

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

MARCUS A. UPSHAW,

Appellant,

v.

Case No. 5D17-3717

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed June 22, 2018

3.800 Appeal from the Circuit
Court for Lake County,
Lawrence J. Semento, Judge.

Marcus A. Upshaw, Jasper, pro se.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Robin A. Compton,
Assistant Attorney General, Daytona
Beach, for Appellee.

PER CURIAM.

Marcus Upshaw appeals the summary denial of his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). The State properly concedes that one of the issues raised by Upshaw has merit.

In June 2015, Upshaw entered a nolo contendere plea on Count I in case number 2014-CF-002517 to felony petit theft, a third-degree felony. Upshaw was sentenced to

six years in prison on that count, the lowest permissible sentence as reflected on his scoresheet. However, as the State acknowledges, the scoresheet was erroneous because it improperly used Upshaw's 2010 aggravated assault with a deadly weapon conviction as the primary offense, rather than as a prior offense. Because a properly calculated scoresheet would yield a lowest permissible sentence on this charge of less than five years, the trial court was precluded from imposing a sentence greater than the five-year statutory maximum. Accordingly, on remand, the trial court is directed to vacate the sentence imposed on Upshaw's felony petit theft conviction in case number 2014-CF-002517 and to resentence him. We find the other issues raised by Upshaw to be without merit.

AFFIRMED, in part; REVERSED, in part; and REMANDED.

COHEN, C.J. and ORFINGER and EVANDER, JJ., concur.