal episode is readily apparent from the face of the record). The trial court deleted the HFO designation from all three sentences and reduced the 30-year robbery sentence to 15 years, the statutory maximum sentence for a second-degree felony without enhancement. Otherwise, the sentences were unchanged.

Thompson appealed the changed sentence, arguing for a *de novo* resentencing hearing because the consecutive life sentence for the

burglary conviction is still a sentence above the guidelines. *See Brooks v. State*, 937 So.2d 827, 828 (Fla. 2d DCA 2006) (finding that sentencing guidelines apply to resentencing following a successful rule 3.800(a) motion, but the state has the right to seek an upward departure).

A defendant need not be present when a court simply deletes a HFO designation without otherwise changing the sentence. *Catalan v. State*, 911 So.2d 203 (Fla. 3d DCA 2005). In this case, however, when the trial court deleted the HFO designation, there was no justification for a sentence above the guidelines. *Cf. Dougherty v. State*, 785 So.2d 1221, 1223 (Fla. 4th DCA 2001) (stating a defendant is entitled to be present at sentencing, except in “resentencing cases where all that is required on remand is a ministerial act of sentence correction”). Although, a departure sentence for the burglary conviction may be justified, the trial court must give reasons for imposing a departure sentence. Because appellant’s HFO designation was improper under *Hale*, a *de novo* resentencing hearing is necessary for the court to consider whether a sentence above the guidelines is justified.

Reversed and remanded for a de novo resentencing hearing.

SHAHOOD, C.J., FARMER and KLEIN, JJ., concur.

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Appeal of order denying rule 3.800(a) motion from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Stanton S. Kaplan, Judge; L.T. Case No. 89-6825 CF10A.

Ryan J. Sydejko of Loren Rhoton, P.A., Tampa, for appellant.

Bill McCollum, Attorney General, Tallahassee, and August Bonavita, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.