

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

STATE OF FLORIDA,

Appellant,

v.

Case No. 5D18-1420

GEORGE E. MELENDEZ, III,

Appellee.

_____ /

Opinion filed October 25, 2019

Appeal from the Circuit Court
for Orange County,
John E. Jordan, Judge.

Ashley Moody, Attorney General,
Tallahassee, and Rebecca Rock
McGuigan, Assistant Attorney General,
Daytona Beach, for Appellant.

James S. Purdy, Public Defender, and
Andrew Mich, Assistant Public Defender,
Daytona Beach, for Appellee.

JACOBUS, B.W., Senior Judge.

The State appeals the downward departure sentence imposed on George E. Melendez, III. We reverse the sentence because the departure is not supported by competent, substantial evidence.

Melendez was charged with second-degree grand theft, defrauding a financial institution, and three counts of cashing or depositing a worthless item with intent to defraud. Melendez's victim was the CFE Federal Credit Union. His scoresheet provided that the lowest permissible sentence would be 27.45 months. The trial court, finding the victim's need for restitution outweighed the need for incarceration, made a downward departure and sentenced Melendez to time served and three years of probation.

While a victim's need for restitution is a valid reason for a downward departure sentence, see § 921.0026(2)(e), Florida Statutes (2017), there must be competent, substantial evidence to support the victim's need. See State v. Wheeler, 180 So. 3d 1117, 1119 (Fla. 5th DCA 2015). Here, there was zero evidence that CFE Federal Credit Union needed the restitution. Instead, the trial court based its decision on discussions with Melendez's counsel. A defense counsel's unsworn assertions cannot support a downward departure. See State v. Montgomery, 155 So. 3d 1182, 1184 (Fla. 2d DCA 2014). Accordingly, Melendez's sentence must be reversed and remanded for further proceedings.

On remand, Melendez must be given the opportunity to withdraw his plea. See Wheeler, 180 So. 3d at 1120. If Melendez elects to be resentenced under the Criminal Punishment Code, the trial court is not precluded from imposing a new downward departure sentence based on a valid legal ground that is supported by substantial, competent evidence. See Jackson v. State, 64 So. 3d 90, 93 (Fla. 2011).

REVERSED and REMANDED.

ORFINGER and WALLIS, JJ., concur.