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

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

CALVIN DEJUAN FORMAN, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-4740

Opinion filed December 2, 2020.

Appeal from the Circuit Court for Pinellas County; Nancy Moate Ley, Judge.

Howard L. Dimmig, II, Public Defender, and Julius J. Aulisio, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Helene S. Parnes, Senior Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

Calvin Dejuan Forman appeals his twenty-year habitual felony offender (HFO) sentence entered on remand from this court in Forman v. State, 231 So. 3d 580 (Fla. 2d DCA 2017). Because the resentencing court was precluded from relying on evidence admitted at the original sentencing hearing to support its finding that Mr.

Forman qualifies as an HFO and because there was no evidence presented at resentencing to establish the existence of any prior convictions, we again reverse Mr. Forman's sentence and remand for the circuit court to conduct a de novo resentencing hearing consistent with this opinion.

I.

Mr. Forman was convicted of one count of aggravated battery and originally sentenced as an HFO to twenty-five years in prison. See § 775.084(1), Fla. Stat. (2015) (allowing for an extended term of imprisonment when a defendant qualifies as an HFO, as defined by the statute). Mr. Forman appealed that judgment and sentence. This court affirmed Mr. Forman's conviction but reversed and remanded for resentencing before a different judge, holding that the totality of the circumstances surrounding the trial judge's involvement in the plea negotiations and ultimate sentence gave rise to a presumption of judicial vindictiveness. Forman, 231 So. 3d at 581.

On remand, the resentencing court relied upon the same evidence admitted in the original sentencing hearing and sentenced Mr. Forman as an HFO to twenty years in prison. The resentencing court's reliance on the prior evidence was the result of the State's failed attempt to use an uncertified Crime and Time Report to prove Mr. Forman qualified for HFO sentencing. When the State sought to admit the updated, uncertified Crime and Time Report, Mr. Forman objected, arguing a lack of foundation and that the report was not certified or self-authenticating.[1] On the record, a discussion

[1]"For a Crime and Time Report to be admitted as a business record at a sentencing hearing, the State must supply the authentication required by sections 90.803(6)[, records of regularly conducted business activity,] and 90.902(11) [, self-authenticating records], Florida Statutes [(2018)], or it must submit the Crime and Time Report and a signed and sealed release-date letter as one combined record." Denlinger

took place as to whether a certified copy of the report was necessary. The State advised that the original report admitted at the original sentencing hearing was certified. The resentencing court informed the parties that it had reviewed the court file and had reread this court's opinion in Forman but had found no reference to the technical aspects of the original sentence; therefore, the resentencing court believed it was permitted to judicially notice the documents in the court file, which included a certified copy of the report from the original sentencing packet admitted at the original sentencing hearing.[2] Mr. Forman objected and reminded the resentencing court that this was a new sentencing as a result of the reversal of the prior sentence that thus the State was required to produce original, certified copies of any prior felony convictions in order to prove Mr. Forman qualified as an HFO for purposes of any enhanced sentence. Mr. Forman's objection was overruled, and the resentencing court took judicial notice of "all of the documents that were filed in the previous sentencing hearing." The resentencing court did not admit or consider the State's updated, uncertified Crime and Time Report.

Mr. Forman argues the resentencing court erred in taking judicial notice of the previously admitted evidence, which was used to support the finding that Mr. Forman qualified as an HFO. We agree.

II.

---

v. State, 17 So. 3d 1264, 1264 (Fla. 4th DCA 2009) (citing Yisrael v. State, 993 So. 2d 952, 958, 960 (Fla. 2008)).

[2]The resentencing court stated it had reviewed the trial transcript, prior sentencing packet, prior notice of enhanced penalty, scoresheet guidelines, and presentence investigation report.

"Generally, courts have held that once a defendant successfully challenges his sentence on appeal and the cause is remanded for resentencing, the resentencing is a 'de novo' proceeding, at which either side may present evidence anew regarding the appropriate sentence." Walker v. State, 988 So. 2d 6, 8 (Fla. 2d DCA 2007) (Altenbernd, J., concurring specially), quashed on other grounds by State v. Walker, 992 So. 2d 232 (Fla. 2008); see also Heatley v. State, 279 So. 3d 850, 852 (Fla. 2d DCA 2019) ("Where the court has discretion to impose a new sentence and is not merely performing a ministerial act, a defendant is entitled to a full de novo resentencing hearing." (citing Marana v. State, 226 So. 3d 329, 329 (Fla. 1st DCA 2017))). The supreme court has agreed, holding that "resentencing entitles the defendant to a de novo sentencing hearing with the full array of due process rights." State v. Collins, 985 So. 2d 985, 989 (Fla. 2008) (quoting Trotter v. State, 825 So. 2d 362, 367-68 (Fla. 2002)); see also Galindez v. State, 955 So. 2d 517, 525 (Fla. 2007) (Cantero, J., specially concurring) ("We have consistently held that resentencing proceedings must be a 'clean slate,' meaning that the defendant's vacated sentence becomes a 'nullity' and his 'resentencing should proceed de novo on all issues bearing on the proper sentence.' " (first quoting Preston v. State, 607 So. 2d 404, 408 (Fla. 1992); then quoting Morton v. State, 789 So. 2d 324, 334 (Fla. 2001))).

