NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JAMES LEE MINNICK, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D07-3934

Opinion filed October 22, 2008.

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Pasco County; Thane B. Covert, Judge.

STRINGER, Judge.

James Lee Minnick filed a motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a), and the postconviction court denied his motion. We reverse in part and affirm in part.

Minnick was charged on March 1, 2006, with (1) burglary of an unoccupied dwelling pursuant to section 810.02(3)(b), Florida Statutes (2005), a second-degree felony, and (2) grand theft. He was charged on March 30, 2006, with one count of dealing in stolen property. His plea form indicates that he pleaded nolo

contendere to "BE (3rd)" and the grand theft and dealing charges in exchange for five years as a prison releasee reoffender (PRR).[1] "BE (3rd)" apparently refers to "breaking and entering"—i.e., burglary—at the third-degree felony level. The judgment for the March 1 charges includes the following notation with respect to the burglary: "Lessor [sic] burglary (PRR)[,] 810.02(3)(B)[,] 3F."

Minnick filed a motion to correct illegal sentence alleging, first, that he had accepted a plea for the lesser offense of "burglary of an un-occupied structure," that he was designated a PRR, and that the lesser offense is not a PRR-qualifying offense. As such, he urged, his sentence is illegal. The postconviction court denied the motion as to this issue, ruling that burglary of an unoccupied structure is a PRR-qualifying offense. Minnick also alleged that convictions for both grand theft and dealing in stolen property constitute double jeopardy. The court denied this claim, granting leave for Minnick to file a timely rule 3.850 motion. Finally, Minnick alleged that being advised to accept an illegal PRR sentence constituted ineffective assistance of counsel. The court did not address this claim.

As recited above, the record is somewhat contradictory. The judgment lists the first charge to be sentenced as a "less[e]r," third-degree-felony version of the count originally charged as burglary of an unoccupied structure, a second-degree felony, but retains the statute number of the second-degree felony. The plea form indicates that Minnick was agreeing to plead to burglary at the third-degree-felony level. Because the only relevant lesser included offense of burglary of an unoccupied

[1] § 775.082(9), Fla. Stat. (2005). PRR sentences bear the same terms of years as the maximum sentences for the respective felony degrees, compare § 775.082(9)(a)(3) with § 775.082(3)(b)-(d), but a defendant sentenced as a PRR must serve "100 percent of the court-imposed sentence," § 775.082(9)(b).

dwelling[2] is burglary of an unoccupied structure, a third-degree felony,[3] see Fla. Std. Jury Instr. (Crim.) 13.1 (listing lesser included offenses), it is clear to us that the latter offense is the one that Minnick was convicted of and sentenced for.

The postconviction court was incorrect in ruling that burglary of an unoccupied structure is a valid PRR-qualifying offense. Section 775.082(9)(a)(1), Florida Statutes (2005), lists the following relevant offenses as qualifying offenses: armed burglary,[4] burglary of a dwelling, and burglary of an occupied structure.[5] Burglary of an unoccupied structure is not listed in section 775.082(9)(a)(1).[6] Furthermore, Minnick may attack the sentence even though he negotiated for it.[7] See Graham v. State, 813 So. 2d 248 (Fla. 2d DCA 2002); Wallen v. State, 877 So. 2d 737, 738 (Fla. 5th DCA 2004) (noting that defendant's agreement to a certain sentence "does not bar him from attacking the same as an illegal sentence") (citing Larson v. State, 572 So. 2d 1368 (Fla. 1991)). Because Minnick was sentenced as a PRR in the absence of a qualifying offense, we reverse the postconviction court's order as to his first claim.

However, because Minnick's plea was negotiated, it is not automatic that the PRR designation should be stricken. Rather, the State may either agree to a resentencing in which the PRR designation is stricken with the sentence otherwise

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[2] § 810.02(3)(b).

[3] § 810.02(4)(a).

[4] § 775.082(9)(a)(1)(p).

[5] § 775.082(9)(a)(1)(q).

[6] Neither are grand theft and dealing in stolen property, the other two offenses of which Minnick was convicted.

[7] We note that the State concedes error on this issue and recommends a reversal.

unchanged or withdraw from the plea agreement and take Minnick to trial on the original charges. See West v. State, 818 So. 2d 637, 638 (Fla. 1st DCA 2002) (reversing an order denying a claim similar to the one at issue here and ruling that "the state will have the choice either to resentence the appellant or to take the appellant to trial, because the appellant's sentence was negotiated"); Wallen, 877 So. 2d 737 (similar); cf. Caddo v. State, 806 So. 2d 520, 522 (Fla. 2d DCA 2001) (delineating the two options in the direct-appeal context).[8] Whichever option is chosen, on resentencing the trial court shall ensure that the charges, statute numbers, and felony levels are consistent with one another in the judgment documentation.

We affirm the postconviction court's order as to the double jeopardy issue. We note also that Minnick's ineffective assistance of counsel claim, not addressed by the postconviction court, may be cognizable in a motion filed pursuant to rule 3.850.

Reversed in part and affirmed in part, with instructions.

CASANUEVA and LaROSE, JJ., Concur.

[8] It may be noted that in some situations in which a defendant has raised a rule 3.800(a) claim when the underlying conviction was based on a negotiated plea, this court has affirmed the postconviction court, noting that the defendant should raise the issue via a rule 3.850 motion. See, e.g., Casey v. State, 788 So. 2d 1121 (Fla. 2d DCA 2001) (concerning a claim under Heggs v. State, 759 So. 2d 620 (Fla. 2000)). This is "because an evidentiary hearing may be necessary to determine whether the State gave up something in negotiating the plea." Id. at 1122. Here, however, it is already clear from the record that the State agreed to a reduced charge. As such, there is no need for an evidentiary hearing.