

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING  
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

ELIJAH MOORE, JR.,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 2D18-1488
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

Opinion filed December 11, 2019.

Appeal from the Circuit Court for  
Pinellas County; Frank Quesada, Judge.

Howard L. Dimmig, II, Public Defender,  
and Kevin Briggs, Assistant Public  
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,  
Tallahassee, and Jonathan P. Hurley,  
Assistant Attorney General, Tampa,  
for Appellee.

MORRIS, Judge.

Elijah Moore, Jr., appeals his conviction after a jury trial for possession of  
oxycodone and his sentence of forty-eight months in prison. We affirm his conviction  
without comment, but we reverse his sentence and remand for resentencing.

At trial, the State presented evidence that Moore possessed an oxycodone pill in his pocket when he was booked into the jail on other charges. Moore stated to an officer that a friend had given him the pill and that he had forgotten it was in his pocket. During trial, however, Moore testified and denied having a pill in his pocket or making an admission to the officer. The jury convicted him as charged.

At sentencing, which occurred immediately after the jury returned its verdict, Moore did not make a statement but Moore's counsel asked for a bottom of the guidelines sentence of 26.025 months because Moore possessed only one pill. The trial court responded: "Those bottom of the guidelines are pretty much reserved for people who accept responsibility. This is a matter where the jury went forward and convicted your client." The trial court then sentenced Moore to forty-eight months in prison.

On appeal, Moore argues that the trial court committed fundamental error in stating that Moore was not entitled to the lowest permissible sentence under the sentencing guidelines because he proceeded to a jury trial. While

[a] sentencing court has wide discretion regarding the factors it may consider when imposing a sentence[,] . . . "[t]he fact that a defendant has pled not guilty cannot be used against him or her during any stage of the proceedings because due process guarantees an individual the right to maintain innocence even when faced with evidence of overwhelming guilt."

Bracero v. State, 10 So. 3d 664, 665-66 (Fla. 2d DCA 2009) (quoting Holton v. State, 573 So. 2d 284, 292 (Fla. 1990)). Here, the trial court declined to consider a bottom of the guidelines sentence because Moore did not accept responsibility and proceeded to trial. This was improper because it punished Moore for exercising his right to a jury trial.

The State argues that the trial court was permitted to consider Moore's failure to take responsibility in rejecting Moore's claim for a mitigated sentence. See, e.g., Godwin v. State, 160 So. 3d 497, 498 (Fla. 2d DCA 2015) (holding that trial court's comments were not improper because they "were made in connection with its rejection of the argument for mitigation"); Rankin v. State, 174 So. 3d 1092, 1097 (Fla. 4th DCA 2015) (holding that consideration of certain factors is "appropriate if it occurs during a court's consideration of whether or not to mitigate a sentence"). However, Moore did not ask for a downward departure; rather, he asked for a sentence at the bottom of his guidelines range.

Because the trial court considered the fact that Moore proceeded to trial on his charges, Moore's sentence is fundamentally erroneous, and he is entitled to be resentenced by a different judge. See Bracero, 10 So. 3d at 666.

Affirmed in part, reversed in part, and remanded.

LaROSE and SLEET, JJ., Concur.