A resentencing hearing is an entirely new proceeding at which all issues bearing upon a proper sentence must be considered de novo, entitling the defendant to all due process rights. Heatley, 279 So. 3d at 852 (citing Collins, 985 So. 2d at 989). The resentencing court is not simply permitted to reweigh existing evidence at

resentencing.[3] "Indeed, '[i]n Florida, the State is required to produce evidence during the new sentencing proceeding to establish facts even if those facts were established during the original sentencing proceeding.' " Id. (alteration in original) (quoting Lebron v. State, 982 So. 2d 649, 659 (Fla. 2008)); see also Galindez, 955 So. 2d at 525 (Cantero, J., specially concurring) ("In fact, because resentencing is de novo, the State was required to produce evidence on sentencing issues even if the State established the fact at the original sentencing." (emphasis omitted)); Baldwin v. State, 700 So. 2d 95, 96 (Fla. 2d DCA 1997) (holding that on resentencing, the defendant is permitted to challenge prior convictions used in his sentencing guidelines scoresheet, even if he had not challenged them at his original sentencing; resentencing is a de novo sentencing hearing and the State is not excused from proving the defendant's challenged prior record); Tubwell v. State, 922 So. 2d 378, 379 (Fla. 1st DCA 2006) ("As this resentencing proceeding was de novo, the state was not relieved of its burden to prove the prior offenses." (citations omitted)); Rich v. State, 814 So. 2d 1207, 1208 (Fla. 4th DCA 2002) (agreeing that "the State could not simply rely upon evidence introduced at

[3]We acknowledge that the resentencing court was permitted to take judicial notice of documents in the court file that were properly placed there; however, taking judicial notice "does not allow the substance of the underlying materials to be entered into evidence without compliance with the rules of evidence." Dufour v. State, 69 So. 3d 235, 254 (Fla. 2011); see also § 90.202(6), Fla. Stat. (2018). The Crime and Time report judicially noticed by the resentencing court is hearsay and while Crime and Time reports are often admitted into evidence as either a business record, or as a properly certified copy of an official record, the proper predicate was not laid in this case, which would have allowed the resentencing court to admit the Crime and Time Report. See § 90.803(6), (8); see also Gray v. State, 910 So. 2d 867, 869 (Fla. 1st DCA 2005). As the supreme court has noted, reliance upon a Crime and Time report not admitted in the resentencing hearing "is inconsistent with the premise that a resentencing proceeding is de novo and must begin with a 'clean slate.' " Lebron v. State, 982 So. 2d 649, 659 (Fla. 2008) (citing Galindez, 955 So. 2d at 525).

a prior sentencing proceeding" and holding that the State was required to introduce evidence at the resentencing hearing to prove that the defendant qualifies for an enhanced sentence); Mills v. State, 724 So. 2d 173, 174 (Fla. 4th DCA 1998) ("The [S]tate is not insulated by law of the case principles from proving challenged prior convictions forming the basis of a guideline sentence, notwithstanding the defendant did not challenge the priors at the original sentence or appeal therefrom." (citing Baldwin, 700 So. 2d at 96)). Accordingly, because Mr. Forman was entitled to a new sentencing hearing, the resentencing court was precluded from relying upon the prior evidence admitted at the original sentencing hearing and the State was required to put forth evidence showing that Mr. Forman qualified as an HFO.

The State argues it put forth evidence showing that Mr. Forman qualifies as an HFO when it offered into evidence the uncertified, updated Crime and Time Report. But the resentencing court properly precluded the uncertified report from being admitted. See Yisrael v. State, 993 So. 2d 952, 960 (Fla. 2008); Denlinger v. State, 17 So. 3d 1264, 1264 (Fla. 4th DCA 2009).[4]

III.

Because no evidence was admitted at the resentencing hearing to support

[4]The State supplemented the record and filed a certified copy of the updated Crime and Time Report, but that report was signed on December 18, 2019, after Mr. Forman was resentenced on October 29, 2018. Even if we entertained this issue, we cannot take a report into consideration where it was not presented to the sentencing court on resentencing. See Fla. Emergency Physicians-Kang & Assocs., M.D., P.A. v. Parker, 800 So. 2d 631, 636 (Fla. 5th DCA 2001) ("It is the function of the appellate court to review errors allegedly committed in the trial court, not to entertain for the first time on appeal, issues which the complaining party could have, and should have, but did not, present to the trial court." (citing Abrams v. Paul, 453 So. 2d 826, 827 (Fla. 1st DCA 1984))).

a finding that Mr. Forman qualifies for an enhanced sentence as an HFO and because no evidence was admitted at resentencing to establish the existence of any prior convictions, we again reverse Mr. Forman's sentence and remand for the circuit court to conduct a de novo sentencing hearing with the full array of due process rights afforded to a defendant upon sentencing. See Collins, 985 So. 2d at 989. On remand, the State shall have the opportunity to introduce evidence establishing that Mr. Forman qualifies for an HFO sentence. See Cameron v. State, 807 So. 2d 746, 747 (Fla. 4th DCA 2002).

Reversed and remanded for resentencing.

BLACK and ROTHSTEIN-YOUAKIM, JJ., Concur.