Third District Court of Appeal

State of Florida, January Term, A.D. 2008

Opinion filed January 30, 2008.
Not final until disposition of timely filed motion for rehearing.

No. 3D05-702
Lower Tribunal No. 87-35599

Luis Delgado,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Leonard E. Glick, Judge.

Bennett H. Brummer, Public Defender, and Thomas Regnier, Assistant Public Defender, for appellant.

Bill McCollum, Attorney General, and Jill K. Traina, Assistant Attorney General, for appellee.

Before RAMIREZ, and SHEPHERD, JJ., and SCHWARTZ, Senior Judge.

RAMIREZ, J.

This Court withdraws the opinion rendered on February 7, 2007, and substitutes the following in its place. Luis Delgado appeals the denial of his

motion under Florida Rule of Criminal Procedure 3.800(a), alleging that the State incorrectly calculated his scoresheet points resulting in a sentence greater than allowed by law. We agree and reverse for resentencing.

Delgado was convicted of twelve felony counts arising out of a single home invasion robbery, involving multiple victims. The trial court sentenced Delgado to life in prison on February 21, 1989. His scoresheet totaled 518 points and notes one departure reason, the "sophisticated, professional, organized, planned" manner in which the crimes were carried out. This total placed Delgado in the "life" range on the scoresheet. If he had scored between 471 and 506 points, he would have been in the twenty-seven to forty year range. In his 3.800(a) motion, Delgado argued that: (1) his scoresheet reflects an incorrect calculation because first degree and second degree felonies were counted; (2) victim injury points were illegally assessed; and (3) the departure reason was invalid and this resulted in a sentence beyond the legal limit.

First, Delgado raised purely legal issues in his 3.800(a) motion regarding his sentencing, which may be resolved by consulting court records and which, taken together, show that the terms of his sentence are impermissible as a matter of law. See Carter v. State, 786 So. 2d 1173, 1180 (Fla. 2001) (concluding that because the error in sentencing Carter as a habitual offender for a life felony was apparent on

the face of the record, Carter was entitled to relief pursuant to Rule 3.800(a)). Florida Rule of Criminal Procedure 3.800(a) provides that a court:

> [M]ay at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet . . . when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief....

(emphasis added). The State concedes, and we acknowledge, that it improperly scored Delgado a net of seven additional points when it miscounted the number of first and second degree felonies.

Second, Delgado also argues that the trial court improperly allowed eight victim injury points for alleged victim Jose Luis Goyriena, although the charging document never accused Delgado of any crime against the person of Goyriena. Erroneous assessment of victim injury points is cognizable in a 3.800(a) motion and can be raised at any time as long as the error is discernible from the face of the record. See Chapman v. State, 885 So. 2d 475, 476-77 (Fla. 5th DCA 2004); Daum v. State, 544 So. 2d 1035, 1036 (Fla. 2d DCA 1989). Here, the information alleged no physical contact with or injury to Goyriena, as it alleged no crime against his person, and therefore it was improper for the court to assess the eight victim injury points as to Goyriena.

The trial court, however, denied Delgado's 3.800 motion and did not attach any portions of the record that would conclusively refute Delgado's claims. Thus,

the trial court should have either granted the motion or attached the relevant portions of the record. A deduction of the eight victim injury points, plus the seven points from the scoresheet miscalculation, would place Delgado in a lower sentencing range.

We now address the validity of the trial court's reason for departure. Florida courts have held invalid the departure reason the trial court gave here, that the crime was carried out in a "sophisticated, professional, organized, planned" manner. See State v. Fletcher, 530 So. 2d 296, 297 (Fla. 1988); Collins v. State, 535 So. 2d 661, 662 (Fla. 3d DCA 1988) (finding "professional manner" not a valid departure reason because it was inherent component of crime). In Fletcher, the Florida Supreme Court stated that an "inherent component" of the crime in question can never be used to justify a guidelines departure. Fletcher, 530 So. 2d at 297. Where a crime inherently involves premeditation and planning, the planned and calculated manner in committing the crime is not a valid departure reason. Id. Thus, the planning necessary to carry out a crime is an inherent component of that crime, even if it is not a statutory element. A home invasion robbery of the type that occurred in this case – where several victims allegedly were held hostage over several hours – could not have occurred without planning and premeditation.

Furthermore, we are aware that the validity of a departure reason is not cognizable on a rule 3.800(a) motion. See Wright v. State, 911 So. 2d 81, 83-86 (Fla. 2005); see also Concepcion v. State, 944 So. 2d 1069, 1071 (Fla. 3d DCA 2006); Wood v. State, 867 So. 2d 590, 592 (Fla. 5th DCA 2004). However, this general rule appears to be in conflict with Rule 3.800(a), which permits scoresheet errors discernible on the face of the record, like the scoresheet errors raised here, to be corrected at any time. For this reason, a court may consider the validity of the departure reason on a 3.800(a) motion when the issue is inextricably tied to the harmfulness of a scoresheet error. Indeed, the Florida Supreme Court has deviated from this general rule and considered the validity of departure reasons in a 3.800(a) challenge to a scoresheet error. See State v. Lemon, 825 So. 2d 927, 928 (Fla. 2002); see also Squires v. State, 891 So. 2d 600 (Fla. 2d DCA 2005) (where the district court likewise addressed the validity of departure reasons on a 3.800(a) motion).

We do not believe that Isom v. State, 915 So. 2d 183 (Fla. 3d DCA 2005), requires affirmance here. In that case, we held that a claim that departure reasons were inadequate does not render a sentence illegal for purposes of Florida Rule of Criminal Procedure 3.800(a). Isom, 915 So. 2d at 184. The defendant in Isom, however, raised a factual issue regarding his "escalating pattern of criminal conduct," an issue which could only have been pursued under Rule 3.850, Florida

Rules of Criminal Procedure, and was therefore time barred. Isom, 915 So. 2d at 184. This is unlike Delgado's challenge to the departure reason which involves a purely legal question and is combined with a guidelines scoresheet error.

Additionally, subsection 921.001(5), Florida Statutes (1987), does not require affirmance. Subsection 921.001(5) provides that a "departure shall be upheld when at least one circumstance or factor justifies the departure regardless of the presence of other circumstances or factors found not to justify departure." The trial court in this case, however, provided a single departure reason which was invalid as a matter of law at the time during which Delgado received his sentence.

We therefore hold that where, as here, there is both an error in the guidelines scoring and an invalid departure reason, the defendant should be resentenced.

Reversed and remanded.