FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-2551

RICHARD E. KELLY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Alachua County.
Mark W. Moseley, Judge.

March 10, 2021

PER CURIAM.

AFFIRMED.

KELSEY and TANENBAUM, JJ., concur; B.L. THOMAS, J., concurs with opinion.

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

B.L. THOMAS, J., concurring.

Richard E. Kelly appeals the denial of his rule 3.800(a) motion to correct illegal sentence.

In 1987, Kelly was convicted and sentenced on three counts of sexual battery (using slight force) and one count of kidnapping. His sentence included imprisonment for a term of natural life on the kidnapping charge. This Court affirmed the judgment and sentence on March 9, 1988. *See Kelly v. State*, 522 So. 2d 389 (Fla. 1st DCA 1988).

Prior to his instant appeal, Kelly filed the following appeals and petitions with this Court—none of which resulted in the granting of relief: 1D91-1725 & 1D93-2225 (postconviction appeals–unknown type), 1D97-1000 (rule 3.850 appeal), 1D03-1011 (petition for writ of prohibition), 1D04-4255 (rule 3.800 appeal), and 1D13-1581 (rule 3.800 appeal).

On July 28, 2020, Kelly filed the instant motion, challenging the legality of his life sentence on the kidnapping charge. He asserted that his sentencing guidelines scoresheet was in error. Kelly argued that the prior felony convictions listed on the scoresheet were from September 14, 1973, at which time "Florida's Burglary, Sexual Battery, Robbery and Assault Statutes did not divide Florida statutes by degrees." He claimed that, because the degrees of these offenses were ambiguous, pursuant to Florida Rule of Criminal Procedure 3.701(d)(5), they should have been scored as third-degree felonies. Kelly concluded that once his scoresheet is properly calculated, the total score would be 386 points, with a sentencing range of between 17 and 22 years.

On August 13, 2020, the lower court summarily denied the motion. Citing to *Harris v. State*, 674 So. 2d 110, 111 n.1 (Fla. 1996), the court indicated that felonies in Florida were first classified by degrees beginning January 1, 1972. It also reasoned that when a prior offense is not classified by degree, it can be scored by reference to the more current, analogous statute. The court found the scoresheet was not miscalculated. It also found that, even if it were recalculated to bring the sentencing range below life imprisonment, "the sentencing court could still have

imposed an upward departure sentence of life imprisonment based on Defendant's escalating pattern of criminal conduct, which it appeared inclined to do."

The lower court correctly denied relief. For a motion filed under rule 3.800(a) more than two years after the conviction became final, any scoresheet error is harmless if the trial court could have imposed the same sentence using a corrected scoresheet. *See Brooks v. State*, 969 So. 2d 238, 243 (Fla. 2007). Kelly asserts his prior felonies took place before Florida began classifying them by degrees. The Florida Supreme Court has provided the following guidance on how to handle this type of situation: "Just as a court is directed to score federal and out-of-state convictions by reference to the analogous or parallel Florida statute, a trial court should similarly score a Florida conviction received before crimes were classified by degrees." *Harris*, 674 So. 2d at 112.

Appellant's scoresheet included prior record points for three life felonies, three first-degree felonies punishable by life, one second-degree felony, three third-degree felonies, and two misdemeanors. (R. 48.) The lower court attached documentation regarding seven of the prior convictions—three for rape (73-2120, 73-2396, and 73-2667), three for robbery (73-2119, 73-2149, and 73-2392), and one for assault with intent to commit first-degree murder (73-2121). Kelly received concurrent sentences in those cases, resulting in a total punishment of 25 years' imprisonment. He contests the points allocated for the rape and robbery offenses but does not contest any of the other items on the scoresheet. Under section 794.011(5)(c), Florida Statutes, the least serious form of sexual battery is a second-degree felony. Thus, at the least, each rape conviction could be scored as a second-degree felony. Under section 812.13(2)(c), Florida Statutes, the least serious form of robbery is a second-degree felony. Thus, at the least, each robbery conviction could be scored as a second-degree felony. After recalculating the scoresheet in accordance with the above—seven second-degree felonies, three third-degree felonies, and two misdemeanors—Appellant's point total would be 524, with a recommended range of life.

As a result, even with a corrected scoresheet, the trial court could still have imposed the same sentence, and any error in this regard was harmless. *See Brooks*, 969 So. 2d at 243.

Richard E. Kelly, pro se, Appellant.

Ashley Moody, Attorney General, and Michael McDermott, Assistant Attorney General, Tallahassee, for Appellee.