

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

TAQUARVIS BURTON,

Appellant,

v.

Case No. 5D20-1500

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed October 23, 2020

3.800 Appeal from the Circuit Court
for Orange County,
Keith F. White, Judge.

Taquarvis Burton, Blountstown, pro se.

Ashley Moody, Attorney General,
Tallahassee, and Carmen F. Corrente,
Assistant Attorney General, Daytona
Beach, for Appellee.

LAMBERT, J.

Taquarvis Burton appeals the postconviction court's denial of his Florida Rule of Criminal Procedure 3.800(a) motion for correction of his sentence. Burton argues that since one of his two convictions was reversed on direct appeal, he was entitled to be resentenced on his remaining conviction with a corrected Criminal Punishment Code Scoresheet. For the following reasons, we reverse and remand for resentencing.

Burton was convicted in August 2010 after trial of attempted second-degree murder with a firearm and attempted robbery with a firearm. The jury made separate findings in its verdicts returned on each charge that Burton discharged a firearm resulting in great bodily harm to the victim. Burton, who was eighteen years old in July 2009 when he committed these two crimes, received a thirty-year prison sentence for his attempted second-degree murder conviction and a concurrent twenty-five-year prison sentence for the attempted robbery with a firearm conviction. Both sentences included a twenty-five-year mandatory minimum provision, as required under section 775.087(2), Florida Statutes (2010),¹ based on the jury's aforementioned findings.

Burton appealed. This court reversed his conviction for attempted second-degree murder with a firearm and remanded for a new trial. *Burton v. State*, 76 So. 3d 1026 (Fla. 5th DCA 2011). The State thereafter filed a nolle prosequi on this charge.

Earlier this year, Burton filed the instant rule 3.800(a) motion. Burton argued that after his attempted second-degree murder conviction was vacated and the State then declined to pursue a second trial on the charge, he should have been resentenced on his attempted robbery with a firearm conviction with a scoresheet that no longer included the sentencing points for the attempted second-degree murder conviction.

In summarily denying Burton's motion, the postconviction court first correctly recognized that, "[i]n general, when the vacation of a conviction would result in changes to the defendant's scoresheet, the defendant is entitled to be resentenced using a corrected scoresheet." *Tundidor v. State*, 221 So. 3d 587, 605 (Fla. 2017) (quoting *Fernandez v. State*, 199 So. 3d 500, 502 (Fla. 2d DCA 2016)); accord *Pierce v. State*,

¹ Commonly referred to as Florida's 10-20-Life Statute.

281 So. 3d 569, 571 (Fla. 5th DCA 2019) (quoting *Tundidor*, 221 So. 3d at 605). The court nevertheless concluded that Burton was not entitled to relief because the resulting error in the scoresheet due to the vacating of the attempted second-degree murder conviction was harmless. It reasoned that with the jury finding that during the commission of the attempted robbery, Burton had discharged a firearm causing great bodily harm to the victim, the trial court had been left with no discretion but to impose a twenty-five-year mandatory minimum prison sentence under section 775.087(2), Florida Statutes. Simply put, the court determined that a correction to Burton's scoresheet to reduce his total sentence points could not affect his previously-imposed sentence.

Burton argues here, as he did below, that the court has the discretion to impose a lesser sentence. Burton asserts that due to his age both at the time he committed and was later sentenced for attempted robbery with a firearm, and because the conviction was not for a capital or life felony, the court has the discretion, despite the jury's factual findings, to impose a youthful offender sentence under section 958.04(1), Florida Statutes (2010).

Burton is correct. The Youthful Offender Act provides that a trial court may sentence a defendant as a youthful offender "[i]n lieu of other criminal penalties authorized by law." § 958.04(2), Fla. Stat. This court and other Florida appellate courts have held specifically that "the minimum mandatory provisions of the 10-20-life statute do not supersede the Youthful Offender sentencing provisions." *Darrow v. State*, 789 So. 2d 552, 553 (Fla. 5th DCA 2001) (citing *State v. Wooten*, 782 So. 2d 408, 410 (Fla. 2d DCA 2001)); accord *Gallimore v. State*, 100 So. 3d 1264, 1266–67 (Fla. 4th DCA 2012) ("[T]his plain language gives a trial court the discretion to impose a youthful offender sentence in

lieu of the 10-20-Life Statute's minimum mandatory sentence." (citing *Postell v. State*, 971 So. 2d 986, 989 (Fla. 5th DCA 2008); *Bennett v. State*, 24 So. 3d 693, 694 (Fla. 1st DCA 2009); *Wooten*, 782 So. 2d at 410)). Therefore, as Burton is eligible to be *considered* for sentencing as a youthful offender, we conclude that, under the specific circumstances of the case, the postconviction court erred in denying his rule 3.800(a) motion.

To be clear, we are not ordering that the trial court must impose a youthful offender sentence upon remand. Whether to do so is within the court's discretion. As observed by the Fourth District Court:

We note on remand that the defendant "is merely entitled to a resentencing in which the trial court is fully informed of its discretion to sentence [the defendant] as a youthful offender; [the defendant] is not necessarily entitled to resentencing as a youthful offender." *Bennett*, 24 So. 3d at 694 (citation omitted). Put another way, "[w]e do not suggest [the defendant] is necessarily entitled to resentencing as a youthful offender; rather, [the defendant] is entitled to be sentenced at a proceeding at which the trial court is fully informed of its discretion." *Postell*, 971 So. 2d at 989.

Gallimore, 100 So. 3d at 1267 (alterations in original).

Accordingly, we reverse the order denying Burton's motion for correction of his sentence and remand this case for a hearing, with a corrected scoresheet,² where the court shall consider whether to exercise its discretion to resentence Burton as a youthful offender. If, at the conclusion of the hearing, the court chooses not to impose a youthful offender sentence, then, consistent with the factual findings in the jury's earlier verdict, it must reimpose Burton's previous twenty-five-year mandatory minimum prison sentence for his attempted robbery with a firearm conviction.

² The trial court is also directed to appoint counsel to represent Burton for this hearing.

REVERSED and REMANDED, with directions.

EVANDER, C.J., and HARRIS, J., concur.