

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-1092

JENNIFER UPTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Duval County.
Marianne L. Aho, Judge.

August 9, 2021

PER CURIAM.

Appellant challenges the trial court's denial of her timely motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)(2). On appeal, the State concedes that the scoresheet was erroneously calculated. We agree with Appellant that the trial court did not actually sentence her as a habitual felony offender (HFO), thus, was compelled to follow guideline requirements. *See Geohagen v. State*, 639 So. 2d 611, 612 (Fla. 1994) (“[I]f the judge chooses not to impose a habitual offender sentence, the judge must still adhere to the sentencing guidelines. . . . By virtue of sentencing a habitual offender to a more lenient sentence than that required by section 775.084, Florida Statutes (1991), the judge has necessarily decided that a habitual offender sentence is not necessary.”); *Walker v. State*, 473 So. 2d 694, 698

(Fla. 1st DCA 1985) (holding that that HFO sentencing of a first degree felony requires a sentence of life imprisonment and that any term of years HFO sentence on a first degree felony was error), *disapproved of on other grounds*, *Wong v. State*, 212 So. 3d 351, 358–59 (Fla. 2017).

The question remains whether the record conclusively shows that the same sentence would have been imposed using a correct scoresheet. *See State v. Anderson*, 905 So. 2d 111, 112 (Fla. 2005) (“Under [the would-have-been-imposed test applicable here], a scoresheet error requires resentencing unless the record conclusively shows that the same sentence would have been imposed using a correct scoresheet.”). Here, we find the trial court would have imposed the same sentence if a correct scoresheet had been used. The trial court was clearly operating under the belief that it was imposing an HFO sentence without regard for guideline requirements and that the ten-year term chosen was the term necessary to serve all criminological considerations. Further, the ten-year sentence imposed was consistent with the request of the State and consistent with similarly situated co-defendants in the case. These factors confirm that the sentence was not based in any substantial part on the minimum required sentence under the guidelines, regardless of whether that minimum was seven and one-half years or something slightly less.

AFFIRMED.

BILBREY, KELSEY, and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

S. Nicole Jamieson, Law Office of S. Nicole Jamieson, Fernandina, for Appellant.

Ashley Moody, Attorney General, and Tabitha Herrera, Assistant Attorney General, Tallahassee, for Appellee.