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

VICTOR ECHEVARRIA,

Appellant,

v. Case No. 5D19-3074

STATE OF FLORIDA,

Appellee.

_____/

Opinion filed May 8, 2020

3.800 Appeal from the Circuit Court for Volusia County, James R. Clayton, Judge.

Victor Echevarria, Raiford, pro se.

No Appearance for Appellee.

PER CURIAM.

Appellant, Victor Echevarria, appeals the denial of his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Concluding that Appellant's sentences exceed the statutory maximum, we reverse.

In March 2012, Appellant pled *nolo contendere* to attempted sexual battery on a person less than twelve years of age (count I) and attempted lewd or lascivious molestation on a person less than twelve years of age (count II). The court imposed concurrent sentences of twenty years in prison followed by life probation.

Appellant argued in his rule 3.800(a) motion that the sentences were illegal because they exceeded the statutory maximum for second-degree felonies. The court denied the motion, finding both offenses were life felonies and therefore did not exceed the statutory maximum.

Florida Rule of Criminal Procedure 3.800(a) provides that "[a] court may 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."

As to count I, Appellant pled to attempted sexual battery on a person less than twelve years of age. As pled, count I is a first-degree felony punishable by up to thirty years in prison. See Adams v. State, 901 So. 2d 275, 276 (Fla. 5th DCA 2005) (explaining that under section 794.011(2), "an attempted capital sexual battery is classified as a first degree felony" and "is punishable at a maximum of 30 years"); see also § 794.011(2)(a), Fla. Stat. (2011); § 777.04(4)(b), Fla. Stat. (2011); § 775.082(3)(b)1., Fla. Stat. (2011). Appellant's sentence of twenty years' imprisonment followed by life probation exceeds the thirty-year statutory maximum and, therefore, appears to be illegal. See Adams, 901 So. 2d at 277 ("A defendant cannot by a plea agreement accept a sentence that exceeds the statutory maximum." (citations omitted)); Fuentes v. State, 711 So. 2d 175, 176 (Fla. 2d DCA 1998) ("A sentence in which the incarcerative portion and the probationary portion, when combined, exceed the statutory maximum is an illegal sentence.").

However, section 794.011(2)(a) "contains an attempt offense if the sexual organs of the victim are injured," in which case the "attempt offense is a life felony, punishable by a 'term of imprisonment for life or imprisonment for a term of years [not] exceeding life

imprisonment.'" Adams, 901 So. 2d at 276 (quoting § 775.082(3)(a)3., Fla. Stat. (2011)). Our limited record does not contain any facts or evidence demonstrating that Appellant injured the victim's sexual organs. Without such evidence, we are compelled to reverse and remand for further proceedings as to count I. We do so, however, without prejudice for the trial court to attach further documentation to conclusively show Appellant pled to attempted sexual battery with injury to the victim's sexual organs.

We next consider count II, attempted lewd or lascivious molestation on a person less than twelve years of age. The offense of lewd or lascivious molestation on a person less than twelve years of age is a life felony, while the attempted offense is a second-degree felony punishable by up to fifteen years in prison. See § 800.04(5)(b), Fla. Stat. (2011) ("An offender 18 years of age or older who commits lewd or lascivious molestation against a victim less than 12 years of age commits a life felony . . . ."); § 777.04(4)(c), Fla. Stat. (2011) ("[I]f the offense attempted . . . is a life felony or a felony of the first degree, the offense of criminal attempt . . . is a felony of the second degree."); § 775.082(3)(c), Fla. Stat. (2011) (setting the statutory maximum for a second-degree felony at fifteen years). As Appellant was convicted of the attempted offense, his sentence of twenty years' imprisonment followed by life probation clearly exceeds the statutory maximum and requires reversal.

We accordingly reverse the trial court's denial of Appellant's rule 3.800 motion and remand for further proceedings. Because the sentences were imposed pursuant to a plea agreement, the State must be given the option "to agree to a legal sentence or to withdraw from the plea agreement and proceed to trial on the original charges." See Almenares v.

State, 882 So. 2d 493, 495 (Fla. 5th DCA 2004); see also Armstrong v. State, 145 So. 3d 952, 953 (Fla. 2d DCA 2014).

REVERSED and REMANDED for further proceedings consistent with this opinion.

EVANDER, C.J., LAMBERT and GROSSHANS, JJ., concur.