DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

____

DAVID K. HARRIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D20-3645

____

December 29, 2021

Appeal pursuant to Fla. R. App. P. 9.141(b)(2) from the Circuit Court for Sarasota County; Debra Johnes Riva, Judge.

David K. Harris, Appellant, pro se.

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

SILBERMAN, Judge.

David K. Harris appeals the order granting in part and denying in part his motion to correct illegal sentence filed under Florida

Rule of Criminal Procedure 3.800(a). We affirm in part, reverse in part, and remand for resentencing.

A jury found Harris guilty of robbery with a deadly weapon committed on April 2, 1995, and the trial court sentenced him as a habitual violent felony offender (HVFO) to life imprisonment with a mandatory minimum of fifteen years' imprisonment. The trial court relied on Harris's conviction of robbery in case number 95-CF-999 to designate him as an HVFO. Harris argued in his rule 3.800(a) motion that his sentence was illegal because thirty days had not passed since his robbery conviction in case number 95-CF-999, so the conviction was not yet final. *See* § 775.084(1)(b)1, Fla. Stat. (1995) (providing that a defendant must have previously been convicted of an enumerated offense to qualify as an HVFO); *see also Coleman v. State*, 281 So. 2d 226, 227 (Fla. 2d DCA 1973) (holding that appellant could not be charged with being a subsequent felony offender because he had appealed his prior conviction, so it was not yet final); *Delguidice v. State*, 554 So. 2d 35, 35 (Fla. 4th DCA 1990) (holding that reliance on appellant's prior conviction to support habitual felony offender (HFO) classification was erroneous because the prior conviction was on appeal and not yet final).

The postconviction court properly agreed with Harris and struck the HVFO designation as well as the fifteen-year mandatory minimum. But rather than conduct a resentencing hearing, the court left Harris's life sentence intact by designating him an HFO based on his stipulation at the original sentencing hearing that he had the requisite number of prior felony convictions to be sentenced as an HFO. In doing so, the court took judicial notice of Harris's presentence investigation report and the reference in that report to certified copies of Harris's prior convictions. The court also referred to information about Harris's prior record on the Department of Corrections' website. And the court noted that a life sentence was consistent with the sentencing court's original intent.

In this appeal, Harris argues that once the court struck the HVFO designation, he was entitled to be sentenced under the 1994 guidelines.[1] Harris argues that the record does not support a life sentence because the court did not provide written reasons for a

[1] Harris notes that his 1994 guidelines scoresheet shows a sentencing range of between 103.1 and 172.1 months in state prison.

departure sentence, and it did not find and orally pronounce that he qualified to be sentenced as an HFO.

When the postconviction court decided to leave Harris's life sentence intact, it did so by designating Harris an HFO. But sentencing under the HFO statute is permissive and involves the court's exercise of discretion. *Copeland v. State*, 118 So. 3d 842, 843 (Fla. 2d DCA 2013). When a court exercises its discretion in sentencing, it must conduct a de novo sentencing hearing. *See Mullins v. State,* 997 So. 2d 443, 445 (Fla. 3d DCA 2008) ("A defendant will receive a new sentencing hearing if the resentencing involves additional consideration or sentencing discretion, not if the act to be done is ministerial in nature, such as striking an improper portion of the sentence."); *see also Jordan v. State*, 143 So. 3d 335, 340 (Fla. 2014) ("[A]lthough Jordan's original sentence of life imprisonment appears to demonstrate the trial judge's intent to sentence Jordan to the maximum allowable punishment, the judge was not obligated to maintain that same intent at resentencing."). At a de novo sentencing hearing, "the State is required to produce evidence . . . to establish facts even if those facts were established

during the original sentencing proceeding."[2] *Forman v. State*, 312 So. 3d 141, 144 (Fla. 2d DCA 2020) (quoting *Heatley v. State*, 279 So. 3d 850, 852 (Fla. 2d DCA 2019) (reversing HFO sentence imposed upon remand because the resentencing court improperly relied upon evidence admitted at the original sentencing hearing)).

We affirm the postconviction court's order insofar as it struck the HVFO designation and the fifteen-year mandatory minimum, but we reverse that part of the order designating Harris an HFO and remand for the postconviction court to conduct a de novo sentencing hearing. Because Harris stipulated to qualifying for HFO sentencing, the trial court may sentence Harris as an HFO if the State produces the proper supporting evidence. *See Lowenthal v. State*, 699 So. 2d 319, 320 (Fla. 2d DCA 1997) ("Because the defense failed to object to the trial court's classification of

---

[2] While a resentencing court may take judicial notice of documents properly placed in the court file, that "does not allow the substance of the underlying materials to be entered into evidence without compliance with the rules of evidence." *Forman v. State*, 312 So. 3d 141, 144 n.3 (Fla. 2d DCA 2020) (quoting *Dufour v. State*, 69 So. 3d 235, 254 (Fla. 2011)). The postconviction court's order indicates that the certified copies of Harris's prior convictions were referenced in the PSI and not independently introduced into evidence.

Lowenthal as a habitual violent felony offender on the grounds that the court did not have sufficient evidence of the release date, the trial court, on remand, should permit the state to present substantiated proof of a prison release date. Thereafter, the trial court can determine whether Lowenthal meets the requirements and, if so, sentence him again as a habitual violent felony offender.").

Affirmed in part, reversed in part, and remanded.

CASANUEVA and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.