DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

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ARIEL ZENO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-2266

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December 17, 2021

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Hillsborough County; Barbara Twine Thomas, Judge.

Ariel Zeno, pro se.

Ashley Moody, Attorney General, Tallahassee; and Chris Phillips and Helene S. Parnes, Assistant Attorneys General, Tampa, for Appellee.

LABRIT, Judge.

Ariel Zeno appeals the denial of his Florida Rule of Criminal Procedure 3.800(a) motion to correct a calculation error in his sentencing scoresheet. Because we agree that Zeno's scoresheet

was incorrect and that he couldn't have received the same sentence for one of his convictions—Count 2—under a correct scoresheet, we reverse the denial of this motion as it relates to Count 2 and remand for resentencing on that count.

**Factual and Procedural Background**

Almost two decades ago, a jury convicted Zeno of RICO (Racketeer Influenced and Corrupt Organization) (Count 1), conspiracy to commit RICO[1] (Count 2), conspiracy to traffic heroin (Count 3), two counts of trafficking fourteen to twenty-eight grams of illegal drugs (Counts 5 and 6), and one count of trafficking twenty-eight grams to thirty kilograms of illegal drugs (Count 7).[2]

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[1] Zeno was convicted of conspiring to commit RICO under sections 895.03(3) and 777.04(3)–(4), Florida Statutes (2001), as opposed to section 895.03(4). *See* § 895.03(3) ("It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."); § 777.04(3) ("A person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy, ranked for purposes of sentencing as provided in [section 777.04(4)]."); *see also* § 895.03(4) ("It is unlawful for any person to conspire or endeavor to violate any of the provisions of [section 895.03(1)–(3)].").

[2] After an appeal and a belated appeal, this court affirmed Zeno's convictions. *See Zeno v. State*, 980 So. 2d 1078 (Fla. 2d DCA

The trial court sentenced him to thirty years' imprisonment on all counts, with Count 1 running consecutive to the remaining counts and Counts 2, 3, 5, 6, and 7 running concurrent to one another.

In 2020, Zeno filed a pro se rule 3.800(a) motion to correct his sentence. Zeno claimed that his criminal sentencing scoresheet was off by over 100 points because, among other issues, the trial court didn't reduce the offense level of Count 2 by "one severity level" as mandated in the Criminal Punishment Code. However, the postconviction court denied the motion, concluding that Zeno "[wa]s not entitled to relief" because his "sentence d[id] not exceed the statutory maximum." Zeno now appeals this order.

**Analysis**

We review orders denying rule 3.800(a) motions de novo. *Williams v. State*, 235 So. 3d 962, 963 (Fla. 5th DCA 2017) ("As no evidentiary hearing is required or permitted [for rule 3.800(a) motions], this [c]ourt is presented with pure issues of law on appeal[] and applies the de novo standard of review."). Sentencing

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2008); *Zeno v. State*, 875 So. 2d 625 (Fla. 2d DCA 2004) (table decision); *see also Zeno v. State*, 922 So. 2d 431, 432–33 (Fla. 2d DCA 2006) (granting Zeno's petition for a belated appeal).

scoresheet errors, including mistakes in offense-level scoring, are cognizable in a rule 3.800(a) motion. *See* Fla. R. Crim. P. 3.800(a) ("A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet . . . ."); *see also Brooks v. State*, 969 So. 2d 238, 242 (Fla. 2007) (explaining that rule 3.800(a) motions "are different from [rule 3.850 and rule 3.800(b) motions] in two material respects"—(1) they "may be raised at any time" and (2) "no evidentiary hearing[s] [are] allowed").

However, "if the trial court *could have* imposed the same sentence using a correct scoresheet, any error was harmless" and the defendant isn't entitled to postconviction relief. *Brooks*, 969 So. 2d at 243 (emphasis added). Under the Criminal Punishment Code, "[t]he permissible range for sentencing" is "the lowest permissible sentence up to and including the statutory maximum." § 921.0024(2), Fla. Stat. (2001); Fla. R. Crim. P. 3.704(d)(26). Because the "total sentence points" on a scoresheet are "calculated only as a means of determining the lowest permissible sentence," the scoresheet usually determines a defendant's minimum sentence. § 921.0024(2); Fla. R. Crim. P. 3.704(d)(26). Conversely,

the maximum sentence is generally set by statute. § 921.0024(2); Fla. R. Crim. P. 3.704(d)(26) (noting that the maximum sentence for each offense "[i]s defined in section 775.082, Florida Statutes [2001]"). "But where the [lowest permissible sentence] exceeds the offense's statutory maximum sentence, there is no range; the [lowest permissible sentence] must be imposed." *State v. Gabriel*, 314 So. 3d 1243, 1252 (Fla. 2021) (quoting *Champagne v. State*, 269 So. 3d 629, 637 (Fla. 2d DCA 2019)). Additionally, Florida courts consider the legality of a defendant's sentence on a count-by-count basis. *See id.*

Under the applicable versions of subsections 775.082(3)(b) and (c), the maximum sentence for "a felony of the first degree" is "a term of imprisonment not exceeding 30 years," and the maximum sentence for "a felony of the second degree" is "a term of imprisonment not exceeding 15 years." And it is within the sentencing court's discretion whether to impose sentences concurrently or consecutively. § 921.0024(2) ("The sentencing court *may* impose such sentences concurrently or consecutively." (emphasis added)); Fla. R. Crim. P. 3.704(d)(26) (same).

