

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

ELBERT N. DANIELS ,  
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

v.

CASE NO. 1D10-6255

STATE OF FLORIDA ,  
Appellee.

**CORRECTED PAGES: pg 2,3**  
**CORRECTION IS UNDERLINED IN**  
**RED**  
**MAILED: August 15, 2013**  
**BY: SDE**

Opinion filed August 15, 2013.

An appeal from the Circuit Court for Bay County.  
Don T. Sirmons, Judge.

Nancy A. Daniels, Public Defender and Lacey Kantor, Assistant Public Defender,  
Tallahassee, for Appellant.

Pamela Jo Bondi, Attorney General and Angela R. Hensel, Assistant Attorney  
General, Tallahassee, for Appellee.

PER CURIAM.

In this reinstated direct appeal, appellant argues that fundamental sentencing error occurred based on discrepancies between the trial court's oral pronouncement of his sentence and the written judgment and sentence. Specifically, appellant

points out that while he was sentenced orally to time served on the count of possession of drug paraphernalia, this time-served sentence was not included in the written sentence. He also points out he was orally sentenced as a prison releasee reoffender on the count of resisting a police officer with violence, but the written sentence only generally notes he is sentenced as a prison releasee reoffender and does not specify as to which count. The state concedes in its answer brief that the various written sentencing documents do not conform to the oral pronouncement and concedes that the case should be remanded so that the trial court can correct the written judgment and sentence. Relying on Walton v. State, 106 So. 3d 522, 529 (Fla. 1st DCA 2013), the state urges that the necessary corrections to the written judgment and sentence are ministerial in nature and, therefore, the appellant need not be present at sentencing.

The problem is, however, that we cannot review the appellant's *unpreserved* sentencing error claims on the merits. See Craighead v. State, 36 So. 3d 893 (Fla. 1st DCA 2010) (quoting Jackson v. State, 983 So. 2d 562, 569 (Fla. 2008)). Claims that the written judgment and sentence do not conform to the oral pronouncement must be preserved either with a contemporaneous objection, if possible, or by filing a Florida Rule of Criminal Procedure 3.800(b)(2) motion before filing the initial brief. See Jackson, 983 So. 2d at 572 (noting that sentencing errors subject to Rule 3.800(b)(2) include written orders that deviate

from the oral pronouncement); Evans v. State, 895 So. 2d 1292, 1292–93 (Fla. 1st DCA 2005) (holding that absent contemporaneous objection or Rule 3.800(b)(2) motion, error in non-conforming written sentence and order of probation to oral pronouncement was not preserved for direct appeal). See also Burney v. State, 114 So. 3d 455 (Fla. 4th DCA 2013) (holding that absent contemporaneous objection or Rule 3.800(b)(2) motion, error in non-conforming written revocation of probation to oral pronouncement was unpreserved for direct appeal, citing Evans, 895 So. 2d 1292). In this case, the appellant concedes the issue was not preserved during sentencing by contemporaneous objection. Likewise, neither the appellant nor the state filed a notice of a pending Rule 3.800(b)(2) motion in this Court prior to the appellant’s filing his initial brief.

Accordingly, we must affirm appellant’s sentence. We do so, however, without prejudice to appellant’s ability to raise the above claims in a motion for post-conviction relief under Rule 3.850 or a petition alleging ineffective assistance of counsel. See Hope v. State, --- So. 3d ---, 38 Fla. L. Weekly D247 (Fla. 1st DCA, Jan. 31, 2013); Evans v. State, 904 So. 2d 638 (Fla. 1st DCA 2005).

Affirmed without prejudice.

VAN NORTWICK, CLARK, and OSTERHAUS, JJ., CONCUR.