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

JAMES BRUCE MILLER,

Appellant,

v. Case No. 5D21-676

STATE OF FLORIDA,

Appellee.

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Opinion filed July 2, 2021

3.850 Appeal from the Circuit Court for Brevard County,
David C. Koenig, Judge.

James Bruce Miller, Lake City, pro se.

Ashley Moody, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

James Bruce Miller appeals the partial denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure

3.850. Because the record does not conclusively refute his claim, we reverse and remand for the postconviction court to hold an evidentiary hearing.

In 2016, Miller was charged with a series of crimes in three cases. In all, he was charged with attempted robbery with a deadly weapon, two counts of robbery with a deadly weapon, three counts of aggravated assault with a deadly weapon, and one count of grand theft and petit theft. The cases were consolidated for purposes of trial.

Pursuant to Faretta v. California, 422 U.S. 806 (1975), Miller elected to represent himself, and he was found guilty as charged following a jury trial. The State moved for the trial court to sentence Miller as a Prison Releasee Reoffender ("PRR") based upon a prior out-of-state conviction. The trial court agreed and sentenced Miller as a PRR on all but two counts. That designation resulted in the imposition of mandatory penalties under the PRR statute, including two life sentences.[1] This Court affirmed his judgment and sentence on direct appeal. Miller v. State, 253 So. 3d 618 (Fla. 5th DCA 2018).

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[1] § 775.082(9), Fla. Stat. (2015).

Thereafter, Miller filed his rule 3.850 motion for postconviction relief, raising seven allegations of "ineffective assistance of counsel."[2] Pertinent to this appeal, Miller claimed that he had been wrongfully sentenced as a PRR because the State used, and the trial court relied upon, an out-of-state, non-qualifying predicate offense to designate him as such. Specifically, he alleged that his Kansas conviction for attempted tampering with an electronic monitoring device was insufficient to qualify him as a PRR, as that crime is a first-degree misdemeanor in Florida, not punishable by more than one year in prison.

In denying that claim, the postconviction court relied upon the State's exhibit which showed that Miller had served a 19-month sentence in a Kansas correctional facility for tampering with electronic monitoring equipment. The record also demonstrated that he had been released in 2015. This appeal followed.

On appeal, Miller raises only one argument—that his PRR sentences are illegal because the State used a non-qualifying predicate offense. Having failed to address the other claims raised in his motion, Miller has abandoned

[2] In actuality, only one of the seven allegations implicated Miller's appointed stand-by counsel. The postconviction court granted in part Miller's motion based on double jeopardy issues, striking the three aggravated assault with a deadly weapon counts and the petit theft count. It denied the remainder of his claims.

any contention that the postconviction court erred in denying those claims. See Austin v. State, 968 So. 2d 1049, 1049–50 (Fla. 5th DCA 2007) (citing Marshall v. State, 854 So. 2d 1235 (Fla. 2003)).

The PRR statute provides, in relevant part:

> (9)(a)1. "Prison releasee reoffender" means any defendant who commits, or attempts to commit:
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> . . . .
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> g. Robbery;
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> . . . .
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> j. Aggravated assault with a deadly weapon;
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> . . . .
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> within 3 years after being released from . . . a correctional institution of another state, . . . following incarceration for an offense for which the sentence is punishable by more than 1 year in this state.

§ 775.082(9)(a)1., Fla. Stat. (emphasis added).

The elements of an out-of-state conviction must be sufficient to constitute a felony under Florida law. See Hankins v. State, 42 So. 3d 871, 873 (Fla. 2d DCA 2010). In Florida, tampering with an electronic monitoring device is a third-degree felony with an offense level of 1. See §§ 921.0023(1),

948.11(7), Fla. Stat. (2011).[3] However, an attempted third-degree felony with an offense level of 1 is a first-degree misdemeanor punishable by no more than one year in prison. See §§ 775.082(4)(a), 777.04(4)(d)–(e), Fla. Stat. (2011).

Miller alleges that his Kansas conviction was for attempted electronic monitor tampering, as opposed to the completed offense. Despite providing Miller's release date, the attached records do not indicate whether his Kansas conviction was for the completed offense or attempted offense.[4] If Miller's conviction was for attempted tampering with an electronic monitoring device, then that conviction could not be used to qualify him as a PRR for purposes of sentencing. See §§ 775.082(9)(a)1., 777.04(4)(e), 921.0023(1), Fla. Stat. Accordingly, the attached records do not conclusively refute that

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[3] The penalty for tampering with an electronic monitoring device is now codified under section 843.23, Florida Statutes (2016), which became effective October 2016. It remains a third-degree felony with an offense level of 1. § 843.23, Fla. Stat.

[4] An online search of the Kansas Department of Corrections website reflects that Miller was convicted of attempted tampering of an electronic monitoring device. The county court online docket further reflects that Miller pled to the offense of attempted tampering of an electronic monitoring device. These records are not official, nor are they part of the record before this Court. While we cannot rely upon those records to resolve this claim, they are worth noting because Miller's position appears to be correct and supports the need for an evidentiary hearing.

Miller's PRR sentences are illegal, and therefore we reverse and remand for an evidentiary hearing on that claim.

AFFIRMED in part; REVERSED in part; and REMANDED.

LAMBERT, C.J., COHEN and HARRIS, JJ., concur.