Here, the State concedes—and we agree—that Zeno's criminal scoresheet was miscalculated by 101 points. Specifically, the trial court accidentally counted 92 points for Zeno's primary offense twice. And it didn't score one of his additional offenses, conspiracy to commit RICO (Count 2), at one severity level below the completed offense, erroneously adding another 9 points. *See* Fla. R. Crim. P. 3.704(d)(10) ("Unless specifically provided otherwise by statute, attempts, conspiracies, and solicitations must be . . . scored at 1 severity level below the completed offense."). Meaning that, Zeno's lowest permissible sentence should have been 25.0625 years under a correct scoresheet. While all of Zeno's sentences exceeded this lowest permissible sentence, our analysis doesn't stop here. Instead, both the lowest permissible sentence and the offense's statutory maximum are key to determining the appropriate sentence for each count and whether this scoresheet error was harmful. *See* § 921.0024(2); Fla. R. Crim. P. 3.704(d)(26); *Gabriel*, 314 So. 3d at 1252; *Brooks*, 969 So. 2d at 243.

In this case, one of Zeno's sentences exceeded both the lowest permissible sentence and the statutory maximum—his thirty-year sentence for conspiracy to commit RICO (Count 2). As the

postconviction court concluded in its order,[3] Count 2 is a second-degree felony, which carries a fifteen-year maximum.[4] *See* § 895.04(1), Fla. Stat. (2001) (defining RICO as "a felony of the first degree"); § 777.04(4)(c), Fla. Stat. (2001) ("[I]f the offense attempted, solicited, or *conspired* to is . . . a felony of the first degree, the

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[3] While the postconviction court incorrectly concluded that conspiracy to traffic heroin (Count 3) was a second-degree felony, this technical error isn't reversible because the court correctly concluded that Zeno was not entitled to relief on Count 3. *See Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979) ("[T]he decision of the trial court is primarily what matters, not the reasoning used."); *see also* § 893.135(5), Fla. Stat. (2001) ("Any person who . . . *conspires* . . . to commit any act prohibited by subsection (1)[, including trafficking heroin,] commits a felony of the *first degree* and is punishable as if he or she had actually committed such prohibited act." (emphasis added)); § 777.04(4)(c) (noting an exception to the rule on dropping an offense-level for conspiracy offenses where the underlying offense was a drug trafficking offense listed in section 893.135(5)).

[4] While sections 777.04(4) and 775.082 contain exceptions that sometimes allow a trial court to sentence a conspirator as though he or she committed the complete offense, there is no exception for conspiracy to commit RICO. *See* §§ 777.04(4)(a)–(d); 775.085(b)–(c). Likewise, Florida courts have consistently treated RICO and conspiracy to commit RICO as two separate offenses. *See, e.g., de la Osa v. State*, 158 So. 3d 712, 731-32 (Fla. 4th DCA 2015) (affirming the defendant's conspiracy to commit RICO conviction, but reversing the defendant's RICO conviction, and explaining the difference between RICO and conspiracy to commit RICO); *State v. Reyan*, 145 So. 3d 133, 139 (Fla. 3d DCA 2014) (explaining the difference between a RICO and a conspiracy to commit RICO charge).

offense of criminal attempt, criminal solicitation, or *criminal conspiracy* is a felony of the second degree . . . ." (emphasis added)); § 775.082(3)(c) (instructing that a defendant convicted of a second-degree felony may be punished "by a term of imprisonment not exceeding 15 years"). But the correct lowest permissible sentence exceeds that statutory maximum. As such, the sentencing court *could not have imposed* Zeno's thirty-year sentence on Count 2 under a correct scoresheet; it was obligated to impose the correct lowest permissible sentence. *See Gabriel*, 314 So. 3d at 1252; *Brooks*, 969 So. 2d at 243. And Zeno is entitled to relief on that count.

Accordingly, we reverse the postconviction court's order denying Zeno's rule 3.800(a) motion only as it relates to Count 2 and remand for resentencing, under a corrected scoresheet, on that count alone. *See Pierce v. State*, 322 So. 3d 231, 233 (Fla. 1st DCA 2021) (reversing the defendant's sentences on three counts where the lowest permissible sentence exceeded those offenses' statutory maximums and the sentencing court did not impose the lowest permissible sentence on those counts); *see also Thornton v. State*, 276 So. 3d 976, 979 (Fla. 2d DCA 2019) (reversing the summary

denial of a rule 3.800(a) motion where the defendant's sentences exceeded each offense's statutory maximum). However, the sentences Zeno received on Counts 1, 3, 5, 6, and 7 don't exceed the lowest permissible sentence or the statutory maximums and aren't impacted by this opinion. *See Gabriel*, 314 So. 3d at 1252; *Brooks*, 969 So. 2d at 243.

Reversed and remanded.

MORRIS, C.J., and KHOUZAM, J., Concur.

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Opinion subject to revision prior to official publication.